

COUNTER-TERRORISM ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Powers to Gather and Share Information

Power to remove documents for examination

Section 1 – Power to remove documents for examination

15. *Section 1* provides a new power for a constable to remove documents in the course of a terrorist-related search for the purpose of ascertaining whether they may be seized. Documents removed under section 1 may, subject to the time limits in section 5, be retained until the examination is complete. This power might be used, for example, to remove documents in a foreign language for translation.
16. *Subsection (1)* specifies the situations in which the new power may be used: it may only be used in the context of searches under the listed provisions of the Terrorism Act 2000 (the 2000 Act), the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006.
17. *Subsection (3)* makes provision in relation to documents stored in an electronic form.
18. *Subsection (4)* provides that where a document is removed under this power, a constable has the same powers of seizure (at common law and under statute) as if it had not been removed. This will include the general power of seizure under section 19 of PACE which allows a constable lawfully on premises to seize a document if the constable reasonably believes that it is evidence in relation to any offence and it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

Section 2 – Offence of obstruction

19. *Section 2* creates the offence of wilfully obstructing a constable in the exercise of the power conferred by section 1. This is a summary offence, punishable by a maximum penalty of up to 51 weeks' imprisonment in England and Wales (but before section 281(5) of the Criminal Justice Act 2003 comes into force, 6 months), 12 months' imprisonment in Scotland and 6 months' imprisonment in Northern Ireland.

Section 3 – Items subject to legal privilege

20. *Section 3* deals with documents that are, or may be, legally privileged. Under *subsection (1)* a constable may not remove a document if he has reasonable cause to believe that it is an item subject to legal privilege or has such an item comprised in it (for example it is a document which includes correspondence with a lawyer in it but also includes other information). If it is discovered that a document that has been removed is an item subject to legal privilege, or has such an item comprised in it, it must be returned immediately (*subsection (3)*). However, a document which has an item subject to legal privilege comprised in it may be removed or retained if it is not reasonably practicable to separate the legally privileged part from the rest of the document without

prejudicing the lawful use of the latter if it were to be seized (*subsections (2) and (4)*). This will be the case for example where tearing out legally privileged information from a larger document would also remove non-legally privileged information, which might comprise evidence of an offence, on the reverse of the page.

21. *Subsection (5)* provides that where parts of a document which are subject to legal privilege are removed or retained because it is not reasonably practicable to separate them from those parts which are not, the legally privileged parts must not be used in any other way but to facilitate the examination of the rest of the document.
22. *Subsection (6)* defines an “item subject to legal privilege” for the purpose of this section by reference to PACE for England and Wales, the Proceeds of Crime Act 2002 for Scotland and PACE NI for Northern Ireland.

Section 4 – Record of removal

23. *Subsections (1) and (2)* provide that a constable who removes a document using the new power of removal must make a written record of the removal as soon as is reasonably practicable and in any event within 24 hours of the removal.
24. *Subsections (3), (4) and (5)* set out the matters to be included in such record and *subsection (10)* makes specific provision as to how the reference to the address of the premises in *subsection (3)* is to be interpreted where the search is of a vehicle. Many of the listed search powers include searches of vehicles (for example, searches under Schedule 5 to the 2000 Act may be of “any premises”, and “premises” is defined in section 121 of that Act to include vehicles).
25. *Subsections (7) and (8)* provide that a constable must, within a reasonable time of receiving a request, supply a copy of the search record to a person with an interest in the document as defined.
26. *Subsection (9)* provides that if a document has been found during the course of a search under a warrant in England and Wales or Northern Ireland, the constable must endorse the warrant stating that the document was removed under the provisions of section 1 of this Act. This is so that the person or court which issued the warrant will be aware of the action that has been taken under it when the warrant is returned to them.

Section 5 – Retention of documents

27. *Section 5* provides that documents removed under section 1 cannot be retained for more than 48 hours unless further retention – up to a maximum of 96 hours from the time of removal – is authorised by a constable of at least the rank of chief inspector. Such authorisation may only be given if that officer is satisfied of the matters contained in *subsection (2)*.

Section 6 – Access to documents

28. *Section 6* allows a person referred to in *subsection (3)*, on request, to have supervised access to a document retained under the provisions of section 5 or to be given a copy of such a document (*subsection (2)*). This is subject however to the officer in charge of the investigation (defined in *subsection (5)*) being able to refuse such access or a copy on the grounds set out in *subsection (4)*. The examination of a document under this power might not be part of an investigation into an offence (for example where the document was removed during the search of a terrorist suspect prior to arrest). This explains why the grounds in section 6(4)(a) are required. *Subsection (4)(b)* covers the investigation of an offence - for example the police may believe that providing access to or a copy of the document would tip off a person as to the documentation seized such that other evidence of the offence could be covered up. *Subsection (4)(c)* covers the prejudice of criminal proceedings. The ground in *subsection (4)(d)* is to cover for

example a document which the officer has reasonable grounds to believe constitutes information useful to terrorists.

Section 7 – Photographing and copying of documents

29. **Section 7** provides that a document removed under section 1 may not be photographed or copied except for the purposes of section 6 or to produce information stored in electronic form in a visible and legible form.
30. On return of the document, electronic copies must be destroyed and any hard copies made under *subsection (1)* must be returned at the same time (*subsection (2)*).
31. *Subsections (3) and (4)* provide that the persons referred to in *subsection (3)* can request a certificate to show that all copies have been so destroyed, made inaccessible or returned and such a certificate must be issued within three months of the request. The certificate is to be issued by the “relevant chief officer of police” as defined in *subsection (5)*.

Section 8 – Return of documents

32. This section provides that a document that is to be returned (because the time limit for retention has expired or the document is not one that may be seized), and any copy, is to be returned to the person searched or the occupier of the premises on which it was found. However, where another person appears to have a better right to the document, the document must be returned instead to that person, and where different persons claim to be entitled to the document, it may be retained for as long as reasonably necessary to determine who has best claim to it.

Section 9 – Power to remove documents: supplementary provisions

33. *Subsection (2)* means that when a search is carried out under section 52(1) of the Anti-Terrorism, Crime and Security Act 2001, references in these provisions to a constable should be read as references to an authorised officer as defined in that section – as that search power is conferred on an authorised officer rather than a constable.

Power to take fingerprints and samples from person subject to control order

Section 10 – Power to take fingerprints and samples: England and Wales

34. **Section 10** amends sections 61, 63, 63A, 64 and 65 of PACE, providing a constable with powers relating to the taking and use of fingerprints and non-intimate samples from an individual subject to a control order. (The control order regime is contained in the Prevention of Terrorism Act 2005.) Both “fingerprints” and “non-intimate samples” have the same meaning as that given in section 65 of PACE. That is, “fingerprints” include palm prints and “non-intimate samples” means a sample of hair other than pubic hair; a sample taken from a nail or from under a nail; a swab taken from any part of a person’s body including the mouth but not any other body orifice; saliva and a footprint or a similar impression of any part of a person’s body other than a part of his hand. These amendments will apply to all individuals subject to control orders that are in force from the time this section is commenced, regardless of when the control order was made, but the provisions will not apply to individuals whose control orders have already lapsed (see *subsection (5)* and section 13).
35. *Subsections (1) and (2)* provide a constable with the power to take fingerprints and non-intimate samples respectively without the appropriate consent of an individual subject to a control order. Appropriate consent is defined in section 65 of PACE as meaning: (a) in relation to a person who has attained the age of 17 years, the consent of that person; (b) in relation to a person who has not attained that age but has attained the age of 14 years, the consent of that person and his parent or guardian; and (c) in relation to a person who has not attained the age of 14 years, the consent of his parent or guardian. PACE Code

D (Code of Practice for the Identification of Persons by Police Officers) provides that a constable can use reasonable force to ensure compliance with this provision where the appropriate consent is withheld.

36. *Subsection (3)(a)* provides a constable with the power to check the fingerprints and non-intimate samples of an individual subject to a control order against the same databases that other fingerprints etc. taken under PACE may be checked against (see PACE section 63A, as amended by section 14). So the fingerprints or samples may be checked against other such fingerprints or samples and/or information derived from other samples that are held by or on behalf of any relevant law enforcement authority or are held in connection with or as a result of an investigation of an offence or which are held by or on behalf of the Security Service or the Secret Intelligence Service. Relevant law enforcement authorities are defined in section 63A(1A) of PACE to include a police force and the Serious Organised Crime Agency. The definition also includes persons outside the territory of the United Kingdom whose functions correspond to those of a police force and any other public authority with functions in any part of the British Islands which consist of or include the investigation of crimes or the charging of offenders.
37. *Subsection (3)(b)* provides a constable with powers to require a controlled individual to attend a police station for the purposes of having their fingerprints and/or non-intimate samples taken. In the event that such a request is not complied with, the person may be arrested without a warrant (see the amendment to section 63A(7) made by *subsection (6)*).
38. *Subsection (4)* allows the retention of a controlled individual's fingerprints and non-intimate samples taken under the new provisions, subject to the safeguards in section 64 of PACE (as amended by section 14). These safeguards ensure that any such samples retained are only used for purposes related to the interests of national security, the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom the material came.
39. *Subsection (6)* makes consequential amendments of PACE, many of which mean that fingerprints and non-intimate samples taken from a controlled person will be subject to the same provisions as fingerprints and non-intimate samples taken under current PACE powers. These include safeguards such as requiring a constable to inform the individual concerned of the reason for taking the fingerprints or non-intimate sample without consent (this will normally be simply that they are subject to a control order) before they are taken and informing them that the fingerprints and/or samples may be the subject of a "speculative search". The matters of information must also be recorded as soon as it is practicable to do so. The term "speculative search" is defined at section 65 of PACE and it is taken to mean that the fingerprints and/or non-intimate samples can be randomly checked against other samples that have been taken under current PACE powers as mentioned in relation to *subsection (3)*.

Section 11 – Power to take fingerprints and samples: Scotland

40. **Section 11** makes similar provision to section 10 for Scotland in relation to the taking of fingerprints and non-intimate samples from an individual subject to a control order. The section creates new free-standing powers rather than amending any existing legislation. The main area of difference between the powers in England and Wales and the powers in Scotland is that any samples that are obtained may be used only for the purposes of a terrorist investigation or in the interests of national security. This difference is necessary in order to avoid making provision in areas that are within devolved competence. In addition, in line with current procedures in Scotland, constables would need authorisation from an officer of the rank of inspector or above to take certain types of non-intimate samples (non-pubic hair or nail samples and external body fluid samples) from controlled individuals. (A constable does not require such authorisation

to take fingerprints, palm prints, other external body prints and saliva samples.) In contrast, current procedures in England, Wales and Northern Ireland allow constables to take fingerprints and all non-intimate samples when individuals are arrested under PACE or PACE NI without such authorisation. The difference arises because the provisions in sections 10, 11 and 12 are intended to be in line with existing procedures in each country.

Section 12 – Power to take fingerprints and samples: Northern Ireland

41. **Section 12** makes corresponding provision to section 10 for Northern Ireland in relation to the taking of fingerprints and non-intimate samples from an individual subject to a control order. It amends PACE NI.

Section 13 – Power to take fingerprints and non-intimate samples: transitional provision

42. **Section 13** makes transitional provision for the powers in sections 10, 11 and 12 and provides that the powers to take fingerprints and non-intimate samples from a person subject to a control order will have effect at the time the sections are commenced regardless of when the control order was made.

Retention and use of fingerprints and samples

Sections 14 to 18 – Retention and use of fingerprints and samples

43. **Sections 14 to 18** (retention and use of fingerprints and samples) seek to ensure that fingerprints, DNA and footwear impressions (“samples”) can be effectively used for counter-terrorist purposes including by the security services by:
- a) allowing the cross checking of security services material with ordinary crime (PACE) samples in England, Wales and Northern Ireland. (Scotland does not have PACE);
 - b) putting the retention and use of material not subject to existing restriction (mostly covertly acquired fingerprints and samples) on a statutory footing; and
 - c) standardising the purposes for which fingerprints and samples can be used as between the Terrorism Act 2000, PACE and material not subject to existing statutory restrictions (section 18 of this Act).
44. These sections amend the purposes for which samples obtained during criminal or terrorist investigations can be used. This includes adding that such samples can be used for the purposes of national security. National security is defined in section 1(2) of the Security Services Act 1989 and includes “*threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.*”
45. Section 64(1A) of PACE currently allows samples to be retained and used for the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or for the identification of dead people (the same uses are provided for in PACE NI). In contrast, paragraph 14 of Schedule 8 to the 2000 Act provides that samples taken under the provisions of that Act can only be used for terrorist investigations or for the purposes related to the prevention or detection of crime, the investigation of an offence of the conduct of prosecution.
46. These sections will standardise the purposes for which the samples can be used between the 2000 Act, PACE and PACE Northern Ireland. When the uses for the samples are different they cannot be stored on inter-connected databases.

Section 14 – Material subject to the Police and Criminal Evidence Act 1984

47. *Subsection (2)* amends section 63A(1) of PACE to allow samples (fingerprints, impressions of footwear or DNA samples) taken under PACE to be checked against other samples held by or on behalf of the Security Service (MI5) or the Secret Intelligence Service (MI6 or SIS). The section adds a similar power to check information derived from other samples against that information derived from material held by the Security Services or the Secret Intelligence Service. Samples may be taken from a person under PACE if the person is suspected of being involved with a recordable offence, has been charged with a recordable offence or informed that he will be reported for such an offence, or, following the amendments made by section 10, if he is subject to a control order.
48. *Subsection (3)* amends section 63A(1ZA) of PACE similarly to allow the cross checking against material held by the Security Service or the Secret Intelligence Service of material taken from a person under section 61(6A), which allows a constable to take a person's fingerprints etc. if the person's name cannot be ascertained or if the constable believes the person has given a false name.
49. *Subsection (5)* inserts a new *subsection (1AB)* into section 64 of PACE that sets out the purposes for which samples can be used. The section expands the uses to permit samples to be used in the interest of national security as well as for the purposes already listed in section 64, which are purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or for purposes relating to the identification of a deceased person or the person from whom the material came.

Section 15 – Material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989

50. **Section 15** amends PACE NI to make changes for Northern Ireland that have the same effect to those made above to PACE for England and Wales. These will permit samples and fingerprints to be checked against records held by or on behalf of the Security Service or the Secret Intelligence Service and for the use of such samples to be expanded to include when it is in the interests of national security.

Section 16 – Material subject to the Terrorism Act 2000: England, Wales and Northern Ireland

51. **Section 16** amends paragraph 14 of Schedule 8 to the 2000 Act. Schedule 8 to the 2000 Act governs the treatment of persons detained under that Act. Paragraph 14 applies to fingerprints and samples taken under Schedule 8. Paragraph 14 is amended so that the fingerprints or samples taken under Schedule 8 may be used in the interests of national security and in the identification of a deceased person or of the person from whom the material came, in addition to the uses already allowed for in paragraph 14 (in a terrorist investigation or in the prevention and detection of crime, the investigation of an offence or the conduct of a prosecution). This ensures that the purposes cover all those for which fingerprints and samples taken under PACE and PACE NI may be used following the amendments made by sections 14 and 15. It also provides that samples taken under the 2000 Act in England, Wales and Northern Ireland may be cross checked against material held under section 18. Paragraph 14 already allows cross checking against material referred to in section 63A PACE (and PACE NI). Therefore the amendments to section 63A PACE (and PACE NI) made by this Act will enable the fingerprints and samples taken under Schedule 8 to be cross-checked against any samples held by or on behalf of the Security Service or the Secret Intelligence Service

Section 17 – Material subject to the Terrorism Act 2000: Scotland

52. **Section 17** makes amendments to paragraph 20 of Schedule 8 to the 2000 Act (which applies in Scotland) the effect of which are similar to the amendments made by section 16 (which amends provisions applying in England and Wales). Paragraph 20

governs the use of fingerprints and samples of those detained under the 2000 Act in Scotland. *Subsection (2)* amends paragraph 20 so as to allow samples obtained in Scotland under the 2000 Act to be used for purposes of a terrorist investigation, in the interest of national security, for the purposes related to the prevention and detection of crime or the investigation of an offence or the conduct of a prosecution.

53. *Subsection (3)* adds a new paragraph 21 to Schedule 8 that applies, with modifications, section 20 of the Criminal Procedure (Scotland) Act 1995. The effect is that the 2000 Act samples may be cross checked against samples taken under the 1995 Act, samples referred to in section 63A of PACE and against material held under section 18.

Section 18 – Material not subject to existing statutory restrictions

54. **Section 18** provides a statutory framework for the use and retention of DNA samples and fingerprints that are not held subject to other existing statutory restrictions.
55. *Subsection (2)* restricts the uses to which such samples and fingerprints held by a law enforcement authority in England, Wales or Northern Ireland may be put. They may only be used in the interest of national security, for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or for the purposes related to the identification of a deceased person or of the person from whom the material came.
56. *Subsection (3)* imposes a condition that must be met before the samples and fingerprints may be used for the purposes set out in *subsection (2)*. The condition is that the material must have been either: (i) obtained by the authority pursuant to an authorisation under the Police Act 1997 or the Regulation of Investigatory Powers Act 2000; (ii) supplied to the authority by another law enforcement body (domestic or foreign); or (iii) otherwise lawfully obtained by the authority for one of the purposes in *subsection (2)*.
57. *Subsection (4)* clarifies certain terms used in *subsection (2)*: use of material includes allowing a check to be made against it and disclosing to another person. This phrase is used principally to allow samples to be exchanged with the security agencies who are not included in the definition of “law enforcement authority” and “police force” in section 18(5). The reference in *subsection (2)* to crime includes actions which constitute a criminal offence under law of any part of the UK or a territory outside the UK or actions which would have been a criminal offence had they been conducted in the UK; and the references to investigations and prosecutions are also given a wide meaning, so as to apply equally to investigations and prosecutions which are conducted outside the UK.
58. *Subsection (5)* defines terms used in this section.
59. *Subsection (6)* sets out “the existing statutory restrictions” which are referred to in *subsection (1)*.

Disclosure of information and the intelligence services

Sections 19 to 21 – Disclosure of information and the intelligence services

60. **Section 19** provides that any person may give information to any of the intelligence services (defined in section 21 as the Security Service, the Secret Intelligence Service, and the Government Communications Headquarters) for the purpose of any of the functions of that service. The provisions that specify the functions of each of the intelligence services are listed in section 21(2). The person giving the information may do so regardless of any duty to keep the information confidential or of any other restriction on disclosure (*subsection (6)*). This is subject the Data Protection Act 1998 and Part 1 of the Regulation of Investigatory Powers Act 2000 (see section 20(2)).
61. *Subsection (2)* provides that information obtained by an intelligence service in connection with one of its functions may be used by it in connection with any of its

other functions. *Subsections (3) to (5)* govern the disclosure of information obtained by the intelligence services for the purposes of any of its functions. Such information may be disclosed by the service for the purpose of the proper performance of any of its functions or for other the purposes specified in those subsections (which include for each organisation the purpose of any criminal proceedings). Again, such a disclosure will not breach any obligation of confidentiality or other restriction (*subsection (6)*), subject to compliance with the Data Protection Act and Part 1 of the Regulation of Investigatory Powers Act 2000 (section 20(2)).

62. *Section 20* makes it clear that the information sharing provisions in section 19 do not affect the duties on the heads of the intelligence services (listed in *subsection (1)*) to ensure that arrangements are in place for securing that their service obtains and discloses information only in accordance with the purposes specified in the provisions listed in that subsection (which mirror the purposes listed in section 19(3) to (5)).

Schedule 1 – Disclosure and the Intelligence Services: Consequential Amendments

63. *Paragraphs 1, 4 and 5* omit section 19(2)(a) of the Anti-terrorism, Crime and Security Act 2001, section 38 of the Immigration, Asylum and Nationality Act 2006 and section 67 and subsection 39(4)(g) of the Statistics and Registration Service Act 2007 as there will be no need for the specific information-sharing gateways in these provisions once the new information-sharing gateway in section 19 is brought into force.
64. *Paragraphs 2 and 3* make amendments to secondary legislation concerning the electoral register, removing restrictions in that legislation on onward disclosure by the intelligence and security agencies (as such disclosure will now be governed by section 19 of the Act), but preserving all rights conferred on the intelligence and security agencies to obtain information from the electoral register under the regulations.