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Protection of Freedoms Bill: Committee Stage Report

Bill 189 of 2010-11

RESEARCH PAPER 11/54 28 June 2011

This is a report on the House of Commons Committee Stage of the *Protection of Freedoms Bill*. It complements Research Paper 11/20 prepared for the Commons Second Reading.

During Committee Stage, significant areas of debate included: DNA retention periods; safeguards on the use of children's biometric data; surveillance cameras and crime prevention; wider reform of surveillance law; powers of entry; pre-charge detention; stop and search; provision and challenge of criminal records checks; data protection.

Significant amendments were made to the Bill's provisions on the barring scheme operated by the Independent Safeguarding Authority (ISA). These included a new clause and schedule providing for the dissolution of the ISA and the establishment of a new Disclosure and Barring Service, which would merge the functions of the ISA and the Criminal Records Bureau.

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Research Paper 11/54

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ISSN 1368-8456

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DNA

The provisions on the retention of DNA and fingerprints are largely unchanged, although minor Government amendments were made relating to the retention of data from people found not guilty by reason of insanity and the regime in Northern Ireland. There was extensive debate on a number of Opposition amendments, particularly as to whether the retention period for data from those arrested or charged but not convicted should be three years or six years. However, none of these were accepted.

Biometric information

The provisions on the protection of biometric information in relation to children were not amended in Public Bill Committee. Several amendments were discussed but none was successful. Members probed the Government on issues relating to parental consent and safeguards on the use and retention of children's biometric data. While supporting the principle of consulting parents, the Opposition was concerned about schools being able to manage their affairs effectively.

Regulation of surveillance

The only amendments made to Part 2 of the Bill were of a drafting nature and related to the *Regulation of Investigatory Powers Act 2000* and Northern Ireland transferred matters. Some debate took place on the content of, and consultation on, the proposed surveillance camera code particularly with regard to crime prevention. Other debates sought to establish the evidence base behind the Bill's proposals and whether the Bill might be a vehicle for wider changes in surveillance law.

Powers of entry

There were no substantive changes to the Bill's clauses on powers of entry, although there was some debate on the safeguards in the provision to allow the Secretary of State and other national authorities to rewrite the relevant laws. The Opposition also called for an independent inquiry into the exercise of powers of entry in England and Wales.

Parking / Wheel clamping

No amendments were made to the provisions dealing with vehicles left on land.

Terrorism

Although amendments were proposed to the clauses on pre-charge detention of terror suspects (including an amendment to spell out, on the face of the Bill, that the 14 days pre-charge limit could be temporarily extended through the *Detention of Terrorist Suspects (Temporary Extension) Bills* to 28 days in exceptional circumstances) these were withdrawn. Similarly there were no substantive amendments to the provisions on stop and search, but there was debate on both this Government's record on the issue and that of its predecessor.

Safeguarding / criminal records

A number of Government amendments were made to the Bill's provisions on the barring scheme operated by the Independent Safeguarding Authority (ISA). The most significant of these was a new clause and schedule providing for the dissolution of the ISA and the establishment of a new Disclosure and Barring Service, which would merge the functions of

the ISA and the Criminal Records Bureau. Government amendments were also made to the scope of regulated activity, the definition of vulnerable adults, the ISA's information sharing powers and the application of the barring scheme to Northern Ireland.

Lynne Featherstone undertook to consider two Opposition amendments further ahead of Report (although she gave no guarantee that Government amendments would follow). The first would have required the ISA to pass information to the police, and the second would have introduced statutory guidance relating to the barring scheme.

There were three key areas of debate relating to the criminal records provisions of the Bill. The first related to the proposed disputes process for people who wanted to challenge the results of their criminal records checks. A number of Government amendments were made to introduce a new role in the process for an independent monitor. The second related to the provision of criminal records checks to employers, and the third to the inclusion of an individual's barred status on an enhanced check. Opposition amendments were considered in both of these areas but none were accepted.

Disregarding gay sex convictions

The clauses of the Bill providing for the disregard of certain historic gay sex convictions were not amended in Committee. There were divisions on two Opposition amendments, the first of which would have enabled the Secretary of State to hold oral hearings and the second of which would have required her to give reasons for her disregard decisions. Both were negatived by ten votes to six.

Freedom of information and data protection

An amendment to the Bill saw the term of office of the Information Commissioner extended from five years to seven. Other amendments were made to safeguard parliamentary copyright. Significant debate took place in relation to strengthening data protection law, but no amendments were made.

1 Introduction

The *Protection of Freedoms Bill*, introduced in the House of Commons on 11 February 2011, introduces a wide range of measures; these include a new framework for police retention of fingerprints and DNA data, a requirement for schools to get parents' consent before processing children's biometric information, a new regime for police stops and searches under the *Terrorism Act 2000* and the reduction of the maximum pre-charge detention period under that Act from 28 to 14 days. It also restricts the scope of the 'vetting and barring' scheme for protecting vulnerable groups and makes changes to the system of criminal records checks. The Bill's Second Reading was on 1 March 2011. It had 20 sittings in Public Bill Committee, beginning on 22 March 2011 and ending on 17 May 2011. Oral evidence was taken during the first four sessions.

Detailed information on the provisions in the Bill and background to them can be found in Library Research Paper 11/20 which was prepared for the Second Reading. Further material and links to the proceedings on the Bill can be found on the Parliament website Protection of Freedoms Bill page and, for Members and their staff, on the Bill Gateway pages.

2 Second reading debate

The second reading debate took place on 1 March 2011.[1] The Home Secretary, Theresa May, said that under the previous Government there had been a "steady erosion of traditional British liberties and a slow march towards authoritarian government." The Bill provided an opportunity to "redress the balance".[2] The shadow Home Secretary, Yvette Cooper, indicated the Opposition's support for a number of the measures such as removing old convictions for gay sex; removing the restrictions on the time at which people can get married; the extensions to the *Freedom of Information Act*; action against wheel clampers; tighter restrictions on stop and search powers; and limiting pre-charge detention. However, on the last of these measures she questioned whether the order-making power to extend pre-charge detention in emergencies would be practical where there were difficulties recalling Parliament. Theresa May said that in these cases, individuals could be detained on a lesser charge.[3]

Yvette Cooper went on to accuse the Government's record on protecting freedoms of being "a mass of confusion and contradiction". She cited new confiscation powers, restrictions on protest in Parliament Square and elected police commissioners in the *Police and Social Responsibility Bill* whilst, she argued, a number of other measures, including some in this Bill, made it "harder not easier for the police to fight crime and bring offenders to justice".[4]

The provisions on DNA provoked much debate. Previous Home Secretaries David Blunkett and Jack Straw both pointed out that they had voluntarily given their fingerprints to the police to allow themselves to be eliminated from inquiries, and argued that many innocent people would be happy to be on the database. DNA samples had not only secured convictions of guilty people, but had prevented miscarriages of justice.[5] Labour's Pamela Nash also criticised the provisions as making the police's job more difficult.[6] Other Members argued that the Bill's provisions struck the right balance in enabling the innocent to have their details

1 HC Deb 1 March 2011 c205-270
2 Ibid c295
3 Ibid c218
4 Ibid c224.
5 Ibid c234
6 Ibid c245

removed.[7] Nicola Blackwood (Conservative) described the changes as a "great step forward".[8]

Naomi Long (Alliance) raised changes to the Vetting and Barring scheme, which, she felt, might lead to inadequate protection in some circumstances.[9] Responding, Home Office Minister James Brokenshire said that the Government did not consider that this would be the case and that the new scheme would be more "proportionate and efficient".[10]

There was widespread support across the House for the measures in the Bill to outlaw what Members referred to throughout as 'cowboy' or 'rogue' clamping.[11] During the debate, only Bob Russell expressed significant reservations about the proposed ban. In particular, he was concerned about the ability of individual householders to enforce parking restrictions on their private property in the absence of clamping.[12] There was also support for the provisions in the Bill relating to CCTV, [13] although some Members noted that their constituents' main concern was to have more cameras rather than more regulation.[14]

3 Insulting words or behaviour – section 5 of the Public Order Act 1986

One issue which was raised at second reading, but not in the committee stage, was section 5 of the *Public Order Act 1986*. This outlaws threatening, abusive or insulting words if they are likely to cause distress. The *Protection of Freedoms Bill* as introduced in the Commons did not contain any provision to amend section 5. Further background is contained in Library Standard Note 5750, *"Insulting words or behavi": Section 5 of the Public Order Act 1986.*

Edward Leigh (Conservative) raised the issue during the Bill's second reading debate.[15] He argued that the provision had been brought in to tackle hooliganism, but that it was "increasingly being used by police to silence peaceful protestors and street preachers". He cited the example of hotel owners, Ben and Sharon Vogelenzang, who had been prosecuted following a dispute with a Muslim guest, although the case was thrown out by the judge. Other examples included a protestor who carried a placard outside a scientology centre and a man prosecuted for growling at a dog. Mr Leigh argued that the word insulting should be deleted, that the criminal law did not "exist to protect people from feeling insulted" and that there were adequate alternative powers to deal with low level public disorder.[16] Conservative John Glen raised the case of the street preacher Dale Mcalpine who was arrested and detained for "answering a question from a police community support officer about his views on sexual ethics".[17]

Responding, James Brokenshire, said that the Government would continue to review the law:

> An issue that was raised which is not in the Bill was section 5 of the Public Order Act 1986. It is essential to consider in the round whether current laws strike the right

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7 See for example c237
8 Ibid c248
9 Ibid c251
10 Ibid c270
11 See, e.g.: Home Secretary Teresa May (HC Deb 1 March 2011, c209); Shadow Home Secretary Yvette Cooper (c216); Jack Straw, Labour (c231); Jim Shannon, DUP (cc239-40); Gavin Shuker, Labour (c209); Tom Watson, Labour (c210); Edward Lee, Conservative (c224)
12 Ibid cc260-61
13 See for example cc237-8 and c243
14 See for example c253 and c245
15 HC Deb HC Deb 1 March 2011, cc224-9
16 Ibid c 229
17 Ibid c353

> balance on freedom of expression, freedom of assembly, freedom to manifest one's religion and the need to protect the public. In its report, "Adapting to Protest", Her Majesty's inspectorate of constabulary suggested that changing the law was not the answer. In many ways it was the constant changes to the Public Order Act that had led to operational confusion. The Government will continue to review the law throughout the course of this Parliament to ensure that it allows competing rights to be properly balanced.[18]

Mrs Vogelenzang and Mr Mcalpine were amongst those who gave written evidence to the Public Bill Committee on the issue of section 5.[19] However, no amendments were tabled on this issue, and it was not debated during the Bill's committee stage. New clause 1 which has been tabled for the Bill's report stage would remove references to "insulting" in section 5.[20]

4 Committee Stage

4.1 The retention of fingerprint and DNA data

Clauses 1 to 25 of the Bill, which would introduce a new regime for the retention of fingerprint and DNA data taken from arrested and convicted persons, were the subject of extensive debate in committee. Numerous Opposition amendments were considered and there were several divisions; however, only minor Government amendments were made.

The first set of Government amendments made altered **clause 18** to provide for the indefinite retention of fingerprint and DNA data from those who have committed criminal acts but have either been found not guilty by reason of insanity or unfit to plead at trial (in the latter case, retention would only be permitted where a court had made a finding that the person in question had carried out an act that would otherwise constitute an offence).[21] Samples from people falling into these two categories would therefore be treated in the same way as samples from people who had been convicted.

The second set of Government amendments made were technical ones relating to future amendments to the *Police and Criminal Evidence (Northern Ireland) Order 1989*, as Home Office minister James Brokenshire explained:

> The legislation in Northern Ireland governing the retention of DNA and fingerprints closely mirrors the provisions in part 5 of the Police and Criminal Evidence Act 1984, which operates in England and Wales. As a result, the Northern Ireland Administration need to take similar steps to the UK Government to respond to the European Court of Human Rights judgment in the case of S and Marper. David Ford, the Northern Ireland Minister of Justice, recently launched a consultation to that end, with a view to introducing legislation in the Northern Ireland Assembly later this year. That legislation can of course deal only with matters within the legislative competence of the Northern Ireland Assembly. National security is an excepted matter and accordingly it will fall to the UK Government to make appropriate amendments to the Police and Criminal Evidence (Northern Ireland) Order 1989 to make further provisions in respect of the retention and use of DNA and fingerprints on national security grounds.[22]

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18 Ibid c269-270

19 See *Protection of Freedoms Bill Memorandum submitted by Mrs Sharon Vogelenzang (PF 07)* March 2011 and *Memorandum submitted by Dale Mcalpine (PF 12)* March 2011

20 See *Notice of Amendments given on Tuesday 17 May 2011*

21 PBC Deb 5 April 2011 cc279-280

22 PBC Deb 5 April 2011 c288. For details of the Northern Ireland consultation, see *Consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland*, Department of Justice, March 2011

The amendments would therefore give the Government order-making powers to amend the 1989 Order to provide for the retention of biometric data on national security grounds, which will only be exercisable once the Order has been amended by the Northern Ireland Administration.

Some of the key areas of debate that did not result in any amendments are considered further below.

Length of retention period

The most extensive debate concerned **clause 3**, which concerns the retention of material taken from persons arrested for or charged with a "qualifying offence".[23] The key point of difference between the Government and the Opposition was whether such material should be retained for an initial three year period with the possibility of a two year extension, as set out in the Bill, or a six year period, as the Labour Government legislated for in the *Crime and Security Act 2010*.[24]

Shadow Home Office Minister Clive Efford spoke to a number of amendments that would have increased the retention period to six years.[25] He argued that implementing a longer retention period now would mean that the Government could revisit the issue in several years and undertake a detailed analysis of the retention of DNA over this period. It would then have the evidence to decide whether there was any benefit to retaining DNA for more than three years:

> The sensible approach, given our position and accepting that there has to be change, would be to adopt the six-year period, carry out a detailed review, independently of Government, and base future decisions on empirical evidence. Once that information has gone, there is no going back. It has disappeared forever, and we could be back considering the matter again and regretting our actions.[26]

James Brokenshire argued that there was already evidence to support a three-year retention period, making particular reference to research carried out in Scotland and a recommendation by the Home Affairs Committee that there should be a three year limit.[27] He went on to say that the length of the retention period was "ultimately a question of judgment ... and we believe that the changes that we are making in the Bill take the appropriate and proportionate line in that regard".[28] The lead amendment was negatived on division.

Similar arguments were raised during the clause stand part debate on clause 3; it was ordered to stand part (unamended) on division.[29]

Applications to extend retention period: public hearings

The Committee considered a number of probing amendments tabled by Clive Efford that would have altered the procedure in **clause 3** for extending the retention period for data from those arrested for or charged with qualifying offences.[30] As currently drafted, the procedure

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23 The full list of "qualifying offences", which covers certain violent, sexual and terrorist offences, is set out in section 65A of the *Police and Criminal Evidence Act 1984*, as inserted by section 7 of the *Crime and Security Act 2010*.

24 The relevant provisions regarding a six year retention period were never brought into force.

25 PBC Deb 29 March 2011 cc198-204 and 208-217

26 PBC Deb 29 March 2011 c199

27 See Home Affairs Committee, *The National DNA Database*, 8 March 2010, HC 221-I 2009-10, paras 32 to 37 and paragraph 9 of the conclusions and recommendations, and Professor Jim Fraser, *Acquisition and retention of DNA and fingerprint data in Scotland*, June 2008.

28 PBC Deb 29 March 2011 c215

29 PBC Deb 29 March 2011 cc226-236

30 PBC Deb 29 March 2011 cc217-226

would require the police to apply to a magistrates' court for an order extending the initial three year retention period in respect of a particular individual by a further two years. The amendments would have introduced an additional preliminary stage, whereby the police would first write to the individual concerned to notify him that it wanted to extend the retention period. The individual could then either agree or disagree to the extension. If he agreed (or did not respond), the extension would be put in place. If he disagreed, only then would the police have to go to a magistrates' court for an extension order.

Clive Efford said that the aim of the amendments was to explore whether police applications for extension orders would be heard in open court. He expressed concern that individuals in respect of whom such orders were sought would have their names made public if this was the case, even though they had not been convicted of any crime. He thought that this might stigmatise such individuals.

Gareth Johnson (Conservative) said that the clause 3 procedure would require a court summons to be formally served on the individual concerned, which would include certain procedural safeguards. Letters sent out under the amendments, however, would not benefit from such safeguards:

> The difference between the two systems is that there will at least be a judicial process in the Government's provision. Under the hon. Gentleman's amendment, all that is required is that a letter be sent. Such a letter might go into the great blue yonder, and the DNA extension would apply if there were no reply.[31]

James Brokenshire stressed the Government's view that judicial oversight was an important way of increasing public confidence in how the police used and retained DNA, and that public confidence was particularly relevant to the issue of extended retention periods. He also indicated that the Government would normally expect police applications for extensions to be heard in private, either in a closed court or in the judge's chambers. He did, however, acknowledge that the decision on whether the hearing would take place in private or in open court would be a matter for the judge, guided by rules of the court.[32]

The lead amendment was negatived on division.

Taking and retention of material from individuals subject to control orders

Clive Efford moved a probing amendment that would have set out a retention regime for biometric data taken from individuals subject to control orders.[33] Data from such individuals was not dealt with in the Bill as introduced. Mr Efford therefore asked for clarification as to whether data from a person held under a control order but not convicted of any crime would be retained, and if so for how long.

In response, James Brokenshire said that provisions covering the retention of material from people subject to control orders had not been included in the Bill as the Government had already announced that it would be repealing control orders legislation and replacing it with provisions on terrorism prevention and investigation measures. He did, however, express support for the underlying thrust of the new clause insofar as he agreed that there should be provision for the taking and retention of biometric data from individuals subject to terrorism prevention and investigation measures. He indicated that the Government would be making provisions for the taking and retention of data from persons subject to terrorism prevention and investigation measures as part of its counter-terrorism legislation.

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31 PBC Deb 29 March 2011 c220
32 PBC Deb 29 March 2011 cc223-224
33 PBC Deb 29 March 2011 cc170, 177-8 and 186-7

Provisions on the taking and retention of such data have since been introduced by way of clause 23 and Schedule 6 of the *Terrorism Prevention and Investigation Measures Bill*, which had its second reading on 7 June 2011. See section 4.1 of Library Research Paper RP11/46 for further details.

Retention of material from people who receive penalty notices for disorder

The Committee considered a number of Opposition amendments relating to **clause 8**, which would provide for material taken from a person given a penalty notice for disorder to be retained for a period of two years.[34] All were negatived on division.

The first group of amendments would have introduced a minimum age requirement to clause 8, so that it would only apply to persons aged 16 or over who were given a penalty notice. Data from those aged 16 or under who were given penalty notices would have had to be deleted. The amendments would also have introduced an explicit requirement for a person to have been arrested and then given a penalty notice, so excluding people who were given penalty notices without first having been arrested. James Brokenshire emphasised that clause 8 did not give the police any new powers to **take** fingerprints or DNA, and that arrest would still be the threshold for the exercise of these powers as it is under the current law.[35] Clause 8 would not therefore permit such material to be taken from someone given a penalty notice unless they had also been arrested.

The second amendment was a probing one that would have increased the retention period from two years to three years. Clive Efford asked what the rationale for this period was, and why it differed from the three year period being proposed for people arrested and charged for serious offences but not convicted. In response, James Brokenshire said although a penalty notice would only be issued where the police believed a criminal offence had been committed, the person receiving the penalty notice would not have been required to make any admission of guilt and the notice fell short of a criminal conviction. He therefore argued that the two year retention period was appropriate as it "recognises the different status of the PND as a summary disposal".[36]

Longstop date for volunteers

Steve Baker (Conservative) moved an amendment to **clause 10**, retention of material given voluntarily. Clause 10 currently provides that such material may be retained until it has fulfilled the purpose for which it was taken or derived (e.g. to eliminate the person who volunteered the material from an investigation). The amendment would have added a new "longstop" proviso that stated "and must in any event be destroyed within one year from the date it was taken".[37]

He said that the driver for the amendment was to give members of the public the confidence to help the police with inquiries by volunteering their DNA for elimination purposes, "knowing that their DNA profile would be retained for the absolute minimum period".

James Brokenshire said that the suggestion was an interesting one, but that he would want to explore the idea fully with the police and the Crown Prosecution Service before committing to introduce a longstop proviso. He undertook to reflect further on the amendment, following which it was withdrawn.[38]

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34 PBC Deb 5 April 2011 cc249 to 257
35 Sections 61 to 63 of the *Police and Criminal Evidence Act 1984*
36 PBC Deb 5 April 2011 c253
37 PBC Deb 5 April 2011 c260
38 PBC Deb 5 April 2011 c262

Protection of biometric information of children in schools and colleges

Biometric identification systems are used in some schools and colleges for practical purposes such as registration, cashless canteens and library book borrowing. Part 1 chapter 2 of the Bill would require schools and further education institutions to:

- obtain the written consent of parents (or others with main parental responsibility) before processing biometric information from children under the age of 18 years;
- ensure that such information is not processed if a child objects, even where a parent has consented; and
- provide reasonable alternative arrangements for pupils who refuse or whose parents do not consent to biometric information being processed.

Under **clause 26** a child's biometric information must not be processed unless each parent gives their consent subject to certain exceptions as set out in **clause 27** (where a parent cannot be found, where a parent lacks the mental capacity to consent or where the child's welfare requires that a parent is not contacted, or it is otherwise not reasonably practicable to obtain the consent of a parent). Even where parental consent has been given, the processing of such data must not take place if the child objects (clause 26(4)). Schools and colleges would be under a duty to provide a reasonable alternative to a biometric system where the child objects to the processing of his or her biometric information, or where any parent does not consent to such processing (clause 26(6)). **Clause 28** defines various terms in relation to clauses 26 and 27.

The provisions were not amended in Public Bill Committee. Several Opposition amendments and an amendment from a backbench Conservative Member were discussed but none was successful.

Several Opposition amendments (88, 80 and 86) sought to probe the Government on issues relating to parental consent.[39] Clive Efford moved amendment 88 (subsequently withdrawn) which proposed to amend clause 26 to provide an opt-out approach whereby parents, having been notified by the 'relevant authority'[40] that it was processing, or proposed to process, biometric information, could request that their child's biometric information not be processed. He noted that schools had been quick to adopt new technology – for example, for managing their libraries and for issuing free school meals. He said that while it was right to consult parents, it was important not to limit the capacity of schools to manage effectively, and he wanted to know how much influence parents would have over the decision of the institution to introduce such systems.

Responding for the Government, James Brokenshire said that it was fundamental that parents should have the right to protect the biometric data of their children by being able to withhold consent. He noted that there were reports of children as young as three having their biometric data collected and that it was unacceptable that any child, especially one so young, should have data taken without parental consent. There was some debate about children withdrawing their consent and how this could work in practice especially in relation to very young children. The Minister said that it would be difficult to set a specific age limit in relation to the provision but that it was important to set out the general principle that a child should be able to withhold their consent. He noted that the Opposition had not tabled any amendment to set an age limit, and he stressed the importance of having flexibility.

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39 PBC Deb 5 April 2011 c306-12

40 i.e. the proprietor of a school or a 16 to 19 academy or the governing body of a further education institution.

Amendment 80 sought to probe why consent would be required generally by both parents rather than just one. The Minister said that this was because of the sensitive nature of biometric data and the strong feelings many parents had on the issue.

Amendment 86 sought to probe the exceptional circumstances in which the Government thought that it would not be 'reasonably practicable' to obtain the consent of a parent. The Minister emphasised that institutions would not be able use the provisions in clause 27 to justify non-compliance with the requirement for parental consent because, he said, no biometric information processing could take place without the consent of at least one parent or person who has parental responsibility for the child. The exceptions contained in clause 27 would not alter that, he said.

Mr Efford remained concerned about the general requirement to ask each parent to give consent. He accepted the general principle but felt that placing an 'over-bureaucratic and burdensome system' on schools would be regrettable. He noted that the Association of School and College Leaders (ASCL) was opposed to this chapter of the Bill.

Steve Baker welcomed the provisions but wanted to ensure that there would be additional safeguards so that consent would not be given lightly and that parents would properly assess any request for taking their children's biometric information. He moved amendment 51 (subsequently withdrawn) to include safeguards in relation to school admissions and to require that parents would be informed about the purposes for which the data would be used, who would have access to it, how secure it would be and how long it would be kept; and to ensure that no data would ever be transmitted to third parties.[41]

The chair indicated that he did not intend to call a stand part debate on clause 26, and the debate on amendment 51 was fairly wide-ranging. The issue of a child's not consenting overriding parental consent was discussed. Clive Efford questioned the wisdom of the Government legislating to allow a child of any age to determine whether it would participate in the collection of biometric information. Mr Efford spoke to Opposition amendment 79 which sought to ensure that where a child eligible for free school meals did not give biometric information s/he would still be afforded a protected way of receiving free meals to avoid them being stigmatised.

Responding to the debate, James Brokenshire noted the use of administrative alternatives to biometric information systems, such as swipe cards. On the issue of parental consent, he said that consent would have to be both informed and freely given. On school admissions, he stressed that the statutory school admissions code would not permit a maintained school or academy to require that prospective parents consent to their child's biometric information being processed. He reiterated that consent would have to be informed, and that to comply with clause 26 a school or college would have to ensure that parents were aware of the nature of the biometric data collected and the purpose for which it would be used. He highlighted the broader context of the *Data Protection Act 1998*, the principles underlying it, and the specific provisions in the Act relating to the disclosure of information to third parties which, he said, would prevent schools and colleges from sharing personal data with other organisations, apart from certain narrow exemptions. Following these assurances, amendment 51 was withdrawn, and Clause 26 was ordered to stand part of the Bill.

Opposition amendment 87 sought to amend clause 27 to provide that when consent is withdrawn all biometric information would be destroyed, and that the school or college would confirm in writing that this had been done.[42] Responding, the Minister said that while he did not accept the amendment, he did accept the broad principle that information should be

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41 PBC Deb 5 April 2011 c312-18
42 PBC Deb 5 April 2011 c318-20

destroyed and not retained beyond the period for which it was used. He referred to the existing protections under the *Data Protection Act 1998*. He also noted that there were already means for a parent to ascertain whether their child's biometric data had been destroyed. The amendment was withdrawn, and clauses 27 and 28 were ordered to stand part of the Bill.

4.2 Surveillance

Part 2 of the Bill covers the regulation of surveillance. It has two chapters: one on CCTV and other surveillance cameras and one on the *Regulation of Investigatory Powers Act 2000* (RIPA). Chapter 1 makes provision for the Secretary of State to prepare a code of practice for surveillance camera systems, including CCTV and Automatic Number Plate Recognition systems. This code will be overseen by a new Surveillance Camera Commissioner. Chapter 2 provides for judicial approval of those types of surveillance which are available to local authorities under the *Regulation of Investigatory Powers Act 2000*. The relevant surveillance activities are access to communications data and the use of directed surveillance and covert human intelligence sources (undercover agents).

Amendments and new clauses agreed

The only amendments made to Part 2 of the Bill were of a drafting nature and related to RIPA and Northern Ireland transferred matters. These amendments – to clauses 37 and 38 – were accepted without being discussed in the relevant stand part debates.[43]

Other significant areas of debate

Code of practice for surveillance camera systems

Clause 29 was the only clause in Part 2 of the Bill which saw the Committee divide. Vernon Coaker moved an amendment that would have required the new surveillance camera code of practice to contain guidance on the importance of CCTV to community safety and crime reduction. For the Government, James Brokenshire described the amendment as unnecessary considering the matters intrinsic to the deployment of CCTV. On a division the amendment was defeated by 10 votes to 7.[44]

Vernon Coaker went on to "test the Committee's views"[45] in separate votes on two further amendments, both designed to widen the scope of consultation in the course of preparing the CCTV code. The scope of the consultation would be widened to include explicitly community groups such as Neighbourhood Watch and the Victim's Commissioner. Mr Coaker suggested that the Government saw the consultation "from the viewpoint of those who operate the systems, rather than that of those who benefit". Although clause 29(5)(g) provides for other persons to be consulted by the Secretary of State, Mr Coaker considered this "catch-all paragraph" to be insufficient.[46] James Brokenshire reminded the Committee of an ongoing public consultation on the CCTV code (which ran until 25 May 2011) and to the flexibility in the Bill to accommodate wider consultation.[47] Both amendments were defeated by 10 votes to 7.[48]

Another amendment tabled by Vernon Coaker aimed to tease out the evidence base and research that had informed the Government's decision to legislate for the CCTV code. The amendment would have established an independent inquiry into the use of surveillance camera systems in England and Wales. James Brokenshire said it was better to legislate

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43 PBC Deb 26 April 2011 c365 and c381
44 PBC Deb 26 April 2011 c340
45 PBC Deb 26 April 2011 c344
46 PBC Deb 26 April 2011 c342
47 PBC Deb 26 April 2011 cc342-3
48 PBC Deb 26 April 2011 cc344-5

now and to ensure that CCTV benefited from continued trust and confidence. The amendment was withdrawn.[49]

Effect of Code

Clause 33 would require a "relevant authority" to have regard to the surveillance camera code. Vernon Coaker tabled amendments designed to establish why the Government considered it unnecessary for the surveillance camera code to be mandatory. James Brokenshire responded that a mandatory requirement would "fundamentally change the intent of the legislation." He further confirmed that there is no power in the Bill to make the code mandatory in the future.[50]

Tom Watson moved, and subsequently withdrew, an amendment to clause 33 that would include schools in the list of relevant authorities that are covered by the surveillance camera code. Vernon Coaker suggested the Minister provide reassurance by considering whether the educational sector should be covered on the face of the Bill or under the order-making power of clause 33(5)(k). In response, James Brokenshire referred to complexities arising from the mix of educational and community activities in school premises. He referred to the public consultation ongoing at the time before adding:

> I do not want to act rashly now; I prefer to see what the consultation reports back, although I hear clearly the points raised in Committee this morning. I am sure that the question of how the code will apply in the future will be returned to and examined further.
>
> [...]
>
> I want to see what the consultation reports back before considering what further steps or actions are required.[51]

In the stand part debate on clause 33, Mr Brokenshire added that the Government had nothing in mind in terms of extending the application of the code "at this time".[52]

Commissioner in relation to code

Clause 34 relates to the appointment and functions of the Surveillance Camera Commissioner. A probing amendment by Vernon Coaker sought to ask whether the Government saw any merit in subjecting the Commissioner to a pre-appointment hearing before the Home Affairs Select Committee. James Brokenshire said he did not want to pre-empt work on pre-appointment hearings that the Cabinet Office and Liaison Committee would be undertaking.[53]

Judicial approval for obtaining or disclosing communications data

Clause 37 would amend the *Regulation of Investigatory Powers Act 2000* (RIPA) to provide for judicial approval before local authorities could access communications data. The clause also provides for the extension, by order, to other public authorities. During the stand part debate on the clause Vernon Coaker commented that the Government appeared to be legislating not on the basis of evidence but rather on perceptions that local authorities had been misusing their powers to access communications data. He also referred to, but said he did not agree with, the interception of communications commissioner's belief that the

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49 PBC Deb 26 April 2011 cc323-34
50 PBC Deb 26 April 2011 cc348-9
51 PBC Deb 26 April 2011 cc351-2
52 PBC Deb 26 April 2011 c353
53 PBC Deb 26 April 2011 c354

introduction of judicial approval was "totally unnecessary".[54] He further asked how the judicial approval process would work in practice. James Brokenshire considered the clause to be a proportionate response to public concern and drew attention to cross-party recognition that further checks and balances were needed to ensure continuing trust and confidence in RIPA techniques.[55]

Judicial approval for directed surveillance and covert human intelligence sources

Clause 38 makes provision for judicial approval of local authorities' use of directed surveillance and covert human intelligence sources. It includes an order-making power to extend these measures to other public authorities. Vernon Coaker moved an amendment, subsequently withdrawn, to introduce a seriousness threshold so that directed surveillance could only be authorised in relation to offences that carry a maximum custodial sentence of at least six months; this would be subject to limited exemptions involving under-age sales of alcohol and tobacco. James Brokenshire said that the Government would be introducing secondary legislation along the lines of the proposals in the amendment.[56]

Review of RIPA

The Opposition tabled new clause 12 which would have established an independent inquiry into the use of investigatory powers under RIPA. This would have provided for a broader review of the legislation and the reasons for focusing on local authorities' use of RIPA. Tom Watson strongly endorsed new clause 12[57] and further suggested that the Bill might be a suitable vehicle for additional amendments to RIPA.[58] He singled out a need for clarity in the area of illegal interception of voicemail messages.[59]

On the proposal to review RIPA, James Brokenshire referred to other ongoing reviews. New clause 12 was later denied a second reading by 8 votes to 7.[60] On suggestions that the Bill be used to further amend and clarify RIPA, the Minister restricted himself to expressing a willingness to consider any formal requests that might come forward.[61]

Ministerial undertakings to consider

Code of practice for surveillance camera systems

A probing amendment to **clause 29(6)(b)** was moved by Vernon Coaker aimed at clarifying the definition of a surveillance camera system. The Parliamentary Under-Secretary (James Brokenshire) said:

> I am happy to consider further whether the words that he seeks to delete, "objects or events", add to the understanding of the paragraph. I am certainly prepared to consider it and ensure further clarity, if required, to address his points or indeed any points relating to the Information Commissioner. I am prepared to consider that genuinely.[62]

Commissioner in relation to code

Vernon Coaker tabled a set of amendments to **clause 34** which, he claimed, went "to the heart of one of the tensions in the Bill, which is the role of the Information Commissioner vis-à-vis the surveillance camera commissioner." He asked if the Minister hoped the new

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54 PBC Deb 26 April 2011 c367
55 PBC Deb 26 April 2011 cc370-1
56 PBC Deb 26 April 2011 c378
57 PBC Deb 26 April 2011 c376
58 PBC Deb 26 April 2011 c380
59 PBC Deb 26 April 2011 c372
60 PBC Deb 17 May 2011 c761
61 PBC Deb 26 April 2011 c373 and c380
62 PBC Deb 26 April 2011 cc345-6

surveillance camera code would merge with the pre-existing CCTV code issued by the Information Commissioner's Office. On the latter point, James Brokenshire said he was considering the matter carefully. However, he saw no reason for there to be a conflict between the roles of the two commissioners.[63] He added:

> We will certainly focus on this point as part of the process of implementing the provisions in this part of the Bill.[64]

4.3 Powers of entry

Clauses 39 to 53 and **schedule 2** of the Bill deal with powers of entry. There were no substantive changes to these provisions in committee, and only a few minor or drafting amendments.

In the stand part debate on **clause 39**, Vernon Coaker argued that some of the powers of entry to be repealed under Schedule 2 had been introduced for good reason. He highlighted two which the Local Government Group had said should be retained, and asked what consultation there would be. Responding, James Brokenshire described the proliferation of powers of entry in recent years as "not acceptable", and pointed out that, whilst the previous government had reviewed them, they had not changed the law. He suggested that the Local Government Group had misunderstood the nature of the powers which they wanted retained, saying that they had related to temporary situations which had now passed.[65]

There was some debate on **clause 41**, which would allow the Secretary of State (or other national authorities) to rewrite powers of entry, or the laws giving effect to them "with or without modification", and was therefore characterised as a "Henry VIII" clause by Mr Coaker. The Bill provides that no such amendments can be made unless the changes, taken together, increase the level of protection provided to the public. Mr Coaker questioned whether the Secretary of State would decide this, thereby acting as "judge and jury" of his or her own actions.[66] Responding, James Brokenshire said that the Bill's aim was to afford greater protection to householders, and that the Minister's judgement would be subject to review by the Joint Committee on Statutory Instruments, the Merits of Statutory Instruments Committee in the House of Lords and the courts through judicial review.[67] Clause 41 was agreed to.

Vernon Coaker tabled an amendment to **clause 47** which would have required the Secretary of State to establish an independent inquiry into the exercise of powers of entry in England and Wales.[68] In particular, this inquiry would have had to examine issues relating to bailiffs and squatters, leading to a report to Parliament and a code of practice. Mr Coaker said that the Government had missed an opportunity in the Bill to come up with "a much more radical, thorough, ongoing revision of a whole range of different things."[69] The powers of bailiffs were, he said, a cause for confusion, and vulnerable constituents often reported problems, and an inquiry could look into these issues. Responding, James Brokenshire said:

> The Bill is an overarching framework that we seek to put in place across a swathe of issues, and does not seek to address specific issues in the way that the hon.

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63 PBC Deb 26 April 2011 cc355-62
64 PBC Deb 26 April 2011 c362
65 PBC Deb 26 April 2011 c383
66 Ibid c388
67 Ibid
68 Amendment 104
69 PBC Deb 26 April 2011 c393

> Gentleman and other hon. Members have sought to highlight, in connection with bailiffs and squatters.[70]

The Government, he said, was committed to providing more protection against aggressive bailiffs and intended to publish a consultation paper on the subject. It was also committed to looking at options for strengthening the law in relation to squatters.

The amendment was negatived by 10 votes to six.[71]

4.4 Abolition of wheel clamping on private land (clause 54)

The Opposition moved amendments in three areas: to tackle a 'loophole' that would permit private companies to continue to clamp on private land where there is a fixed barrier at the exit to that land; to permit the continued clamping of foreign-registered vehicles on private land; and to make it explicit that the police would be responsible for prosecuting anyone who clamps a vehicle on private land once the ban has come into force.[72] The Minister, Lynne Featherstone, rejected the amendments for the following reasons:

- **Fixed barriers**: the Opposition misread the clause. It does not permit clamping in car parks where there is a fixed barrier, rather the barrier itself can act as a means of keeping a vehicle in a car park where someone has parked illegally or in contravention of the conditions upon which they came onto the land.[73]

- **Foreign vehicles**: private landowners can contact the DVLA about any unregistered vehicles parked on their land. The DVLA informs the police and local authorities will remove the vehicle if it is deemed to be 'abandoned'.[74] The DVLA has additional powers to clamp and remove vehicles from private land if they are not properly taxed or (from June 2011) if they are not insured.

- **Prosecution**: it is already clear in the Bill that wheel clamping on private land will become a criminal offence; only the police can enforce this and the Crown Prosecution Service would be responsible for prosecutions. The Government will work with Citizens' Advice Bureaux to "ensure that appropriate steps are taken to publicise on wheel-clamping and the action that drivers should take if they suspect that their vehicle has been unlawfully clamped or towed away".[75] The Opposition amendment was defeated 10 votes to seven.[76]

In response to other concerns raised during the course of the debate, Ms Featherstone stated that the Government did not wish to continue with the previous Government's plans to further regulate the private clamping industry because "more regulation ... is exactly what the Government are trying to stop and curtail while protecting the rights of landowners and motorists".[77] The activity of bailiffs would not be affected by the measures in the Bill.[78] She also explained that there are already measures in section 35 of the *Road Traffic Regulation Act 1984*, as amended, to allow local authorities to take over the management of private car parks, allowing them to clamp and tow vehicles. She suggested that this might be a viable

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70 Ibid c397
71 Ibid c400
72 PBC Deb 28 April 2011, cc405-411
73 Ibid cc413-414
74 Ibid c417
75 Ibid c411
76 Ibid c419
77 PBC Deb 28 April 2011, c435
78 Ibid c437

solution for large private car parks or housing estates/developments where inconsiderate parking is a problem.[79]

As to costs, the Opposition's proposal to introduce a statutory appeals process would cost approximately £2 million.[80] Ms Featherstone thought that some private landowners might take the decision to install fixed barriers; on the range of costs involved in such an undertaking, she said:

> The simplest bollards cost less than £50, while the cost of more robust, removable bollards starts at about £100. The cost of automatic bollards starts at about £1,400, and the cost of barriers that can be raised and lowered starts at about £1,000. Simple outdoor signs start at a cost of about £10.[81]

The Government's intention is to introduce the ban "as quickly as possible" after Royal Assent, giving at least two months' notice of commencement.[82]

Powers of police and local authorities to remove vehicles from private land (clause 55)

There were no amendments debated on this clause of the Bill. The Opposition did raise concerns that the clause does not place a *duty* on police and local authorities to remove vehicles from private land that are parked 'illegally, obstructively or dangerously', but rather gives them the power to do so should they do wish.[83] The Minister indicated that the Association of Chief Police Officers (ACPO) would publish guidance to police on when and how to use this new power.[84]

Regulating and enforcing parking on private land (clause 56 and Schedule 4)

The Opposition moved two substantive amendments and four new clauses to this part of the Bill. Ms Johnson explained the intention behind the amendments as follows:

> The proposed subsection would introduce the right of appeal to an independent body for anyone who is ticketed on private land. It would also include those who have been issued with a ticket and immobilised by a barrier.[85]

The new clauses would introduce requirements as to signage at car parks and limit the ability of the landowner to enforce a ticket in certain circumstances. They would also give the vehicle driver/keeper a right of redress if the landowner does not properly provide signage or attempts to enforce a ticket incorrectly. They mirror to a great extent provisions in sections 42-44 and Schedule 1 to the *Crime and Security Act 2010* legislated by the previous Government. Mr Watson argued that the amendments were intended to tackle an anomaly in the Bill which puts parking on private land "on a parity with parking on a road by making the registered keeper liable, except that all the protections that a driver has when they park on a road are not introduced".[86]

Ms Featherstone argued that there is already a recognised process for enforcing parking on private land under consumer protection law. She outlined it as follows:

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79 Ibid c439
80 Ibid c436
81 Ibid c439
82 Ibid c436
83 Ibid c445
84 Ibid c448
85 Ibid c451
86 Ibid c454

> If a driver does not pay, a landowner can go to court under consumer protection legislation. Opposition Members have spoken as though the situation does not already exist—as though contractors who are not members of the BPA do not already ticket, but they do. The current consumer protection law protects pieces of land. If landowners wish to operate parking controls and charge for parking, they must comply with consumer protection law and put up clear signs.
>
> People are concerned about the amount that could be charged in such circumstances. The charge will be limited to what is on the sign and limited by the Unfair Terms in Consumer Contracts Regulations 1999. It is therefore simply not true that there will be no protection—as currently—for consumers on privately owned land when landowners have contracted out the rights to ticket or clamp to a parking company. There will be protection, because if there is signage, the companies are liable. A contract has been entered into if a car is parked on that land and accepts the terms and conditions that are posted. If the signs are not visible, are not there or do not state what they should state, the companies will be found against under the consumer protection law.[87]

In addition, she stated that the parking industry is in the process of establishing a sector-wide body whose decisions all its members would abide by. In turn, the Government would mandate that any drivers given a ticket should be informed on that ticket that they may contact that independent body in the pursuit of a resolution of any dispute with the parking operator.[88]

She argued that it would make sense to wait and see what happened with the clamping ban and what knock-on effects it would have on private parking enforcement, such as a migration of 'rogue clampers' to becoming 'rogue ticketers'.[89] The Opposition amendment was defeated 10 votes to five.[90]

There was further debate on stand part for Schedule 4 to the Bill, particularly on the introduction of the new provisions that would make the 'vehicle keeper' liable for tickets incurred on private land and would allow private landowners to obtain their details from the DVLA to enforce a ticket against them (even if they were not driving the vehicle at the time). Ms Featherstone stated that the Government was aware of concerns and may return to the issue at report stage:

> ...it is important to note that the keeper will be liable only in certain circumstances. Those circumstances are important and they are clearly set out in the schedule. As for how the keeper would know, we would expect adequate information to be provided to the keeper. Where the parking provider seeks to pursue the keeper for unpaid parking charges, that would be part of what has to be provided to the keeper when explaining the reason for the charge. After we have finished our proceedings in Committee, we shall reflect on whether we need to say more about such matters in the schedule.[91]

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87 Ibid c458
88 Ibid c269
89 Ibid c460
90 Ibid c466
91 Ibid c468

4.5 Terrorism

Pre-charge detention

Clause 57 of the Bill would ensure a permanent reduction of the maximum period of pre-charge detention from 28 days to 14 days. In particular, it would change the wording of Schedule 8 of the *Terrorism Act 2000* and would also omit section 25 of the *Terrorism Act 2006*. This would have the effect of removing the order making power contained in the 2006 Act (ensuring that it was not possible to reinstate 28 day pre-charge detention through the use of that provision).

Vernon Coaker tabled two amendments to the clause. The first sought to spell out, on the face of the Bill, that the 14 days limit could be temporarily extended through the *Detention of Terrorist Suspects (Temporary Extension) Bills* to 28 days in exceptional circumstances.

These draft Bills were published on 11 February 2011. The Explanatory Notes to the draft Bills state that both would have the effect of extending the maximum period of pre-charge detention to 28 days (for a maximum period of three months) should either of them be introduced and approved by Parliament. One bill could be used immediately (while the order-making provisions of the 2006 Act were still in force) and the other only assuming that the relevant provisions had been repealed. The Bills would only be introduced in "exceptional circumstances."

The draft Bills were the subject of Parliamentary scrutiny by a Select Committee of both Houses, which reported at the end of June (see text box).[92]

Report of the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills

The Committee reported on 23 June. It concluded that the draft bills were "not a satisfactory way to proceed." It highlighted the fact that parliamentary scrutiny of primary legislation would be so circumscribed by the difficulties of explaining the reasons for introducing it without prejudicing the rights of a suspect to a fair trial, as to make the process of justifying the legislation almost impossible for the Secretary of State and totally unsatisfactory and ineffective for members of both Houses of Parliament. The Committee decided this would mean the Government's aim of ensuring parliamentary scrutiny of any increase in the maximum period of pre-charge detention could not be met. The Committee also stated that there would be an unacceptable degree of risk that it would be impossible to introduce and pass the legislation within a sufficiently short period of time particularly when Parliament was in recess or in a period between the dissolution of one Parliament and the opening of a new Parliament.

The Committee recommended that the Home Secretary should be given an order making power to extend the period of detention from 14 to 28 days in exceptional circumstances for a period of three months (with the agreement of the Attorney General).The Director of Public Prosecutions would then have to apply to a High Court judge to extend detention in each individual case. The Committee also recommended compulsory independent review of any use of the power by the Secretary of State and any application by the DPP.

The second amendment sought to amend the clause to establish a Commission "to develop a framework of bail conditions suitable for some suspects after 14 days of pre-charge detention."

[92] Background information on this can be found in Library Standard Note SN/HA/5634, Pre-charge Detention in Terrorism Cases. See: Report of the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Session 2010-12, 23 June 2011, HL Paper 161/HC Paper 893

On the first proposed amendment, Mr Coaker explained that it was designed to get the Minister to explain the circumstances in which he would imagine the *Detention of Terrorist Suspects (Temporary Extension) Bills* would be introduced.[93]

As to the second proposed amendment, he asked:

> Will the Minister outline why the Government have rejected some sort of bail for people who might still be considered a threat to the security of the nation after the 14 days have passed?[94]

James Brokenshire responded that the Government had already committed itself to provide for a contingency mechanism in the form of draft emergency legislation, so the first amendment was unnecessary.[95] As to the second amendment, Mr Brokenshire replied that:

> We have considered the issue of bail for terrorist suspects as part of our review of counter-terrorism and security powers. The review concluded that conditional bail would be inappropriate for suspects who are considered a significant risk to the public, given that the nature and extent of their involvement in terrorism would not have been fully investigated [...] The previous Government took the same approach [...]

He added that Lord Macdonald QC, the former Director of Public Prosecutions who provided independent oversight of the counter-terrorism review, had endorsed the approach, since strict terrorism bail conditions might have been perceived as an unwarranted form of control order.[96]

Following a short discussion as to whether the emergency legislation could be used for "individual cases", rather than in respect of groups of individuals (to which the Minister eventually responded "it is clearly possible to do that within the scope of the legislation"[97]), the amendments were withdrawn and the clause was agreed.

Stop and search

Clauses 58-62 and **schedule 6** cover the new regime for police stops and searches under the *Terrorism Act 2000*. The changes have been introduced in response to the Gillan Judgement by the European Court of Human Rights; this had held section 44 of the 2000 Act to be in breach of the European Convention on Human Rights. The Home Secretary, Theresa May, had announced in July 2010 that she would "not allow" the continued use of section 44 in contravention of the ruling.[98] Interim guidance was provided through a letter from the Association of Chief Police Officers' lead on terrorism, which was also published on the website of the National Policing Improvement Agency.[99] A revised Code of Practice under the *Police and Criminal Evidence Act 1984* was issued on 7 March 2011 which contained paragraphs on section 44 stops and searches reflecting the interim guidance.[100] However, these paragraphs were subsequently revoked on 17 March 2011, when the Home Office laid before Parliament the *Terrorism Act 2000 (Remedial Order) 2011*[101] and a

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93 PBC Deb 3 May 2011 c477
94 Ibid c483
95 Ibid c484
96 Ibid c485
97 Ibid c489
98 *Police and Criminal Evidence Act PACE Code A (6 March 2011)*
99 Letter from Craig Mackey, Chief Constable of Cumbria, NPIA website, undated (accessed on 1 June 2011)
100 HC Deb 8 July 2010 c540
101 SI 2011/631

separate statutory Code of Practice. The Remedial Order replaces sections 44 to 47 of the 2000 Act pending the provisions in the current Bill coming into force.[102]

The Joint Committee on Human Rights (JCHR) conducted an inquiry on the Remedial Order[103] and the evidence they received included confidential information from the Metropolitan Police about the perceived "operational gap" which suspending the section 44 powers had left. In its report, published on 15 June 2011, the JCHR accepted that a replacement power exercisable without reasonable suspicion in tightly circumscribed circumstances was necessary and that there were "compelling reasons" for using the remedial order procedure to bring this in before the Bill's provisions could be enacted. However, it recommend that the Government provide Parliament with more detailed evidence of the sorts of circumstances in which the police have experienced the existence of an operational gap in the absence of a power to stop and search. [104]

There were no substantive amendments to the Bill's provisions on stop and search in committee.

Vernon Coaker raised, through a probing amendment, the fact that guidance produced under the previous Government by the National Policing Improvement Agency had already led to a substantial drop in the number of stops and searches under section 44 in 2009-10.[105] James Brokenshire responded that the Government had to ensure that the statutory power itself was "more reasonable, more proportionate and more focused."[106] During the clause stand part debate on **clause 58**, Mr Coaker criticised the Government for issuing its interim guidance before its counter-terrorism review. According to the JCHR, the Government itself had said that the police had experienced a "clear operational gap" following the suspension of the previous powers,[107] and he argued that the Government should have continued to use the powers pending the review "rather than leave themselves with an operational gap for nine months, which they have had to plug with a remedial order".[108] James Brokenshire argued that the Government had had to "deal with the mistakes and problems of the previous Government", and that even allowing for the drop in searches in 2009-10, the use of the power had still been disproportionate.[109] Clause 58 was agreed to. There was further debate on this "operational gap" in the stand part debate on **clause 60**. Vernon Coaker questioned the minister on the detail of the new scheme, including the reasons why the authorisation period would be 14 days (rather than 28 under the previous provisions), the geographical area and the need for a judicial process.[110] James Brokenshire said that the Government did not feel that additional judicial authorisation was appropriate given the Government's responsibility for national security decisions, and that 14 days had been chosen because intelligence was often imprecise about the time and place of an attack; if the Secretary of State felt the period authorised was too long, then she could restrict this under schedule 5.[111]

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102 Article 6 of the Order.

103 Joint Committee on Human Rights press notice, *Call for Evidence on Replacement Power to Stop and Search without Reasonable Suspicion*, 25 April 2011

104 Joint Committee on Human Rights , *Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion*, 15 June 2011, HL 155/HC 1141 2010-11,

105 PBC Deb 3 May 2011 c492

106 Ibid c492

107 Joint Committee on Human Rights press notice, *Call for Evidence on Replacement Power to Stop and Search without Reasonable Suspicion*, 25 April 2011

108 PBC Deb 3 May 2011 c495

109 Ibid c496

110 Ibid c500-506

111 Ibid c505

The debate on **clause 59** covered the fact that the Bill would end the requirement for a search to be conducted by an officer of the same sex. James Brokenshire made it clear that the statutory code would make it clear that same sex searches should be conducted where possible.[112] Clause 60 was agreed to with only technical Government amendments.[113]

In the discussion of the details in **schedule 5**, Vernon Coaker asked about the possibility of review of a Secretary of State's decision to refuse an authorisation (James Brokenshaw said the independent reviewer would be able to examine this) and about authorisations between police forces (which the Minister confirmed would be possible).[114] Schedule 5 was agreed to without amendment. Drafting amendments were made to **clause 61**, which covers the Code of Practice.[115]

The Northern Ireland provisions were debated in response to a probing amendment moved by Vernon Coaker. Both he and Jim Shannon (DUP) asked why Police Service of Northern Ireland would not have the right to stop and search for unlawful munitions and wireless telegraphy without reasonable suspicion when the military would. James Brokenshire responded that the matter had been closely considered by the Secretary of State for Northern Ireland and with the devolved Administration, who were clear that a lack of powers would not hinder the PSNI in its work. The military powers were designed to be used only in extremis, and there had been no recorded use of the powers since 2007.[116] The amendment was withdrawn.

4.6 Safeguarding vulnerable groups: the barring scheme

This part of the Bill was the subject of extensive discussion. The Committee accepted a number of Government amendments, the most significant of which was a new clause and schedule providing for the dissolution of the Independent Safeguarding Authority (ISA) and the establishment of a new Disclosure and Barring Service. Government amendments were also made to the scope of regulated activity, the definition of vulnerable adults, the ISA's information sharing powers and the application of the barring scheme to Northern Ireland. Various other minor and technical Government amendments were made, not all of which are discussed in this paper.

In addition to the Government amendments, the Committee also debated a number of Opposition amendments. None of these were accepted, although Lynne Featherstone did undertake to consider two of them further ahead of Report: the first being an amendment that would require the ISA to pass information to the police, and the second an amendment that would introduce statutory guidance relating to the barring scheme.

Amendments made

Scope of regulated activity

A number of Government amendments were made to **clauses 63** and **65**, which set out the scope of regulated activity in relation to children and vulnerable adults. Home Office Minister Lynne Featherstone said that the amendments were intended to "refine" regulated activity as set out in these clauses.

Most of the amendments were relatively minor, but two more substantive ones were also made. The first of these was to bring two new roles within the scope of regulated activity:

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112 Ibid c498-9
113 Ibid c500 and c511
114 Ibid c513
115 Ibid c522
116 Ibid c 520

first aid volunteers and social security appointees.[117] The amendment relating to first aid volunteers provoked some controversy. The Minister said that the amendment would not include workers designated as first aiders in offices and other workplaces, but was intended to cover people such as St John Ambulance volunteers: such positions were analogous with paramedics, who were already covered by the scheme. Jenny Chapman (Labour) expressed surprise at the amendment, on the grounds that St John Ambulance volunteers would not usually be in a position to develop relationships with particular vulnerable adults or children (as opposed to, say, a volunteer teaching assistant):

> My experience is that the greatest threat in safeguarding happens when an individual volunteer has the opportunity to develop a long-standing relationship of trust with a vulnerable adult or child. I volunteered for St John Ambulance a long time ago, and we would not be doing our job properly if opportunities in that particular context with members of the public became a regular occurrence.[118]

The second of the more substantive amendments reversed the Government's original plan to take the teaching, training, instruction and supervision of 16 and 17 year olds out of the scope of regulated activity. Lynne Featherstone said that this decision had been taken following meetings with organisations such as the NSPCC, the Children's Society, the children's commissioner and the Scout Association, all of who had argued for this type of work with 16 and 17 year olds to be kept in scope.[119] The effect of the amendment is that 16 and 17 year olds will now be treated in the same way as under 16s when it comes to determining whether a role involves regulated activity. The Minister indicated that this would bring around 40,000 people (whose roles involve the teaching, training etc. of 16 and 17 year olds) back into the scope of regulated activity. The Opposition welcomed this amendment.

Definition of vulnerable adults

The Committee accepted a minor Government amendment to **clause 64**, which would redefine "vulnerable adult" as someone in respect of whom a regulated activity was being provided, rather than someone in a particular setting (such as a care home). During the clause stand part debate, Lynne Featherstone said that this was a "more targeted and risk-based" approach that recognised that an adult's vulnerability may change over time.[120]

She went on to give some examples of roles that would and would not be covered by the barring scheme:

> On who is in and who is out of the scheme, for adults it covers all health, personal and social care workers – doctors, social workers and home care workers who assist with independent living. The types of workers who carry out regulated activities in relation to adults include – apart from doctors, nurses and dentists, who are the more obvious health care professionals, and the staff who work under their direction or supervision, such as a health care assistant on a hospital ward – care workers who provide personal care whether in a health setting, a care home or day care service; care workers who help an older, sick or disabled person with day-to-day management of their money by helping with shopping or paying bills, for example; anyone who makes financial or welfare decisions on behalf of another person because, for example, they lack mental capacity; social workers assessing the needs of social care services for older, disabled or sick adults; and drivers and escorts who transport adults under arrangements organised by service providers.

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117 PBC Deb 3 May 2011 c525
118 PBC Deb 3 May 2011 c528
119 PBC Deb 3 May 2011 c526. See, for example, the comments on amendment 131 in the *Additional Associated Memorandum* (PF 61) submitted to the Committee by the NSPCC.
120 PBC Deb 10 May 2011 c560

> Under the previous scheme, all jobs in care homes are regulated, where the work is carried out for the purpose of the home and there is any form of contact with residents. That is changing under the Bill. Examples of people who are being taken out of regulated activity are volunteers who maintain the plants and the fish tank in the residents' lounge, the lift engineer, the plumber, the electrician, the hairdresser, the window cleaner, the receptionist, volunteers who give their time to provide activities such as music, crafts or flower arranging, and inspectors. The changes will mean that there is a risk-based calculation and the workers or volunteers who are most intimately involved with residents – those providing the care – are in regulated activity.[121]

She emphasised that those who had been taken out of regulated activity under the Bill would still be eligible for an enhanced criminal records check, so employers would still have access to convictions and "soft" police information.

The amended clause was ordered to stand part without division.

Information sharing between the ISA and the police

Two Government amendments were made to **clause 79**. These would change the current position whereby the ISA "may" provide barring information to the police in connection with certain aims, for example the detection or prevention or crime, to a requirement that the ISA "must" provide such information to the police.[122]

The Committee also considered new clause 15 tabled by the Opposition, which would have required the ISA to share information with the police where:

- the information was such that the ISA's chief executive felt that a criminal investigation was appropriate;
- the information was credible and reliable and suggested that an individual posed a real threat to vulnerable groups;
- the information had led to a person being barred; or
- the information was such that it would have lead to a person being barred had the ISA had reason to believe that he or she might work in regulated activity in the future.[123]

Diana Johnson said that the aim of the new clause was to make sure that information held by the ISA would also be added to police databases so that it would be available for enhanced criminal records checks in respect of people undertaking unregulated activity. This would enable such checks to include details of any information that led to a person being barred from regulated activity, even though the fact of the barring itself would not be included. She said that this was important as some 50 per cent of problems in independent care homes and the care sector were not reported to the police; they would not therefore be on police databases and would not be accessible as part of a criminal records check.[124]

Lynne Featherstone reiterated the Government's view that it would be disproportionate to include details of an individual's barred status on enhanced criminal records check for unregulated activity. However, she said that Diana Johnson had made "some reasonable points" and she undertook to reflect on these further, although she said that she could not guarantee that she would bring forward a Government amendment on Report. She said that

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[121] PBC Deb 10 May 2011 c561
[122] PBC Deb 10 May 2011 cc591-2
[123] PBC Dec 10 May 2011 cc592-6
[124] PBC Deb 10 May 2011 c592

any additional duty on the ISA to share information with police would have to be carefully framed so as to exclude unnecessary and unproductive information sharing. Diana Johnson withdrew the new clause but said she would return to it on Report if appropriate.

Northern Ireland

A new clause and schedule were inserted to make provision for Northern Ireland.[125] Lynne Featherstone said that the provisions would implement the barring scheme in Northern Ireland as well as in England and Wales. She indicated that the new clause and schedule were being included at the request of the Northern Ireland Administration and with the support of the Northern Ireland Assembly, and said that the Northern Ireland Ministers:

> ...generally support the changes to the scheme that will be made as a result of the vetting and barring review. In particular, they support the abolition of controlled activity and the monitoring of the children's and adult work forces. The Northern Ireland Assembly approved a legislative consent motion to extend to Northern Ireland the provisions in the Bill on the safeguarding of vulnerable groups. The motion was debated and passed by Assembly Members on 21 March 2011, before the dissolution of the legislature.[126]

She went on to draw the Committee's attention to some "minor" differences between the Northern Ireland provisions and the England and Wales provisions:

> In the main, those are required to reflect differences in Northern Ireland legislation or the organisation of services there. For example, Northern Ireland Ministers have indicated that those involved in education, health, social care and justice inspection services will remain with the scope of regulated activity and therefore subject to the requirements that flow from that. The children's hospital will be retained as a specified establishment on the grounds that Northern Ireland has only one hospital dedicated to children, so there is increased public expectation that all staff who have contact with patients are checked to the highest level prior to being employed.[127]

The Disclosure and Barring Service

In its penultimate sitting the Committee accepted a number of Government amendments that would dissolve the ISA and establish a new body to be known as the Disclosure and Barring Service (DBS).[128] Introducing the amendments, Lynne Featherstone said that they would implement the Government's plans to merge the current functions of the ISA and the Criminal Records Bureau (CRB) into a single body, as had been recommended in its review of the vetting and barring scheme.[129] The DBS would be responsible for administering the barring scheme in England, Wales and Northern Ireland, and for criminal records checks in England and Wales. AccessNI would continue to be responsible for criminal records checks in Northern Ireland.

She said that the DBS would be established as a non-departmental public body rather than as a Home Office agency so as to ensure that barring decisions were taken independently of ministers. The amendments provide for the transfer of staff and property from the ISA to the DBS, and for the transfer of the functions of both the ISA and the CRB, although the Minister indicated that the Government's intention was for the existing sites in Darlington (ISA) and Liverpool (CRB) to remain in use and retain their current functions.

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[125] PBC Deb 12 May 2011 cc702-707
[126] PBC Deb 12 May 2011 cc704-5
[127] PBC Deb 12 May 2011 c705
[128] PBC Deb 17 May 2011 cc713-725
[129] Home Office, *Vetting & Barring Scheme Remodelling Review – Report and Recommendations*, February 2011, p4 and pp23-4

Diana Johnson expressed concern that this group of amendments had been introduced at such a late stage, and that no impact assessment had been produced. She asked the Minister to set out the costs of merging the ISA and the CRB, and what the anticipated cost savings were. She also asked when the DBS would be up and running, and what measures had been taken to develop a single IT system. Jenny Chapman sought reassurance that the merger would not result in any loss of management expertise from the ISA, emphasising that although the ISA and CRB dealt with similar individuals they fulfilled very different functions.

In response, Lynne Featherstone said that the amendments did not alter anything that had already been debated in Committee as they related to the organisation of the ISA and CRB's functions rather than their substance. She indicated that the original impact assessment on the Bill was being revised to take account of all Government amendments, including those relating to the DBS, and would be submitted to the regulatory policy committee for scrutiny in due course. She said there was a possibility the assessment might be available for Report, but gave no guarantees. The Government expected the cost of setting up the DBS to be minimal as there would not be any changes to sites or operational infrastructure. The IT contracts of both the ISA and CRB were due to be renewed shortly, and a new contract would be entered into as the existing ones finished. The Minister said that the Government had not assessed cost savings as bringing the two functions together was "more about making the process work than about what it costs or saves".[130]

Regarding staff, the Minister said that the terms and conditions of staff transfers from the ISA and CRB to the DBS would be progressed in accordance with the Cabinet Office statement of practice.[131] Continuity of service would be recognised, and for the vast majority of posts there would be a direct crossover between roles in the existing organisations and roles in the DBS. There would be a single management team covering both the disclosure and barring functions of the DBS.

Other areas of debate

Volunteers: supervision

Subsection (5) of **clause 63** would draw a distinction between paid workers and unpaid volunteers in certain specified settings such as schools and hospitals. A volunteer working with children in such settings would not be undertaking regulated activity, so long as he or she was subject to the day to day supervision of another person who had been cleared to undertake regulated activity. However, paid employees in the same position **would** be undertaking regulated activity. As an example, a paid classroom assistant under the day to day supervision of a teacher would be undertaking regulated activity, but a volunteer classroom assistant under the same supervision would not be.

The Committee considered a number of Opposition amendments that would have removed this distinction between paid and unpaid workers and replaced the term "day to day supervision" with "close and constant" or "regular and direct" supervision.[132] These were negatived on division.

Diana Johnson said that unpaid staff should not be exempt from regulated activity simply because they were being supervised, and that volunteer organisations such as the NSPCC were of the view that a volunteer was no less likely to cause a child harm than a paid employee.[133] Regarding the definition of supervision, she indicated that "close and constant"

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130 PBC Deb 17 May 2011 cc724-5

131 Cabinet Office, *Staff transfers in the public sector: statement of practice*, 2000 (revised 2007)

132 PBC Deb 3 May 2011 c536

133 PBC Deb 3 May 2011 c537. See also the comments on amendment 167 in the *Additional Associated Memorandum* (PF 61) submitted to the Committee by the NSPCC.

had been proposed by the NSPCC,[134] while "regular and direct" was what the Opposition proposed. She asked the Minister to explain exactly what "day to day" supervision would mean in practice.

In response, Lynne Featherstone said that replacing "day to day" with "constant" would be impractical:

> If supervision needed to be constant, if the person supervising them – who must cleared for regulated activity – popped out of the room to the loo, that would mean that the coach or assistant would immediately become regulated. If the word "constant" is used, the slightest nipping out for anything would not be acceptable, because the legislation would make it illegal, and the person concerned would go from unregulated to regulated activity in that moment, because they would not be under constant supervision.[135]

She said that the Government would be issuing guidance on what might constitute day to day supervision, but that the decision as to whether or not a volunteer was subject to day to day supervision would ultimately be one for the employer or voluntary organisation to make:

> We will publish draft guidance well before Royal Assent, which will go into more detail, with case studies on supervision. The real point is that we do not want either extreme – neither a manager who pops in only once a day, nor a supervisor who is never out of the room. We will consult on the draft guidance and we look forward to hearing the views of practitioners.
>
> (...)
>
> It is for the employer or the voluntary organisation that is responsible for regulated activity to decide what is appropriate in the regular and daily supervision of activity. That fits with the Government's basic intention to create a more balanced vetting and barring scheme, under which responsibility for ensuring that those who are best placed to make such judgments – not with the state. We will, however, provide guidance.[136]

In response to a question from Diana Johnson, the Minister indicated that the Government did not intend this guidance to be statutory. However, at a subsequent Committee sitting the Opposition tabled a new clause that would have required the Secretary of State to issue statutory guidance on the barring scheme. The Minister undertook to consider the need for statutory guidance covering this and other matters in more detail, although she said she could give no commitment to table a Government amendment on Report.[137] Diana Johnson withdrew the new clause but said that she would re-table it on Report if no Government amendment was forthcoming.

Alteration of test for barring decisions

Clause 66 of the Bill would amend the eligibility criteria for barring. At present, anyone convicted of an offence resulting in automatic barring, or subject to discretionary barring because of other convictions or conduct, could find themselves placed on the barred list regardless of whether they had ever worked with children or vulnerable groups or ever intended to do so. The Bill would amend this so that only those individuals who worked, had previously worked, or had expressed an intention to work in regulated activity would be capable of being barred. Those who had not worked in, or did not intend to work in,

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134 See the comments on amendments 168-173 in the *Additional Associated Memorandum* (PF 61) submitted to the Committee by the NSPCC

135 PBC Deb 3 May 2011 c540

136 PBC Deb 3 May 2011 cc547-8

137 PBC Deb 17 May 2011 cc762-4

regulated activity would not be covered and would not be barred even if convicted of a relevant offence.

These proposals prompted extensive debate in Committee.[138] Diana Johnson said that as drafted, clause 66 would mean that (for example) a lorry driver convicted of child rape "would not automatically go on the barred list, although most of the general public would think that was a no-brainer".[139] She asked what would happen if five or ten years later that lorry driver decided to take up driving a school coach with children on board. In response, Lynne Featherstone said:

> If a lorry driver committed child rape and later worked with children totally unexpectedly, the [*employer's*] duty to check [*the driver's barred status*] would be activated if the activity was regulated and that is what the driver was seeking to do.
>
> (...)
>
> May I turn around the question why a child rapist would not be put on the barred list? Why include such a person if they have never worked with children? If, in future, they were to apply to work in a school, the school would apply for an enhanced Criminal Records Bureau check and certificate, which would show the conviction. At that point, the case would be referred to the ISA for the barring decision, as I have said.[140]

Diana Johnson also expressed concern that intelligence could get lost in the system in cases where concerns about an individual were reported to the ISA at a time when that person was not engaged in regulated activity. She queried what the ISA would do with that information and whether it would be retained for consideration should that individual at any future point move into regulated activity. The Minister said that the ISA is already able to retain such information in accordance with the *Safeguarding Vulnerable Groups Act 2006* and data protection principles, so it would be available in for future barring decisions should such an individual move into regulated activity.[141]

On division, clause 66 was ordered to stand part by 10 votes to 8.

Statutory guidance

The Opposition moved a new clause that would have put guidance on the barring scheme on a statutory footing. Diana Johnson said that this recognised the complicated nature of the barring arrangements and would give employers and other organisations "clear and consistent guidance to help them to understand what their responsibilities are".[142] The guidance could cover matters such as the meaning of day to day supervision, the situations in which an employer should refer concerns to the ISA and clarification on how often employers should check their employees.

In response, Lynne Featherstone said that she recognised the need for guidance to employers on several aspects of the new arrangements. She reiterated the Government's intention to provide such guidance, saying that the important point was that such guidance was widely available rather than whether it was statutory or non-statutory. However, she undertook to consider the issue further before Report, although gave no guarantee that a Government amendment would be tabled.

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138 PBC Deb 10 May 2011 cc564-580
139 PBC Deb 10 May 2011 c564
140 PBC Deb 10 May 2011 cc574-5
141 PBC Deb 10 May 2011 cc576-7
142 PBC Deb 17 May 2011 cc762-3

Diana Johnson withdrew the new clause but said she would retable it on Report if no Government amendment was forthcoming.

4.7 Criminal records checks

There were three key areas of debate relating to the criminal records provisions of the Bill. The first related to the proposed disputes process for people who wanted to challenge the results of their criminal records checks. A number of Government amendments were made to introduce a new role in the process for an independent monitor. The second related to the provision of criminal records checks to employers, and the third to the inclusion of an individual's barred status on an enhanced check. Opposition amendments were considered in both of these areas but none were accepted.

CRB disputes process

The Committee accepted two Government amendments to **clause 79**, which would establish a disputes process regarding the disclosure of non-conviction information on enhanced criminal records checks.[143] As introduced, the clause would have enabled a person who felt that irrelevant non-conviction information had been included on his or enhanced check to apply to the Secretary of State for a review of the decision to include it. The review would have been carried out by a chief constable.[144]

As amended, the clause now provides that applications for such reviews should instead be made to the independent monitor appointed under section 119B of the *Police Act 1997*. Upon receiving an application for review, the monitor would have to refer it to a chief constable, who would review the non-conviction information to determine whether it was relevant and should have been disclosed. The chief constable would then pass his or her advice back to the monitor, who would take the final decision.

Provision of CRB checks to employers

The Committee considered a number of Opposition amendments to **clause 77**. The first part of clause 77 would remove the current requirement under section 113A(4) of the *Police Act 1997* for the CRB to send a copy of a person's criminal records check to the organisation that requested it (e.g. his employer). Instead, the person would be required to pass a copy of his check on to this organisation himself. The second would remove the statutory procedure under section 113B(5) and (6) of that Act for the police to provide relevant information to employers by way of a side letter rather than on the face of a criminal records check. The Opposition amendments would have had the combined effect of removing clause 77 from the Bill.

Providing copy checks to employers

In relation to the first part of clause 77, Diana Johnson said that a number of organisations, including Girlguiding UK, had called for it to be removed from the Bill on the grounds that individuals required to hand their criminal records checks directly to an employer or volunteer leader might be too embarrassed to do so. She quoted from Girlguiding UK's written submission to the Committee:

> i. This clause would reduce the number of people volunteering. If a prospective volunteer has a previous criminal history they may not want to show it to a local Guiding Commissioner who may be known to them. They are likely as a result not to choose to volunteer, even if their criminal history would not prevent them from volunteering with Girlguiding UK.

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[143] PBC Deb 10 May 2011 cc634-7

[144] Paragraph 301 of the Explanatory Notes suggested that this would in practice be a difference chief constable to the one who had originally taken the decision to disclose the information concerned.

> ii. If a prospective volunteer did choose to show a Guiding Commissioner, who are themselves volunteers, a certificate with offences recorded it is likely that they would not have enough knowledge of the law to interpret the information. This puts far too much responsibility on Commissioners who may leave because they do are unable to handle the pressure of taking these decisions without the necessary expertise or support. There are over 4000 local Commissioners so it is not feasible to train and support all of them to make sensitive judgements about whether a past offence was a risk to young people and how to mitigate those risks
>
> iii. If only the applicant received the certificate and showed it to their local Commissioner who made a decision about their suitability to become a volunteer then these decisions would vary depending on who took the decision. Girlguiding UK uses an e-bulk system so very few certificates are sent to the headquarters but those that are will be considered by trained staff that can make a risk assessment and, equally importantly, put support measures in place for the volunteer if needed.[145]

In response, Lynne Featherstone said that the proposed amendment would negate the whole point of giving an individual the chance to dispute information on a certificate before it was sent to his employer. She went on to say that individuals would be able to send copies of their checks to central offices or umbrella bodies where appropriate rather than to local groups: so, for example, a person wishing to volunteer with a local guide group would send the copy of her check to the central organisation rather than to the local group.[146]

The amendment was negatived on division. Similar issues were subsequently raised during the clause stand part debate. Diana Johnson raised particular concerns regarding higher education institutions: namely that first year students for courses requiring a criminal records check (e.g. nursing) might be prevented from starting if they had failed to provide copy checks to the institution in time.[147] Clive Efford thought that the change could still increase the administrative burden for smaller organisations, even if individuals were to send their copy checks directly to central offices rather than local groups:

> There is a boxing club at my youth club, and the Amateur Boxing Association makes the centralised decisions and is the governing body. People would have to chase up the individual, send the details to the governing body and wait for a decision, but all those involved in the boxing club are volunteers and help in their spare time. Far from being a liberating change to the arrangements, the provision will be more onerous on the very people at the sharp end who are volunteering and providing their time.[148]

Lynne Featherstone said that it was important to remember the purpose of clause 77, which was to enable individuals to resolve disputes before their criminal records checks were sent on to employers or voluntary organisations. She considered that this benefit outweighed the risk of "a slight delay every now and then". The clause was ordered to stand part on division by 10 votes to 6.

Providing additional police information to employers

Diana Johnson said that the Opposition amendments to the second part of clause 77 were probing ones. She asked why the Government felt it important to remove the statutory procedure whereby the police could pass information to an employer or voluntary organisation via a side letter rather than on the face of a criminal records check.

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[145] Girlguiding UK, *Associated Memorandum* (PF 10), March 2011, para 7
[146] PBC Deb 10 May 2011 c621
[147] PBC Deb 10 May 2011 cc625-6
[148] PBC Deb 10 May 2011 cc628-9

Michael Ellis said that it was his understanding that clause 77 removed the **obligation** of the police to make side letter disclosures under the *Police Act 1997*, but that they would retain a common law **discretion** to make such disclosures. The Minister confirmed that this was the case, saying that the second part of clause 77 would remove the statutory obligation but leave behind the common law discretion.

The amendments were pressed to a division but negatived by 10 votes to 5.

Enhanced CRB checks: inclusion of barred information

Diana Johnson moved an amendment to **clause 79** which would have required enhanced CRB checks to include details of the applicant's barred status. The Committee revisited some of debates it had had on information sharing between the police and the ISA during its consideration of the barring scheme. Diana Johnson said:

> A large amount of soft intelligence is not passed to the police, as we have discussed, and in the cases of vulnerable adults, this might be as high as 50%. Where large amounts of information have been received and assessed, and suggest that an individual poses a threat so severe that the ISA has decided to bar them, that person poses a threat when working with children or vulnerable adults, even if it is not in a regulated activity. An example might be a teacher, who has been struck off through consistent, soft information from a number of schools and local education authorities. Although none of that information has been reported to the police, that person might then become a volunteer teaching assistant, helping with reading and sport in a school. That institution would not know about that person's barred status. The amendment is in line with the arguments that we have made throughout. It will ensure that the information flow on barred status goes to everybody who needs to know about it.[149]

Lynne Featherstone said that the concept of barred people being able to undertake **some** activities with children or vulnerable adults was not a new one:

> The scope of regulated activity has never covered all possible contact with those groups. The previous Government, for example, accepted that the test of frequency and intensiveness should apply to regulated activity and agreed to relax the rules on the definitions following Sir Roger Singleton's review.[150]

The amendment was negatived on division by 10 votes to 6.

4.8 Disregarding convictions for historic consensual gay sex offences

Clauses 82 to 91, which deal with disregarding certain convictions for historic consensual gay sex offences, were not amended in Committee.

There were divisions on two Opposition amendments.[151] The first amendment would have struck out subsection (2) of **clause 84**, which provides that the Secretary of State may not hold oral hearings for the purpose of deciding whether to disregard a conviction. Diana Johnson said the need for oral hearings should not be ruled out. Lynne Featherstone said that the Government had deliberately taken the view that oral hearings might send a message that the original conviction or caution for which the application was being made would be reviewed. She emphasised that this was not the case, and that the purpose of the clause was not to set up any kind of judicial or quasi-judicial process or give the Secretary of State any kind of judicial decision-making role: deciding a disregard application would be an administrative process rather than a judicial one. She did not consider that an oral hearing

[149] PBC Deb 10 May 2011 c638
[150] PBC Deb 10 May 2011 c638
[151] PBC Deb 12 May 2011 cc656-663

would add anything that could change the factual written information supplied by the applicant or contained in official records. The amendment was negatived on division by 10 votes to 6.

The second amendment would have inserted a new requirement into clause 84 for the Secretary of State to give reasons for her decisions to approve or refuse an application for a disregard, and to review her decisions should any new information be provided. Diana Johnson said that if the Secretary of State did not give reasons then the only way to correct any mistake (e.g. an administrative mistake that resulted in an incorrect decision to refuse an application) would be to go to the High Court. Lynne Featherstone said that it was implicit in **clause 89**, which sets out the appeals process, that the Home Secretary would give reasons for turning down any applications:

> We expect most people to be happy simply to hear from the Secretary of State that their application has been approved, but if it were refused, reasons will be given. That is implicit in clause 89, which provides for a right of appeal. If an applicant is to exercise that right, it follows that the applicant will need to know why his application has been rejected. I assure the hon. Lady that, if the applicant produces additional information that impacts on the decision, it will be considered and, when appropriate, the decision will be altered without the applicant having to go through the formalities of an appeal. That is to preclude having in most cases to go anywhere near the High Court. More information can be introduced by the applicant at any time.
>
> (...)
>
> Having received the letter setting out the reasons for his refusal, if the applicant discovers extra information that he did not give in the first wave of information or certain matters lead to other information that will be helpful, he can then submit that to the Home Secretary and it will be reviewed without the need to go on to an appeal stage. Such cases are not finite. The Home Secretary would be minded to consider more information that came on the back of the first refusal.[152]

She said that further details on what could be done following a first refusal would be set out in "clear guidance to applicants". Diana Johnson suggested that the opportunity for review should be included as a clause in the Bill, saying that she was not sure that waiting for later guidance "sends the right message". The amendment was negatived on division by 10 votes to 6.

4.9 Freedom of Information and data protection

This part of the Bill was not particularly contentious.

Parliamentary copyright

There were Government amendments which clarified the provisions on parliamentary copyright and the release of datasets in **clause 92**. Lynne Featherstone noted that the amendments fulfilled a commitment made by the Home Secretary at second reading to amend the Bill in consultation with the House authorities, to ensure that parliamentary copyright and the independence of Parliament was properly safeguarded These amendments were made without a division.[153] Vernon Coaker and Tom Brake probed the meaning of the term datasets in clause 92, but no amendments were made. Ms Featherstone promised further guidance in due course.

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[152] PBC Deb 12 May 2011 cc659-660
[153] PBC Deb 12 May 2011 c675

The Information Commissioner

The term of office for the Information Commissioner was extended from the five years proposed originally in the Bill to seven years, by another Government amendment to **clause 95**, also unopposed. In evidence to the Public Bill Committee, the Information Commissioner, Christopher Graham, had suggested that seven might be a more appropriate term than five.[154] This view was supported by Maurice Frankel of the Campaign for Freedom of Information.[155]

Lynne Featherstone rejected requests from Vernon Coaker to make it a statutory requirement for the Information Commissioner to be subject to a pre-appointment hearing.[156] She announced that there would be a new framework document to be produced shortly which would set out the relationship between the Information Commissioner and the Government. In response to questions about an independent budget for the Commissioner's office Ms Featherstone said that it was appropriate for the Government, rather than Parliament to set the level of grant in aid for the FoI work of the Commissioners' Office. Mr Coaker said that he would want to reflect on this point, suggesting that Parliament, rather than an individual Secretary of State might be a more appropriate sponsoring body.[157]

New clause 5, moved by Tom Watson, would have created a new post of Privacy Commissioner, combining the roles of the Information Commissioner with that of four others. He withdrew the motion despite being unconvinced by James Brokenshire's arguments, some of which centred on the specialist knowledge needed by the existing commissioners.[158]

Mr Watson also moved other clauses, subsequently withdrawn, aimed at strengthening data protection law. James Brokenshire said that the Government were already considering all aspects of the *Data Protection Act 1998* in preparation for forthcoming EU negotiations on a new data protection instrument.[159]

4.10 Removal of restriction on times for marriages and civil partnership

Clause 100 was agreed to without amendment. Clive Efford asked how communities might be safeguarded from any unintended consequences such as planning issues or unsociable working hours; Lynne Featherstone responded that the provisions were permissive, and these were matters to be sorted out locally.

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154 PBC Deb 24 March 2011 Q297
155 PBC Deb 24 March 2011 Q342
156 PBC Deb 12 May 20100 c692
157 PBC Deb 12 May 2011 c697
158 PBC Deb 17 May 2011 cc747-60
159 PBC Deb 17 May 2011 c743

Appendix 1 – Membership of the Committee

Chairs: Martin Caton, Mr Gary Streeter

Baker, Steve *(Wycombe)* (Con)
Blackwood, Nicola *(Oxford West and Abingdon)* (Con)
Brake, Tom *(Carshalton and Wallington)* (LD)
Brokenshire, James *(Parliamentary Under-Secretary of State for the Home Department)*
Buckland, Mr Robert *(South Swindon)* (Con)
Chapman, Mrs Jenny *(Darlington)* (Lab)
Chishti, Rehman *(Gillingham and Rainham)* (Con)
Coaker, Vernon *(Gedling)* (Lab)
Efford, Clive *(Eltham)* (Lab)
Ellis, Michael *(Northampton North)* (Con)
Featherstone, Lynne *(Minister for Equalities)*
Johnson, Diana *(Kingston upon Hull North)* (Lab)
Johnson, Gareth *(Dartford)* (Con)
Opperman, Guy *(Hexham)* (Con)
Robertson, John *(Glasgow North West)* (Lab)
Shannon, Jim *(Strangford)* (DUP)
Tami, Mark *(Alyn and Deeside)* (Lab)
Watson, Mr Tom *(West Bromwich East)* (Lab)
Wright, Jeremy *(Lord Commissioner of Her Majesty's Treasury)*