These notes refer to the Offender Management Act 2007 (c.21) which received Royal Assent on 26 July 2007

OFFENDER MANAGEMENT ACT 2007

EXPLANATORY NOTES

EUROPEAN CONVENTION ON HUMAN RIGHTS

202. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before the Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The then Minister of State for the Home Department (the Department responsible for introducing the Bill, since which time responsibility has passed the Ministry of Justice), Baroness Scotland of Asthal, made the following statement:

""In my view the provisions of the Offender Management Bill are compatible with the Convention rights."

Part 1 –New arrangements for the provision of probation services

203. Sections 1 to 13 and section 15 abolish local probation boards and give the responsibility for providing probation services to the Secretary of State. These are the legislative provisions necessary to enable the Secretary of State to commission probation services from the best available provider, whether in the public, private or voluntary sectors. Probation trusts will be established as the public sector provider with whom he may contract. Section 13 deals with approved premises. The Government expects that most services commissioned under section 3(2) will be regarded as "public functions" for the purposes of section 6 of the Human Rights Act 1998. It is not considered that these sections give rise to any other ECHR issues.

204. Section 14 enables the Secretary of State, providers of probation services and their officers, to share information with each other or with any of the following: other Government Departments; relevant Local Authorities; the Youth Justice Board; the Parole Board; relevant contactors including private prisons; a chief officer of police; any person responsible for electronically monitoring an individual, and any other person specified or described in regulations made by the Secretary of State. The power applies where it is necessary or expedient for certain specified purposes.

205. Disclosure of information relating to individuals is capable, in individual cases, of engaging the Government's obligations under article 8 of the ECHR (right to respect to private life). The power created by the clause is compatible with those obligations. This is because the clause creates a power to disclose information, not a duty to do so. Accordingly, the party proposing to disclose is able to refrain from doing so if he considers that such a disclosure would amount to an unlawful interference with an individual's article 8 rights. That the clause enables disclosure of information where it is expedient to do so does not undermine the obligation to ensure that a particular disclosure is necessary in pursuit of a legitimate aim in those cases where Article 8 is engaged and interference with that right has been established.

Part 2 – Prisons

206. *Powers of search etc.*Sections 16 and 18 confer new powers of search upon prisoner custody officers working in contracted out prisons. It is possible that the exercise of these new powers might engage the "right to respect for private life" limb of article 8 ECHR. Such an issue is most likely to arise in relation to exercise of new search powers or where the exercise of these new powers might engage the "correspondence" limb of article 8 ECHR, e.g. where the exercise of the new power authorises the performance of an activity which requires the supervision or observation of a prisoner in the prison or his communications with the outside world. However, it is considered that any interference with the right to respect for private life occasioned by these new powers would be in accordance with the law (because of the provision the Bill makes and also the fact that the procedures adopted will mirror those already operated in public sector prisons, and which have already been found to satisfy the procedural requirements of the ECHR by the European Court of Human Rights). Further, the use of these powers would be justified by reference to a legitimate aim – that of maintaining good order, protecting the health and security of prisoners and others and, possibly, preventing the commission of a crime. The question of whether any interference is proportionate will always depend on the circumstances of each case.

207. *Powers to detain*. Section 17 amends the Criminal Justice Act 1991 and the Criminal Justice and Public Order Act 1994 to enable a prisoner custody officer, or a custody officer, to require a person to wait with him for a period no longer than is necessary for a constable to arrive and, in any event, for no longer than two hours. The Government considers that this requirement to wait does not amount to a deprivation of liberty and therefore does not engage article 5 of the ECHR (the right to liberty and security).

208. However, even if this were not the case and article 5 was engaged, the power does not of itself breach any of the obligations under article 5 in any event. Firstly, the Government takes the view that detention is authorised by Article 5(1)(b) which enables a deprivation of liberty "in order to secure the fulfilment of any obligation prescribed by law". In the Government's view a requirement to submit to a search in accordance with the Prison Rules is an obligation prescribed by law as referred to in Article 5(1)(b). Detention may be required in certain circumstances in order to enable a constable to attend a prison to ensure that a visitor fulfils the obligation that a search be carried out.

209. In addition, Article 5(1)(c) permits an interference with the right to liberty guaranteed by article 5, where that interference is "effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". The power provided for in the Bill is squarely within this limb of article 5, as it is clear from the express wording of the section that a requirement to wait can be imposed by a prisoner custody officer or custody officer only where that officer has reason to believe that a person has committed a prison offence.

210. *Prison adjudication powers*. Section 19 enables a director of a contracted out prison to inquire into a disciplinary charge against a prisoner and to order the removal of a prisoner from association with other prisoners, temporarily confining him or imposing any control or restraints. It is not considered that this gives rise to any ECHR issues as the procedures used are not in themselves new and will simply mirror those already in use in public sector prisons.

211. *Conveyance of prohibited articles into or out of a prison*. Section 22 amends the law relating to taking prohibited articles into and out of a prison by replacing section 40 of the Prison Act 1952 with new sections 40A to C. The new section 40B prohibits the conveyance of illegal articles like drugs, explosives and weapons; the Government takes the view that this therefore would be unlikely to engage ECHR rights.

212. The new section 40C prohibits the conveyance of, amongst other things, cameras, sound-recording devices and mobile phones as well as any other article prescribed by prison rules. These offences will only be committed if the person is acting without

authorisation. The Government is of the view that the new section 40C may engage and interfere with rights under Article 10 of the ECHR. However, the Government believes that the interference would be justified for the following reasons:

- the protection of the security, good order and effective running of the prison;
- the protection of the rights of prison staff and prisoners and visitors;
- the protection of health and morals;
- the prevention of crime or disorder;
- the protection of the integrity of the trial process by avoiding prejudicial media coverage; and
- the protection of the public.

213. Further, new section 40C provides a defence of overriding public interest in relation to list B or C offences. This is intended to maintain the right to bring to a court's attention a serious failure by a prison such as the mistreatment of prisoners.

214. *Other offences relating to prison security.* Section 23 inserts new section 40D into the Prison Act 1952. It creates the offences of taking a photograph or making a sound-recording inside a prison, or the transmission of images or sound. This section also creates an offence of removing or transmitting a restricted document from a prison. Both of these offences are only committed if the person is acting without authorisation. The Government is of the view that the new section 40D may engage Article 10 of the ECHR but that this is justifiable for the same reasons as for new section 40 D. Again, this new section also provides a defence of overriding public interest.

215. *Abolition of requirement for a medical officer*. Section 22 provides that it is no longer a requirement for there to be a medical officer for every prison. The reason for this change is because the provision of medical care is now contracted out to primary care trusts and the role of medical officers has become redundant. The transfer of services to the NHS complies fully with the European Prison Rules and the UN Basic Principles for the Treatment of Prisoners. It raises no ECHR issues.

Part 3 – Other provisions about offender management

216. *Polygraph condition*: Sections 24, 25 and 26 provide the Secretary of State with the power to impose a mandatory polygraphy test condition on the licences of certain released sex offenders. A proposal to conduct mandatory polygraph tests for certain prisoners as a condition of their release on licence is capable of engaging Article 8 ECHR (the right to respect for private life).

217. The Government takes the view that, where such a condition is imposed, the clear benefits for effective offender management will ensure that any interference with an Article 8 right will be necessary in pursuit of a legitimate aim (i.e. the interests of public safety and for the protection of the rights and freedoms of others) for the purposes of Article 8(2). That is particularly the case, given that polygraphy test conditions will only be imposed upon a specific class of serious offender i.e. adults sentenced to 12 months or more for certain sexual offences.

218. The Government takes the view that its conclusion is bolstered by the limited use to which test results will be put in practice, along with the prohibition contained in the section which limits its use in criminal proceedings in which the offender is the defendant.

Part 4 – Supplemental

219. The provisions in Part 4 of the Bill do not give rise to any ECHR issues.