



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report

Third Report of Session 2009-10

*Report, together with formal minutes and
appendices*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Chloe Mawson (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Lori Verwaerde (Committee Assistant), John Porter (Committee Assistant), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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Summary

The Financial Services Bill and the Pre-Budget Report both contain measures designed to reform remuneration practices in the financial services industry which engage Article 1 Protocol 1 of the European Convention on Human Rights (the right to peaceful enjoyment of possessions) as a result.

Powers to interfere with an individual's remuneration may be incompatible with the Convention if their scope is not defined with sufficient precision to enable people to know whether they might be affected by the exercise of the power. The Financial Services Bill appears to give the Financial Services Authority the power to interfere with existing contractual terms. The Government says, however, that this is not its intention. We recommend that the Financial Services Bill should be amended to make clear that powers to interfere with contractual terms are not retrospective.

Taxation measures are incompatible with the Convention if they are devoid of reasonable foundation or impose an individual and excessive burden on particular people. We conclude that the tax on the payment of bonuses announced in the Pre-Budget Report is unlikely to be incompatible with the Convention.

We also clear from scrutiny a number of the recently published Government bills.

Bill drawn to the special attention of both Houses: Financial Services Bill

Date introduced to first House	19 November 2009
Date introduced to second House	
Current Bill Number	HC Bill 6
Previous Reports	None

Background

1.1 This is a Government Bill which was introduced in the House of Commons on 19 November 2009. The Chancellor of the Exchequer, the Rt Hon Alistair Darling MP, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Bill received its Second Reading on 30 November 2009 and began its Committee Stage on 8 December 2009.

1.2 Both the Financial Services Bill and the Pre-Budget Report contain measures which are designed to reform remuneration practices in the financial services industry. Because these measures affect individuals' remuneration, they engage the right to peaceful enjoyment of possessions in Article 1 Protocol 1 ECHR and require scrutiny for compatibility with that right.

Powers to control remuneration: the Financial Services Bill

1.3 The Financial Services Bill both imposes a new duty on the Financial Services Authority (the FSA), and gives it new powers, in relation to remuneration.¹ The new duty on the FSA requires it to make rules requiring certain persons to have and implement a remuneration policy, and the FSA's rules must require such remuneration policies to be consistent with the effective management of risks and the Financial Stability Board's "Principles for Sound Compensation Practices Implementation Standards". The Bill gives the FSA a broadly worded power to make general rules which may:²

- impose specific prohibitions on the way in which a person is remunerated;
- provide that any provision of a remuneration contract which contravenes such a prohibition is void (and therefore unenforceable); and
- make provision for the recovery of any payment which may have been made under such a provision.

¹ Clause 11, inserting new s. 139A into the Financial Services and Markets Act 2000.

² New s. 139A(9) Financial Services and Markets Act 2000.

1.4 In the Lords debate on the Queen's Speech, Lord Woolf raised the following concern about this broad power in the Financial Services Bill:³

Finally, I turn to a Bill that at first sight may seem rather inappropriate, considering the title of this debate. I refer to the Financial Services Bill, because in my view its provisions relating to the possibility of forfeiting the salaries of bank employees raise constitutional issues. As the Bill is drafted, the delegated legislation provisions-they appear in a form with which we are unfamiliar-give powers to the Financial Services Authority to take action that could interfere retrospectively with the private contractual rights of employees without providing any backing for that in primary legislation. I submit that this is not an appropriate use of delegated legislation. In my experience the provisions are unprecedented and should surely have been the subject of very careful consideration.

The relationship between an employer and an employee with regard to salary is a matter of great importance to the individual concerned. If interference in that relationship of the sort contained in the Bill is to be undertaken by an authority, it should be done only through very clear and specific provisions contained in primary legislation. We are told that the rules may,

- "(a) prohibit persons ... being remunerated in a specified way;
- (b) provide that any provision of an agreement that contravenes such a prohibition is void; and
- (c) provide for the recovery of any payment made, or other property transferred, in pursuance of a provision that is void".

However, we are not told how and when this is going to be done. The powers will enable the FSA to make rules that authorise it to take action that is clearly penal in nature. As arrangements that lead to the payment of bonuses normally cover a continuing situation, there is clearly a risk that they could be retrospective in effect. I suggest that this aspect of the Bill needs careful examination, particularly in view of the fact that there is no provision in the Bill to enable action taken to be subject to any form of appeal process and that any resort to the courts would have to be through judicial review.

1.5 Although Lord Woolf expressed his concerns in terms of the Bill raising "constitutional issues", similar questions arise under Article 1 Protocol 1 ECHR: is the FSA's general power to make rules about remuneration intended to include a power to interfere with existing contractual rights, which amount to "possessions" within the meaning of that Article? If so, the scope of the power to do so must be defined on the face of the Bill with sufficient precision to enable those who might be affected to ascertain when and how they might be affected. In addition, the interference with existing contractual rights must be shown to be proportionate in the sense that they strike a fair balance between the individual and the general interest.

1.6 It appears, however, that the wide power given to the FSA in the Bill is not intended by the Government to authorise interference with existing contractual terms. At the conclusion of the Second Reading debate the Minister made clear that it was not the Government's intention to give the FSA the power to interfere with existing contracts.⁴

There is general consensus that remuneration practices in the financial services sector were a contributory factor in the recent financial crisis. That is why we are taking decisive action to tackle remuneration practices that incentivise excessive risk taking. ... The shadow Chancellor and others asked about the power that we have proposed in that area and about concerns expressed by Lord Woolf. The power that we are proposing is not a power to interfere with existing contracts—the FSA is not being given retrospective powers. As a public authority, its actions are required to be compatible with the rights in the European convention on human rights, which are protected by the Human Rights Act 1998.

1.7 This was confirmed by General Counsel to the FSA, Andrew Whittaker, in Public Bill Committee:⁵

Q 136Mr. Hoban: The other area, which we have managed to avoid commenting on so far today, is remuneration. Will you explain the powers to do with seeking to take over employment contracts?

Andrew Whittaker: Yes. I should start by saying that we are happy with the powers proposed in the legislation. We have an existing code of conduct in relation to remuneration. It focuses on methods of remuneration, to ensure that those that are used are not ones that promote risk. The new legislation would provide an additional backing to that kind of code—specifically, if it were incorporated in the form of rules—that would enable provisions that we had bound by rules then to be ineffective. It would not be a retrospective effect. It would apply after the date on which the rules come in to contracts that are made after that date. We do not see any virtue in retrospection. Indeed, we see a positive virtue in provisions encouraging people to formulate their contracts in a way that complies with the code—that complies with the rules.

Q 137Mr. Hoban: To be clear about it, if someone had an existing employment contract that was in breach of your code, you would not seek powers to tear up that contract, or does it relate only to future contracts?

Andrew Whittaker: Yes. In that situation, it is conceivable that there would be other action that we would want to take. We might, for example, be concerned about the exposures that would result to the firm from that contract of employment. Therefore, we might ask for additional supervision of a trader who was incentivised in a way that we believed was dangerous, but the effect of this clause would not be to make that an unlawful term.

4 HC Deb 30 Nov 2009 cols 935- 936 (Ian Pearson MP).

5 PBC 8 Dec 2009 cols 47-48.

1.8 It therefore appears that the generally worded power in the Bill, which on its face appears to give the FSA the power to interfere with existing contractual terms, is not intended to do so. **We recommend that the Government make this limitation explicit on the face of the Bill, which should meet the concerns about the provision's compatibility with Article 1 Protocol 1.**

The tax on the payment of bonuses: the Pre-Budget Report

1.9 In the Pre-Budget Report on 9 December 2009 the Government announced that, in advance of the measures in the Financial Services Bill concerning remuneration taking effect,

where bank (and building society) employees are awarded discretionary bonuses, in whatever form, above £25,000 in the period from the Pre-Budget Report to 5 April 2010, the banks paying these bonuses will pay an additional bank payroll tax of 50 per cent on the excess bonus over £25,000.

1.10 In view of the overlap in the subject matter of this part of the Pre-Budget Report and the Financial Services Bill, and the fact that there has been much high profile discussion in the media about whether the tax on bonuses is in breach of the Human Rights Act, we have decided to look at this particular aspect of the Pre-Budget Report in this report.

1.11 The Government's justification for the tax on bankers' bonuses is explained in the Pre-Budget Report: it says that it is to encourage banks to take full account of factors such as a prudent approach to risk and the need to ensure a sound capital base when making their decisions about bonuses.

The Government attaches great importance to tackling the remuneration practices that contributed to excessive risk taking by the banking industry. The Government has made clear that the sector needs to develop sustainable long-term remuneration policies that take better account of risk and facilitate the build up of loss-absorbing capital. However, evidence suggests that some may be intending to pay bonuses for the current year that are not consistent with a prudent approach to risk.

... This tax will encourage banks to consider their capital position and to make appropriate risk adjustments when settling the level of bonus payments above the threshold, which is at the level of median earnings in the UK. If banks choose to make awards that are not consistent with a prudent approach to risk, it is only fair that they contribute more to the public finances, in a year when profits have been facilitated by significant taxpayer support for the banking sector as a whole.

It is intended that in the longer term, the remuneration practices will be changed as a result of corporate governance and regulatory reforms ... The one-off bank payroll tax will apply until 5 April 2010, but the Government will consider extending the period of the charge so that the tax remains in place until the relevant provisions of the Financial Services Bill come into force.

1.12 Tax measures necessarily involve taking property from the citizen (or, in this case, banks) and therefore engage Article 1 Protocol 1. However, the second paragraph of that Article provides:

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary ... to secure the payment of taxes or other contributions or penalties.

1.13 The powers of the state under this provision are recognised by the European Court of Human Rights to be very wide.⁶ They are not, however, unlimited. Taxing measures must satisfy the requirements of proportionality, but the threshold of justification to be met by the State is very much lower than in relation to other ECHR rights. The approach to be adopted to determining whether a taxing measure is compatible with Article 1 Protocol 1 is authoritatively set out in the judgment of the High Court in *R (on the application of the Federation of Tour Operators) v HM Treasury* which concerned an Article 1 Protocol 1 challenge by tour operators to the increase in Air Passenger Duty announced in the 2006 Pre-Budget Report.⁷

[134] The latitude to be accorded by the judicial branch of government to the Executive and Legislative branches varies with the context: see the speech of Lord Nicholls in *A v Secretary of State for the Home Dept*; *X v Secretary of State for the Home Dept* [2004] UKHL 56 at [80], [2005] 2 AC 68 at [80]:

“80 ... the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question and the extent of the encroachment upon that right.”

[135] The right engaged in the present case is less important than Human Rights Convention rights under, for example, arts 2, 3 and 5. In this connection, it is pertinent to recall what the European Court of Human Rights said in *James v UK* (Application 8793/79) (1986) 8 EHRR 123, para 42 of the judgment:

“42 ... the object and purpose of Article 1 (P1-1) ... is primarily to guard against the arbitrary confiscation of property.”

The encroachment on the claimants' rights under A1P1 in this case does not approach confiscation, and does not demand anxious scrutiny by the court. Far from it, in the present context (see (1986) 8 EHRR 123, para 46):

“46. ... The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation ...”

6 See e.g. *Gasus Dosier und-Fordertechnik v The Netherlands* (1995) 20 EHRR 403.

7 [2007] EWHC 2062 (Admin), [2008] STC 547. Stanley Burnton J.'s reasoning on Article 1 Protocol 1 was unanimously upheld by the Court of Appeal, [2008] EWCA Civ 752, [2008] STC 2524 at para. 21.

[136] Thus in the *Gasus* case [*Gasus Dosier-und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403], referred to above, the European Court of Human Rights held that a measure entitling the Netherlands tax authorities to seize and to realise property in the possession of a defaulting taxpayer that belonged to the applicant, who had sold that property subject to its retention of title, was not disproportionate. It expressed the approach of the Court of Human Rights in such a case as follows (see (1995) 20 EHRR 403, para 60 of the judgment):

“60. As follows from the previous paragraph, the present case concerns the right of States to enact such laws as they deem necessary for the purpose of 'securing the payment of taxes' ...

In passing such laws the legislature must be allowed a wide margin of appreciation, especially with regard to the question whether—and if so, to what extent—the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation.”

[137] In my judgment, there is no difference between the approach of the court to a measure to secure the payment of taxes in the sense of that considered in *Gasus* and the approach to a substantive tax measure, ie a decision to impose a particular tax or to increase it. In order to challenge successfully such a measure, it must be shown that the legislature's assessment is “devoid of reasonable foundation”.

1.14 As the Court of Appeal in the same case made clear, an indication of whether a taxing measure is “devoid of reasonable foundation” will be whether it imposes “an individual and excessive burden” on particular people.

1.15 Both the High Court and the Court of Appeal in the *Air Passenger Duty* case concluded that, while the decision to increase that tax was open to criticism, on grounds that the Treasury had overlooked certain matters and it was a tax with retrospective effect, nevertheless it was impossible to conclude that the measure was “devoid of reasonable foundation”, nor did it impose an excessive or individual burden on tour operators. The Article 1 Protocol 1 challenge to the taxing measure therefore failed.

1.16 It is therefore clear that the hurdle facing anyone challenging a taxing measure under Article 1 Protocol 1 is very high. They must demonstrate that the measure is devoid of reasonable foundation or imposes an excessive and individual burden which is disproportionate to the public good. Even on the basis of the summary justifications provided in the Pre-Budget Report it would appear difficult to conclude that the measure is devoid of reasonable foundation. The measure is likely to raise a not insignificant amount of revenue (estimated to be about £0.55 billion); it is part of a package of measures designed to address excessive risk-taking in the banking industry and to require banks to consider the soundness of their capital base; it is directed at banks rather than individual bankers; and it is intended to be a one-off tax, in place only until the more systemic reforms in the Financial Services Bill come into force. Nor is it likely that those who are most directly affected by the new tax will be able to demonstrate hardship amounting to an

excessive individual burden. **In our view it is therefore unlikely that the tax is incompatible with Article 1 Protocol 1 ECHR.**

Bills not requiring to be brought to the attention of either House on human rights grounds

2.1 In view of the limited amount of parliamentary time available for legislative scrutiny before the end of this session, the fact that a number of bills may not complete their passage during this session, and the need to complete our other work, we have applied a higher significance threshold than usual to enable us to focus on the most significant human rights issues raised by Government Bills.

2.2 We consider that the following Government bills either do not raise any human rights issues or, applying the higher threshold, do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

- Bribery Bill⁸
- Cluster Munitions Prohibitions Bill⁹
- Consolidated Fund Bill
- Corporation Tax Bill¹⁰
- Fiscal Responsibility Bill
- Flood and Water Management Bill
- Northern Ireland Assembly Bill
- Taxation (International and other provisions) Bill¹¹
- Third Parties (Rights Against Insurers) Bill

⁸ This is a significant human rights enhancing measure which we welcome as such.

⁹ This is also a significant human rights enhancing measure which we welcome. We are grateful to the FCO for the human rights memorandum it provided to us, which assisted us greatly in our initial scrutiny of this Bill: see page 16.

¹⁰ A Tax Law Rewrite Bill. The Committee's approach is not to scrutinise such Bills unless a human rights issue is drawn to its attention.

¹¹ Also a Tax Law Rewrite Bill.

Conclusions and recommendations

Powers to control remuneration: the Financial Services Bill

1. We recommend that the Government make this limitation [of the power of the FSA to interfere with existing contractual terms] explicit on the face of the Bill, which should meet the concerns about the provision's compatibility with Article 1 Protocol 1. (Paragraph 1.8)

The tax on the payment of bonuses: the Pre-Budget Report

2. In our view it is ... unlikely that the tax is incompatible with Article 1 Protocol 1 ECHR. (Paragraph 1.16)

Formal Minutes

Tuesday 15 December 2009

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Dubs Baroness Falkner of Margravine Lord Morris of Handsworth The Earl of Onslow	Dr Evan Harris MP Fiona Mactaggart MP Mr Virendra Sharma MP
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Draft Report (*Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph. Paragraphs 1.1 to 2.2 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Third Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 13 and 27 October in the last session of Parliament and on 1 December.

[Adjourned till Tuesday 12 January 2010 at 1.30pm]

Written Evidence

The correspondence published below relates to the Committee's scrutiny of section 58 of the Finance Act 2008.

Letter to the Chair of the Committee from Rt Hon Stephen Timms MP, Financial Secretary to the Treasury, dated 22 July 2009

Thank you for your letter of 7th July¹² in which you ask for a memorandum on s58 FA 2008. In particular, a detailed assessment of the impact of the legislation, detailed justification for retrospective effect, and evidence that HMRC have consistently made the case that the avoidance scheme does not work.

By way of background, this legislation retrospectively clarifies pre-existing anti-avoidance legislation which was itself introduced with retrospective effect. The retrospective aspect of the legislation is the subject of a number of applications for judicial review - a main element of which is the quest for a declaration of incompatibility of that retrospective aspect with the European Convention of Human Rights. Permission for a review was granted by the High Court on 16th June for one of those cases. HMRC is in the process of preparing its formal defence with a hearing likely towards the end of this year. In the circumstances, I wonder if you and the committee would be content that, rather than providing the memorandum you have requested, HMRC undertakes to keep you informed about the progress of the case.

Your report also recommends that in the future a memorandum be provided to the Committee identifying provisions in the Finance Bill which have retrospective effect. I am willing to consider this, but as I'm sure you will appreciate, I will need to discuss further with colleagues in the Ministry of Justice and elsewhere.

Letter from the Chair of the Committee to Rt Hon Stephen Timms MP, Financial Secretary to the Treasury, dated 22 October 2009

Section 58 Finance Act 2008

Thank you for your letter of 22 July, which my Committee considered at its meeting last week.

We are disappointed that you have not provided the memorandum we asked for and have suggested that we will not receive a substantive response to the issues we raised until after judicial review proceedings have concluded. We would be grateful if you could reconsider your position. We have received numerous representations about

¹² Published in the Committee's 20th Report of 2008-09, HL 133/HC 882

section 58 and are unable to assess the human rights compatibility of the measure without being informed of the Government's position.

I am grateful for your offer to keep us informed about the progress of the judicial review case and it would be very helpful if you could do so. As a first step, could you let us know when the judicial review is likely to be heard?

Finally, I note your encouraging response about alerting us in future to provisions in the Finance Bill which have retrospective effect, which you intend to discuss further with colleagues in the Ministry of Justice and elsewhere. It would be helpful if arrangements for such a memorandum could be put in place before next year's Finance Bill is published, so perhaps you could let me know what progress you have made in your discussions early in the new year? I am copying this letter to Michael Wills MP, who has responsibility for human rights at the Ministry of Justice.

Letter to the Chair of the Committee from Rt Hon Stephen Timms MP, Financial Secretary to the Treasury, dated 16 November

Thank you for your letter of 22 October.

With regard to progress of the judicial review I can advise you that there will be a Case Management Hearing in the High Court on 17th November 2009 in respect of two applications. HMRC will be represented by Rabinder Singh QC at that hearing. The substantive hearing has been listed over 3 days beginning 19th January 2010. If there are any changes to these dates I will write to you again.

Given that this issue will be fully examined in the High Court in the near future I hope you will accept that it would be inappropriate for me to set out the Government's position with the case still pending. I will of course keep you informed of any further developments as the case progresses and also let you have a final memorandum once all judicial proceedings have been concluded.

I will update you early next year on the progress of discussions about the proposed memorandum on retrospective provisions in the Finance Bill.

Memorandum submitted by the Foreign and Commonwealth Office

CLUSTER MUNITIONS (PROHIBITION) BILL 2009

1. This Memorandum addresses any human rights issues arising in relation to the Cluster Munitions(Prohibitions) Bill.
2. The Bill is intended to give effect to the international obligations in the Convention on Cluster Munitions 2008. This Convention is a multilateral treaty the purpose of which is to prohibit cluster munitions that cause unacceptable suffering to civilians. The Bill is needed to enable the United Kingdom to implement the obligations in the Convention and proceed to ratify the Convention.

3. At Article 9, the Convention requires that:

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

4. Under Article 1 of the Convention a State Party may not use cluster munitions, or develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; or assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention. These prohibitions apply also to explosive bomblets.

5. Under Article 21(3) of the Convention, the “interoperability” provision, notwithstanding Article 1, State Parties, their military personnel or nationals may engage in military co-operation and operations with States not parties to the Convention that may carry out the activities, prohibited to a State Party, which are referred to in the previous paragraph. Article 21(4) however sets out exceptions to Article 21(3) which reflect a number of the prohibitions under Article 1: a State Party may not develop, produce or otherwise acquire cluster munitions; it may not itself stockpile or transfer cluster munitions; or itself use them, or expressly request the use of them in cases where the choice of munitions is within its exclusive control.

6. The Bill creates offences to reflect the prohibitions in the Convention and penalties for committing the offences, in order to enforce the prohibitions on cluster munitions in the Convention. It also creates defences including the visiting forces defence to protect, while in the United Kingdom, visiting forces of non State parties who use cluster munitions e.g. those of the United States of America and the interoperability defence to protect United Kingdom armed forces in the circumstances referred to in paragraph 5 above. The Bill also sets out a number of ancillary provisions such as a power to enter premises and destroy prohibited objects (cluster munitions and explosive bomblets) and powers to search and obtain evidence when there are reasonable grounds for suspecting an offence under the Bill has been committed.

Brief Description of the Bill

7. Clause 1 defines certain terms such as “prohibited munition” and “cluster munition”. Clause 2(1) provides that it is an offence for a person to use, develop, produce, acquire or transfer prohibited cluster munitions, or have them in one’s possession or make arrangements under which another person acquires them or make arrangements for another person to transfer a prohibited munition. Under Clause 2 (2) it is an offence to assist, encourage or induce any other person to engage in this conduct. A person found guilty of an offence under this section is liable to imprisonment for a term not exceeding 14 years, or a fine, or both.

8. Clause 4 provides that section 2(1) applies to conduct in the United Kingdom or elsewhere. Section 2(2) applies to assistance, encouragement and inducements in the United Kingdom or elsewhere. In their application outside the United Kingdom both

subsections only apply to United Kingdom nationals, Scottish partnerships or bodies incorporated in part of the United Kingdom. Section 2(2) applies whether or not the conduct assisted, encouraged or induced takes place or will take place in the United Kingdom or elsewhere.

9. In clauses 5, 6, 7, 8 and 9 the Bill provides that under certain circumstances it is for the person charged with an offence to show that a defence applies to him. In clause 5 it is a defence for a person charged with certain offences under clause 2 to show his conduct was carried out for the purposes of enabling a prohibited munition to be destroyed or that at the time he gave assistance, encouragement or inducement to another person to engage in any conduct, he had reasonable cause to believe that the other person had a defence in respect of their conduct under subsections (1) to (5).

10. In clause 6, it is a defence for a person charged with certain offences under clause 2 to show that his conduct was carried out for permitted purposes (“permitted purposes” is defined in subsection (8)) and had been authorised by the Secretary of State or that at the time he gave the assistance, encouragement or inducement to another person to engage in any conduct, he had reasonable cause to believe that the other person had a defence in respect of their conduct under subsections (1) to (5).

11. Clause 7 sets out defences relating to the state of mind of the defendant. For example, it provides for a defence to certain offences under Clause 2 if the person charged can show that he neither knew, nor suspected, nor had any reason to suspect, that the object in question was a prohibited munition. Another example is that if the prohibited munition was in the person’s possession it is a defence if the person can show that as soon as he first had knowledge or suspicion that it was a prohibited munition he took all reasonable steps, as soon as reasonably practicable, to inform the Secretary of State, or a constable or a member of a service police force.

12. Clause 8 sets out defences for visiting forces in the United Kingdom. For example, it is a defence under clause 8 for a person who was charged with an offence under clause 2(1)(e) to show that he was the member of a visiting force or working with a visiting force of a State not party to the Convention and his possession of the prohibited munitions was in accordance with the terms of an authorisation given to that State by the Secretary of State.

13. In clause 9 it is a defence for a person charged with an offence listed in paragraphs 1 to 6 of Schedule 2 to show that the conduct took place in the course of or for the purposes of an international military operation or co-operation activity. An international military operation is defined in subsection (2) and an international military co-operation activity is defined in subsection (3).

14. Clause 10 is about the evidential burden as respects defences and the effect of an authorisation given before the coming into force of the Act for the purposes of sections 6 and 8.

15. Clauses 11-26 are ancillary provisions to do with securing destruction of prohibited munitions including powers of search and entry, information and records for Convention purposes, powers to search and obtain evidence, disclosure of information and criminal proceedings.

16. Clauses 27 to 34 set out general provisions including safeguards in connection with the exercise of powers of entry and service of notices.

17. There are three Schedules. Schedule 1 sets out definitions of cluster munitions and related terms. Schedule 2 sets out the offences to which Article 9 applies and deals with the application of the defence in section 9(1) for offences relating to use or transfer and to conduct by visiting forces. Schedule 3 deals with amendments of other Acts.

I Reverse Burden of Proof – clauses 5, 6, 7, 8 and 9

Article 6 ECHR

18. In the Cluster Munitions (Prohibition) Bill, there are various provisions for defences. For each of these (at clause 5, 6, 7, 8 and 9) the wording sets out that it shall be for a person charged with an offence to show that the defence applies.

19. This is qualified by clause 10 of the Bill which states:

(1) Subsection (2) applies where a person relies on a defence under this Act

(2) If evidence is adduced which is sufficient to raise an issue with respect to the defence, the court must assume that it is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

20. Article 6(2) of the European Convention on Human Rights (ECHR) implements the presumption of innocence in criminal law: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

21. A reverse burden of proof operates where there is a presumption of law or fact which places the burden of proof on the defendant to rebut that presumption. . Where the evidential burden is reversed, the defendant simply has to raise the defence, and it is for the prosecution to prove beyond reasonable doubt that it does not apply to him.

22. The Convention and Court of Human Rights case-law do not outlaw presumptions of fact or law but require that these should be kept within reasonable limits and should not be arbitrary. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. In particular, the operation of the presumptions must not strip a trial court of any effective power of assessment of the facts or guilt. (see for example *Salabiaku v. France*). In the case of *Sheldrake* [2004] MKHL43, Lord Bingham made it clear that “the task of the court is never to decide whether a reverse burden should be placed on a defendant, but always to assess whether a burden enacted by parliamentary authority unjustifiably infringes the presumption of innocence”.

23. The defences in clauses 5, 6, 7, 8 and 9, as qualified by clause 10, ensure that an evidential burden of proof only is imposed on the defendant. It is enough for the defence to “show” that one of the defences apply to him. The legal burden of proof remains on the prosecution to prove beyond reasonable doubt that the defence does not apply. These provisions are compatible with the ECHR.

II Powers of Search and Entry

Article 8 ECHR

24. The powers of search and entry set out in the Bill are to be found at clauses 12, 13, 16, 21 and 22. Clause 27 on safeguards in connection with the exercise of powers of entry needs to be read with them. The provisions are consistent with the Police and Criminal Evidence Act as far as possible.

25. The ECHR Article 8(2) provides that:

“1. *Everyone has a right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ...for the prevention of crime...”.*

26. The case law of the Court of Human Rights has concentrated on the requirements that searches be “lawful” and that there are adequate procedural safeguards against arbitrariness and abuse. For example, in the case of *Niemietz v. Germany*, the court found the order for search and seizure of documents without any limitation to be disproportionate, particularly in the context of the confidentiality attaching to correspondence and documents of a lawyer. The minor nature of the offence which led to the search was also relevant. There must also be sufficient reasons for carrying out a search at the particular location (see *Smirnov v. Russia*, June 7, 2007).

27. The manner in which the entry or search is conducted must also be compatible with Article 8. In particular, the means employed should be proportionate to the legitimate aim pursued. In the *Keegan v. UK* case, the circumstances in Northern Ireland necessitated the precautions taken by the armed forces on entering houses. In contrast, in the *Mcleod v. UK* case, a power for the police to enter a house to prevent a breach of the peace was generally acceptable but in the case in question, there was little risk of crime and disorder because the applicant was not in the house at the relevant time.

28. As to the search warrant itself, in the case of *Smirnov v. Russia*, the warrant was considered too broad because it gave the police “unrestricted discretion” in removing items. Likewise in the case of *Ernst*, the warrant contained no limitation.

29. The essential aim of Article 8 is to protect the individual against arbitrary action by the public authorities by preventing unjustified interference with a person’s private and family life, his home and correspondence. In assessing whether there is such interference the Court considers four questions:

- a) was there an interference?
- b) was the interference in accordance with the law?
- c) did the interference have a legitimate aim or aims?
- d) was the interference necessary in a democratic society?

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

30. Clause 12 empowers the Secretary of State to authorise a person to enter and search premises if the Secretary of State has reasonable cause to believe that conditions A to C (set out in paragraph 31) are met. A justice of the peace may issue a warrant authorising a person acting under the Secretary of State's authority to enter and search premises if the justice of the peace is satisfied, on information on oath that conditions A to B are satisfied.

31. Condition A is that there is a prohibited munition defined in clause 1(3)(b) on the premises. Condition B is that the persons in possession of it would not have a relevant defence. Condition C is that the public has access to the premises or they are occupied by someone who consents to them being entered and searched.

32. The application for a warrant must specify the premises in respect of which the application is made. The warrant is only in force for one month from the date of issue and it can only authorise entry on one occasion only. "Premises" are defined in clause 31(1) and include land, moveable structures, vehicles, vessels, aircraft and hovercraft.

33. In the case of clause 12, there would be an interference with a person's right to respect for his home. "Home" in terms of Article 8 can be both a private person's home and a professional person's office (see *Buck v. Germany* and *Niemitz v. Germany*). The interference would, however, be in accordance with the law, namely the Bill and it would be justified because it is necessary for the prevention of crime, namely criminal offences under the Bill, such as possession of a prohibited munition. So the interference would have a legitimate aim. But the main issue is whether the interference is "necessary in a democratic society", that is, that it is proportionate to the legitimate aim pursued. The interference would be proportionate because entry would be on the basis of reasonable cause to believe that there is a prohibited munition on the premises and the person(s) who possess the prohibited munition would not have a relevant defence. In the case in which the premises are not public, the person consents to his premises being entered and searched. The application for the warrant must specify the premises in respect of which the application is made and the warrant will only be valid for one month and only authorise entry on one occasion only. Furthermore the safeguards set out in clause 27 apply where relevant.

In conclusion 12(1) does not breach Article 8 ECHR.

Clause 13: Removal or immobilisation of prohibited munitions

34. This clause is about the removal or immobilisation of prohibited munitions. It provides that a person authorised by a warrant issued under section 12(2) may use force to enter premises, if necessary. A person who enters premises under a warrant issued under section 12(2) or under an authorisation under section 12(1) may take with him such other persons and such equipment on to the premises as appear necessary. When on the premises, the person may make safe any prohibited munition which is found or seize and remove it, if reasonably practicable to do so, or affix a warning to it stating that the prohibited munition is not to be moved or interfered with. The authorisation or warrant may provide that the person exercising the powers conferred by the warrant or authorisation may only do so in the presence of a constable.

35. The provision about use of force if necessary is justified because prohibited munitions are a danger to the public. While the power of entry itself would be an interference with the right of respect for a person's home, it would be authorised by the Bill and would be justified for reasons to do with the prevention of criminal offences, namely offences under the Bill such as possession of a prohibited munition. So the interference would have a legitimate aim. The interference would be justified and proportionate because the forcible entry would be on the basis of a warrant granted on the basis of information on oath that there is a prohibited munition on the premises and the person possessing the prohibited munition does not have a relevant defence.

In conclusion clause 13 would not breach Article 8 ECHR.

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

36. Clause 16 confers a power on the Secretary of State to authorise a person to enter premises and destroy an immobilised prohibited munition. A justice of the peace may issue a warrant in writing authorising such a person to enter the premise and destroy the prohibited munition. The justice has to be satisfied on information on oath that the Secretary of State has decided under section 15(6) that a prohibited munition should be destroyed and it is on premises where a warning relating to that prohibited munition was affixed. The application for the warrant must specify the premises in question and the warrant is only valid for one month and may only authorise entry on one occasion only.

37. A person authorised by a warrant to enter the premises may use force if necessary and take such persons and equipment as he thinks necessary. The person who exercises the powers may do so only in the presence of a constable if the authorisation or warrant states this.

38. The safeguards set out in clause 27 apply where relevant. This clause raises similar issues to those already examined in clauses 12 and 13 and also does not appear to breach Article 8 ECHR for the reasons stated in relation to those clauses.

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

39. This confers a power to search and obtain evidence where a justice of the peace issues a warrant in writing authorising a person acting under the authority of the Secretary of State if the justice is satisfied on information on oath that either condition A (i.e. that there are reasonable grounds for suspecting an offence under the Act has, is or is about to be committed on the premises) or condition B (i.e. that there are reasonable grounds for suspecting that evidence of the commission of an offence under the Act is to be found on the premises) apply. An application for a warrant may be made by any one acting under the authority of the Secretary of State. It must specify the premises concerned. The warrant is to be in force for one month only from the date of issue and may authorise entry on one occasion only.

40. The safeguards set out in clause 27 apply where relevant. Clause 21 raises similar issues to those raised by clause 12 and there are similar reasons for considering that ECHR Article 8 is not breached.

Clause 22: Power to search and obtain evidence: supplementary

41. Clause 22 which contains supplementary provisions to do with powers of search and obtaining evidence, provides that a person authorised by a warrant issued under section 21 to enter and search premises may if necessary, use force to enter premises (subsection (1)) and take such persons and equipment on to the premises as appear necessary to that person (subsection (2)(a)).

42. It also provides powers under subsection (2) to inspect documents found on the premises which the person has reasonable cause to believe may be required as evidence for proceedings in respect of an offence under the Act, take copies of, seize or remove such documents and require information stored in electronic form to be produced in an accessible form in which it can be taken away and is visible and legible. The person can also take copies of or seize and remove any electronic information in an accessible form and inspect, seize and remove devices or equipment or substances and sample such substances, such as the person has reasonable cause to believe may be required as evidence in proceedings for offences under the Act. Items seized may not be returned for as long as necessary in all the circumstances. The person seizing anything under subsection (2) must provide a record of the seizure if requested by the occupier of the premises or by the person who had possession or control of the item immediately before it was seized. The person who is authorised to take action under subsection (2) cannot take action in relation to anything in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

43. Under subsections (6) and (7) and (8) a constable who enters under a warrant issued under section 21 or by virtue of subsection 2(a) can search anyone on the premises who he has reasonable cause to believe possesses any document, device, equipment or substance required as evidence but cannot search someone of the opposite sex. A warrant issued under section 22 can provide that a person who exercises the powers conferred by the warrant can only do so in the presence of a constable, if that person is not a constable (subsection (9)).

44. There is no breach of Article 8 ECHR because while there is an interference with the rights of the person whose premises are searched, or of the occupier of the premises or of the person who possessed or controlled an item before it was seized, the interference is authorised under the Act, and it has a legitimate aim which is to find evidence for the purposes of criminal proceedings under the Act. The interference is proportionate to the aim in question which is searching for and obtaining evidence for criminal proceedings under the Act. The person seeking the evidence must have reasonable cause to believe what is seized and removed may be required as evidence.

III Powers to remove, immobilise, forfeit and destroy cluster munitions

Protocol 1, Article 1 ECHR

45. Clause 12 is described at paragraphs 30-32 above.

46. Clause 13 provides that a person authorised by a warrant (under clause 12) is entitled to enter premises and may if necessary use force to do so. A person who enters premises

under an authorisation of the Secretary of State under clause 12(1) or a warrant under clause 12(2) may make a prohibited munition safe and may seize and remove it or fix a warning to it. But a person cannot exercise these powers if the prohibited munition is in the possession of a person(s) who has a defence under sections 5 or 6 if charged with possessing a prohibited munition.

47. Clauses 14 and 15 provide the Secretary of State with power to destroy removed or immobilised prohibited munitions. Before doing this the Secretary of State must serve a notice on the person in whose possession the prohibited munition was or on anyone else with an interest materially affected by destruction of a prohibited munition, allowing them time to make objections to the destruction of the prohibited munition. If the Secretary of State has not authorised the destruction of the prohibited munition within a year, it must be returned to the person in whose possession it was, while if it is destroyed the Secretary of State may recover from the possessor any costs reasonably incurred by the Secretary of State in connection with the removal and destruction or destruction.

48. Clause 16 gives the Secretary of State power to authorise a person to enter premises to destroy a prohibited munition that has been immobilised, where he has decided under section 15(6) that it should be destroyed. Additionally, a justice of the peace may issue a warrant in writing authorising a person acting under the Secretary of State's authority to enter premises and destroy the immobilised munition. A number of safeguards apply in the two cases.

50. Clause 17 provides for a person to make a claim for compensation to the High Court or the Court of Session in Scotland in the event that the person had a materially affected interest in a prohibited munition which has been destroyed, has suffered loss as a result of the destruction, and was not served a notice under Clauses 14 or 15.

51. Clause 18 provides for offences including ones where a person wilfully obstructs another person who is entering and searching premises under an authorisation or warrant issued under section 12(1) or (2), or who is making a prohibited munition safe, seizing or removing it or fixing a warning, or who is destroying a prohibited munition under an authorisation or who is entering premises under an authorisation or a warrant issued under section 16(2) or (4). A person is also guilty of an offence if without reasonable excuse he moves or interferes with a prohibited munition to which a warning has been affixed or interferes with the warning, or knowingly makes false or misleading statements in response to a notice served under certain sections of the Bill.

52. Clause 25 provides that where a person has been convicted of an offence under the Act the court may order that anything that is shown to the court's satisfaction to be related to the offence may be forfeited and destroyed, or dealt with as the Secretary of State sees fit. The court may not make a forfeiture order unless the person who has an interest in it has been given an opportunity to show why it should not be made.

Article 1 Protocol 1

53. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the*

conditions provided for by law and by the general principles of international law. The preceding paragraphs shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties

54. Considerable room for manoeuvre is accorded in respect to confiscation of property. The jurisprudence is focused on whether a fair balance has been struck between the public and private interest.

55. In *Handyside v UK* (7 December 1976, para 66) the Court set out that Article 1, Protocol 1 establishes the Contracting States as sole judges for the “necessity” of an interference. Lawfulness must be ascertained by addressing whether domestic legislation regulates the deprivation, and the purpose must fall within “public interest”.

56. The public interest has been held by the Court to be necessarily extensive (*Hentrick v France*, Sept 22 1994, para. 39). The Court has stated that it will offer a wide margin of appreciation in respect of the Member State’s judgment as to what is in the public interest unless it is “manifestly without reasonable foundation”.

57. In *Agosi v UK* (Oct 24, 1986) the Court held that there were procedural safeguards and requirements implicit in the protection of property rights. There should be procedures by which reasonable account could be taken of the link between the conduct of the owner and the breach of the law and to afford the owner to put his case to the authorities.

58. As such, the seizure of goods that have been seized in a criminal context has proved acceptable in the case that the seizure has pursued lawful and legitimate purposes, even when the seizure has been draconian, provided that there were minimum requirements of procedural safeguards and domestic lawfulness.

59. In *Agosi and Air Canada v UK* (May 5, 1995) the possibility of judicially reviewing a decision to confiscate property was found to furnish sufficient procedural protection even though the decisions were essentially unreasoned, thereby limiting the ability to challenge them in judicial review.

60. Conversely, in the case of *Baklanov v Russia* June 9, 2005, where there was no legal basis for the confiscation of US \$250,000 whatsoever and the applicant had committed no offence in respect of the money, there was a breach of Protocol 1.

61. The Bill provides a legal basis for seizing items, and there is clearly a sound “public interest” in doing so. Additionally, there are numerous procedural safeguards within the Bill in the detailed requirements in clauses 13 to 17 for ensuring that any power to seize or destroy prohibited munitions is not exercised arbitrarily and that those affected are given an opportunity to make representations before destruction takes place or are given the right to apply for compensation. In the event of forfeiture in case of conviction under clause 25, before the court orders that the forfeited item is destroyed or disposed of in any other way, a person claiming an interest in it has the right to be heard before the court makes its order.

62. Accordingly, the clauses in the Bill on removal, immobilisation, forfeiture and destruction do not appear to cause concern in relation to the ECHR, as by their very nature

they are provided for in domestic law, they pursue an aim that can be described as being in “the public interest” and they are adequately subject to safeguards.

IV Information and Records for Convention purposes

Article 6 ECHR

63. Clause 20 provides that the Secretary of State may serve a notice on a person requiring that person to give such information as is described in the notice which the Secretary of State has reasonable cause to believe is needed or will be needed for Convention purposes. A person who fails to provide the information, without reasonable excuse, is guilty of an offence and liable on conviction to a fine. A person who knowingly makes a false statement is guilty on conviction either to a fine, or if convicted on indictment, to imprisonment for a term not exceeding two years. Article 6 of the ECHR may have relevance to this provision, in terms of protection against self-incrimination.

64. The relevant provisions of Article 6 are paragraph 1, on fair trial, and para.2 on the presumption of innocence.

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

65. In *Funke v France* (Feb 25 1993) the general principle is that Article 6.1 contains the right of anyone charged with a criminal offence to remain silent and not to incriminate himself. In the case of *John Murray v UK* the Court found that the right to remain silent under police questioning and the privilege against self incrimination were internationally recognised standards which lay at the heart of the notion of a fair trial and protected the accused from miscarriages of justice.

66. Where a procedure infringes the privilege against self-incrimination the Court will consider the nature and the degree of compulsion as well as the existence of any safeguards to the procedures and what any material obtained in this way would be used for. It will also take into account the weight of the public interest in the investigation of the offence.

67. In *Funke* the Court found that the fines imposed on a person for failing to disclose documents relating to his financial transactions offended against the principle against self-incrimination. This approach has however attracted considerable criticism. In *Saunders v UK* (Dec 17, 1996) an applicant, who had not yet been charged, was compelled to give oral evidence in an inquiry conducted by DTI inspectors. It was not regarded as falling under the scope of Article 6. It has since been recognised that requiring someone to provide information to the authorities under threat of penalty does not infringe the privilege against self-incrimination. However in the same case, where interviews obtained through compulsory powers were later used in criminal proceedings, the Court found that the essence of the privilege against self-incrimination required the prosecution to prove their case without resort to evidence obtained through coercion (so did not apply to interviews that were exculpatory). In *Shannon v UK* (April 10, 2004) the Court recognised that penalising someone for refusing to provide information when they are charged or likely to be charged with an offence, even if the information is not subsequently used for criminal proceedings, may be problematic.

68. In a later case, *Allen v UK* (10 Sept 2002) the Court clarified its position in finding that the purpose of the protection against self-incrimination is primarily so that the will of a person who wishes to remain silent during criminal proceedings is respected, and did not preclude the use of compulsory powers to require persons to provide information about their company or financial affairs.

69. The Court has found that the position of drivers is different because in effect they have consented by using a vehicle to adhere to a special regulatory regime (*O'Halloran and Francis v UK*, June 29 2007).

70. In the Bill, powers of compulsion are set out in clause 20 because the Secretary of State may serve a notice on a person requiring that person to give such information as is described. If the person without reasonable excuse fails to comply with a notice served, he or she is guilty of an offence and liable to a fine. The Secretary of State must have reasonable cause to believe that the information is necessary in connection with anything to be done for the purposes of the Convention, and it may relate to a state of affairs existing pre-Convention. It is a mechanism whereby the Secretary of State can gather information about the functioning of the Convention and matters to do with cluster munitions that existed pre-Convention. In the *Saunders* case, requiring a person to provide information under compulsory powers did not infringe the privilege against self-incrimination. Clause 20 does not in itself breach Article 6, ECHR. To avoid, however, that there is any risk of self-incrimination arising when clause 20 is read with clause 23(2)(d), a provision has been inserted into subsection 20(6) to provide that the power conferred by subsection 20(1) may not be exercised as to require a person to provide

information which might incriminate that person or their spouse or civil partner. The Secretary of State would in consequence be unable compulsorily to acquire such information. This is relevant to disclosure under clause 23 for the purposes of criminal proceedings or criminal investigations, one of the exceptions to the prohibition against disclosure in clause 23. It ensures compatibility with the other principle in the Saunders case whereby testimony obtained under compulsion should not be used in criminal proceedings to incriminate the defendant.

Clause 8 ECHR

71. Article 8 may also be relevant to clause 20

Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

72. Public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities, particularly where such information relates to a person's past. The Court has also stated that Article 8 corresponds with the Council of Europe's Data Protection Convention whose purpose is to secure for every individual his right to privacy with regard to the automatic processing of personal data relating to him. Thus it is arguable that the fact of recording and using any personal data is an interference.

73. The recording of personal information for purposes of criminal investigation generally will concern private life but may be justified, in the circumstances explicitly set out in Article 8 itself. This includes information obtained by the police in investigations where no criminal proceedings are brought.

74. In *McVeigh* (8022/77, (Rep) March 18, 1981, 25 DR 15) questioning, searching fingerprinting and photographing the applicants was said to be an interference but was justified in the interests of public safety and prevention of crime.

75. The Bill sets out a means by which information relating to the purposes of the Convention is requested – as opposed to personal information being systematically collected, as appears to be envisaged by the Article 8 jurisprudence relating to private information. It does not therefore appear that the requesting of information in this way

will offend Article 8. In any event, when the aim of requesting the information is lawful, necessary in a democratic society and proportionate to the aim, as appears to be the case here, there will not be interference with the individual's rights under Article 8.

76. There appears to be no breach of Articles 6 and 8 of the ECHR in respect of clause 20, including when read with clause 23(2)(d).

Conclusion

None of the provisions in the Bill appear to infringe the ECHR.

November 2009

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Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079