

LEGISLATIVE CONSENT MEMORANDUM PROTECTION OF FREEDOMS BILL

Legislative Consent Motion

1. “To propose that the National Assembly for Wales, in accordance with Standing Order 26.4, agrees that provisions of the Protection of Freedoms Bill in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”

Background

2. The Legislative Consent Motion at paragraph 1 above has been tabled by Carwyn Jones AM, First Minister for Wales, under Standing Order 26.4 of the Standing Orders (SO) of the National Assembly for Wales (the National Assembly). This Legislative Consent Memorandum is laid under SO26.2. SO26 prescribes that a Legislative Consent Motion must be tabled, and a Legislative Consent Memorandum laid, before the National Assembly if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within the legislative competence of the National Assembly.

3. The Protection of Freedom Bills (the Bill) was introduced on the 11 February 2011. The Bill can be found at <http://services.parliament.uk/bills/2010-11/protectionoffreedoms/documents.html>

Summary of the Bill and its Policy Objectives

4. The Bill is sponsored by the Home Office. The main purpose of the Bill is to restore the rights and freedoms of individuals. The UK Government’s aim is “to roll back the State, reducing the weight of government imposition on citizens that has increased in recent years through legislation and centralised programmes”.

The Bill includes provision in the following areas:

- DNA retention
- protection of biometric information of children in schools and colleges
- further regulation of closed circuit television/automatic number plate recognition systems
- powers of entry
- prohibiting wheel clamping
- reform of the vetting and barring scheme and criminal records regime
- non-disclosure of decriminalised convictions for consensual gay sex
- freedom of information
- right to data
- Office of the Information Commission
- serious fraud trials

Provisions in Bill for consent is sought

5. Biometric identification systems are a means of obtaining and recording a child's unique physical or behavioural characteristics (biometric information) such as a child's fingerprint, voice or handwriting to identify a child. Biometric identification systems do not store the information obtained from a child. Instead, the system converts the information into binary data unique to the child based on his or her information. For example when a child's fingerprint is scanned only unique points of reference are taken and these are converted into binary data to identify the child.

6. Biometric information is used for a number of purposes including access by children to school buildings, attendance registration systems, the borrowing of library books and cashless catering. The benefits to schools and to children in using such a system include improved site security, more efficient pupil registration, easier access for children to services and less need for children to carry cash.

7. Clauses 26 to 28 of the Bill makes provision to **regulate the use of children's biometric information** by placing a duty on schools and colleges to obtain written parental consent before any biometric information can be obtained from a child under the age of 18 (there are however exceptions to the consent requirement). If permission of each parent is not forthcoming the school or college is prohibited from obtaining any biometric information from the child. Provision is also made in the Bill to ensure that the wishes and feelings of the child are respected (regardless of a child's age or understanding). A child therefore has a right to refuse to participate, or to continue to participate, in any process that involves the processing of his or her biometric information and any such refusal will override parental consent.

8. Conversely where written parental consent is not received no biometric information can be taken by the school or college even if the child is willing to participate. The Bill makes it clear that parental consent may be withdrawn at any time and that consent must be given (and withdrawn) in writing. Where a parent refuses consent or the child objects, the school or college will be under a duty to make reasonable alternative arrangements for the child to be able to access the same facilities and services as children who do so via a biometric identification system.

9. These provisions fall within the National Assembly's legislative competence under Part 1 of Schedule 5 to the Government of Wales 2006 ('GOWA 2006') in relation to the following Matters:

- (i) Matter 5.2A – conduct and governance of schools maintained by local authorities;
- (ii) Matter 5.4A – the regulation of schools that are not maintained by local authorities;
- (iii) Matter 5.5 – school attendance, the behaviour of pupils at school, school discipline and the exclusion of pupils from school;

- (iv) Matter 5.8 – Provision about the provision of services that are intended to encourage, enable or assist people to participate effectively in education or training;
- (v) Matter 5.9 – food and drink provided on school premises;
- (vi) Matter 5.10 - arrangements for persons to travel to and from the places where they receive education or training.
- (vii) Matter 5.11 – Provision for and in connection with securing the provision of facilities for post-16 education or training;
- (viii) Matter 5.12 – provision about the conduct and functions of further education institutions and bodies that conduct such institutions;
- (ix) Matter 5.18 – The provision of facilities for social or physical training or educational activities for children or young persons;
- (x) Matter 15.2 - Functions of public authorities relating to safeguarding children from harm and neglect; safeguarding and promoting the well-being of vulnerable children; reducing inequalities in well-being between children or young persons; and
- (xi) Matter 15.6 - Co-operation and arrangements to safeguard and promote the well-being of children or young persons

10. The UK coalition Government announced in June 2010 a remodelling review of the **Vetting and Barring Scheme (VBS)** to “bring it back to common sense levels”. As a result, the Protection of Freedoms Bill will make amendments to the Safeguarding Vulnerable Groups Act 2006 which laid the foundations for the scheme.

11. VBS was designed in response to the Bichard Inquiry following the Soham murders, which called for checks to be brought in for people who work with vulnerable groups. The VBS was expected to become fully operational in July 2010.

12. Key recommendations stemming from the remodelling review include:

- the retention of a central barring function to prevent unsuitable people working children and vulnerable adults.
- Scaling back the scope of the scheme by redefining “regulated activities”, - the range of activities to which barring applies.
- Criminal records disclosures will continue to be available to employers / voluntary bodies whose staff work within the current definition of regulated activities but are excluded from the new definition.
- There will be no registration or ongoing monitoring under the new scheme.

13. The category “controlled activities”, which provides the opportunity for limited contact with children or vulnerable adults or the opportunity to have access to sensitive records, which Welsh Ministers have regulation making powers in relation to, will also be abolished.

14. The Welsh Assembly Government is keen to ensure that the safety of children and vulnerable adults is the primary consideration of the remodelled scheme and will continue to work towards promoting and safeguard these groups both within and outside any proposed scheme. Welsh Ministers are keen to ensure there remains consistency in the operation of the scheme in England and Wales. Where possible however the Assembly Government has sought to strengthen safeguarding arrangements for the people of Wales.

15. The National Assembly has competence in relation to Matter 15.2 (as set out in paragraph 9 (x) above) and 15.6 (as set out in paragraph 9 (xi) above). It is the view of the Assembly Government that taking these two matters together it is within the competence of the Assembly to set up some sort of barring and vetting scheme which could apply in Wales in relation to children and young persons within the 18-25 age group. The Assembly does not have such competence in relation to vulnerable adults in general. To the extent that the Bill makes provision to amend the vetting and barring scheme as it currently applies in Wales in relation to children and under 25's those provisions are within the competence of the National Assembly

16. Chapter 1 of Part 3 of the Bill makes provision in respect of **powers to enter land or other premises**. The provisions enable Welsh Ministers to make orders, to repeal unnecessary powers of entry, add safeguards in respect of the exercise of such powers, or replace such powers with new powers subject to additional safeguards. A power is also conferred upon the Welsh Ministers to issue a Code of Practice about Welsh devolved powers of entry and associated powers.

17. The Government of Wales Act 2006 (GOWA 2006) sets out Matters about which the Assembly can pass Measures. Given the Bill's cross-cutting subject matter, the relevant power of entry provisions have the capacity to affect a number of "subject areas" which are within the Assembly's legislative competence. For example, the Assembly's legislative competence under Matter 1.1 in Part 1 of Schedule 5 of GOWA 2006 is wide enough to allow a Measure to contain relevant provisions relating to "powers of entry." Such a power of entry was created in the Red Meat (Wales) Measure 2010. Other matters where the Assembly may also have wide legislative competence to create powers of entry would be in the case of education and training and social welfare.

18. To the extent that the Assembly has the competence to create powers of entry, it would be able to repeal, add safeguards to, or replace such powers with new powers subject to additional safeguards. It is also considered that this competence is wide enough to issue a powers of entry code in respect of any existing powers of entry, insofar as those powers of entry relate to matters falling within the Assembly's legislative competence.

19. It is the view of the Welsh Assembly Government, therefore, that, to the extent outlined in this Memorandum, the provisions in the Bill fall within the National Assembly's legislative competence and the agreement of the National Assembly is required under SO 26.

Advantages of utilising this Bill

20. It is the view of the Welsh Assembly Government that it is appropriate to deal with these provisions in this UK Bill as it represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales and to ensure the consistency in the operation of the Vetting and Barring Scheme in England and Wales.

Financial Implications

21. There are no anticipated financial implications for the Welsh Assembly Government of any subsequent implementation of the relevant provisions of the Protection of Freedoms Bill which cannot be absorbed as part of existing obligations.

Carwyn Jones AM
First Minister
March 2011