

*These notes refer to the Lords Amendments to the Protection of Freedoms Bill  
as brought from the House of Lords on 12 March 2012*

# PROTECTION OF FREEDOMS BILL

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## EXPLANATORY NOTES ON LORDS AMENDMENTS

### INTRODUCTION

1. These Explanatory Notes relate to the Lords Amendments to the Protection of Freedoms Bill as brought from the House of Lords on 12 March 2012. They have been prepared by the Home Office in order to assist the reader of the Bill and the Lords Amendments, and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes, like the Lords Amendments themselves, refer to HL Bill 99, the Bill as first printed for the Lords.
3. These Notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords Amendments.
4. All of the Lords Amendments were tabled in the name of the Minister, except for **Lords Amendments 16\* to 18\*** which were opposed by the Government. In the following Commentary, an asterisk\* appears against those amendments dealing with the non-Government amendments.

### COMMENTARY ON LORDS AMENDMENTS

#### *Lords Amendments to Chapter 1 of Part 1: Destruction, Retention and Use of Fingerprints Etc.*

5. For the purposes of clause 3, ‘vulnerable adult’ is defined by reference to the Safeguarding Vulnerable Groups Act 2006 (SVGA). As a result of clauses 65 and 66, the definition in the SVGA will no longer define an adult as permanently vulnerable and will instead emphasise that an adult is vulnerable at the time they are being provided with a specified activity that they require, known as regulated activity, (such as health or social care) and will instead focus on the person providing the regulated activity.

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This means that the SVGA will no longer attempt to define vulnerability or label a person as permanently vulnerable. This definition is therefore no longer appropriate for the purposes of clause 3, which seeks to define when an alleged victim is vulnerable. **Lords Amendment 1** would therefore import the definition used in the Domestic Violence, Crime and Victims Act 2004 (2004 Act), which states that a vulnerable adult is a person “whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise”. The definition in the 2004 Act applies to those aged 16 or over; the definition in this amendment applies to those aged 18 or over, as all those under the age of 18 are already within the scope of the new section 63G(2)(a) of the Police and Criminal Evidence Act 1984 (PACE), as inserted by clause 3.

6. The Bill currently provides that all DNA samples must be destroyed within six months of the sample being taken. **Lords Amendment 2** to clause 14 and **Lords Amendments 70 and 71** to Schedule 1 would enable the retention of the DNA samples in a case for a longer period in certain circumstances where it appears to a chief officer of police that, in relation to an investigation into a serious offence, it is necessary to ensure that key evidence remains available for disclosure to the defendant or to respond to an evidential challenge by the defendant. In such cases, the decision to extend the permissible retention period would fall to a district judge following an *ex parte* application made by the chief officer. If such an application were approved, the judge would authorise retention of the material for an initial period of 12 months which would be extendable, on one or more occasions, following a further (*inter partes*) application by the relevant chief officer. Where material is retained under this provision, it would only be available for use in that case and not in connection with the prevention and detection of crime more generally. The police would have a duty to notify all those whose samples were retained of the fact of an initial order and, in the normal way, of the application for and outcome of a subsequent application.

7. **Lords Amendment 3** to clause 17 would provide that material taken under the regimes in the International Criminal Court Act 2001 and the Terrorism Prevention and Investigation Measures Act 2011 are not subject to the retention and destruction rules in PACE but to the rules in those Acts.

8. **Lords Amendments 4 and 5** to clause 18 would provide that, in respect of a DNA profile, the responsible chief officer is the one whose force took the original sample, rather than the one in whose force area the forensic science laboratory is located.

9. **Lords Amendment 6** to clause 21 would remove a definition of the phrase ‘law enforcement authority’ which is not used elsewhere in that clause.

10. New section 63U(3) inserted by clause 17 provides that section 63D material

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need not be destroyed where it may fall to be disclosed under the Criminal Procedure and Investigations Act 1996 or its Code of Practice. **Lords Amendment 72** to Part 1 of Schedule 1 would make the same provision for material taken from a person detained under section 41 of the Terrorism Act 2000.

11. **Lords Amendments 73, 74, 76 and 78 to 92** to Part 3 of Schedule 1 would clarify the application of the provisions which govern the retention and destruction of DNA and fingerprints held by a law enforcement authority that are not subject to existing statutory restrictions (known as “section 18 material”).

12. **Lords Amendment 73** would ensure that section 18 applies only to biometric material that is held by a law enforcement authority under the law of England, Wales or Northern Ireland, that is not subject to existing statutory restrictions, and is held for the purposes of national security. **Lords Amendment 79** would correct the current reference to section 1(2) of the Intelligence Services Act 1994 to section 2(2) of that Act.

13. The retention regime provided for in new section 18 of the Counter-Terrorism Act 2008 does not apply to fingerprints, DNA samples and DNA profiles that are subject to “existing statutory restrictions”. **Lords Amendments 74 to 78, 80 and 81** would extend the list of “existing statutory restrictions” in new section 18(8) to include material taken under: paragraph 18(2) of Schedule 2 to the Immigration Act 1971; section 22 of PACE and any corresponding provision in an order made under section 113 of PACE; Article 24 of PACE (Northern Ireland) Order 1989; section 56 of the Criminal Justice and Police Act 2001; paragraph 8 of Schedule 4 to the International Criminal Court Act 2001; sections 73, 83, 87, 88 and 89 of the Armed Forces Act 2006 and any provision relating to the retention of material in an order made under section 74, 93 or 323 of that Act; and the Terrorism Prevention and Investigation Measures Act 2011.

14. **Lords Amendments 82 and 83** would provide for the indefinite retention of material obtained under section 18 of the Counter-Terrorism Act 2008 which is anonymous.

15. **Lords Amendment 84** would remove paragraphs 6(4) and 7 from Schedule 1 which amend section 19C of the Criminal Procedure (Scotland) Act 1995 and section 56 of the Criminal Justice (Scotland) Act 2003 respectively. The changes to these Acts are no longer required as the Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions and Modifications) Order 2011 has now made the required amendments to the relevant sections of the 1995 and 2003 Acts. **Lords Amendments 134 and 135** to Schedule 10 are consequential upon **Lords Amendment 84**.

16. **Lords Amendments 85 to 88** to Part 7 of Schedule 1 would bring into line with the rest of the United Kingdom the purposes (including speculative searches) for which a person’s section 63D material may be used that has been taken and retained under the PACE (Northern Ireland) Order 1989 pursuant to a national security

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determination.

17. **Lords Amendments 89 to 92** to Part 8 of Schedule 1 would ensure that the Secretary of State's order-making power in relation to Northern Ireland includes provision in respect of a transferred matter, where that matter is ancillary to a reserved or excepted matter.

18. **Lords Amendments 114, 115 and 136** to Schedules 9 and 10 would repeal in England, Wales and Scotland, the uncommenced section 22 of the Crime and Security Act 2010 (2010 Act), which makes similar transitional provisions in respect of biometric material taken before the commencement of that Act to that contained in clause 25. The Bill already repeals sections 14, 16 to 19, 21 and 23 of the 2010 Act.

***Lords Amendments to Chapter 2 of Part 1: Protection of Biometric Information of Children in Schools Etc.***

19. **Lords Amendments 7 to 9** to clause 26 would remove the requirement that the consent of each parent is necessary before a child's biometric information can be taken and processed and would replace it with a requirement for schools and colleges to notify all parents of a child (which includes any individual who is not a parent but who has parental responsibility for the child) that they intend to take and process the child's biometric information and that parents may object, in writing, to the processing. As long as no parent objects to the processing, the written consent of only one parent will be required.

20. **Lords Amendments 10 to 13** to clause 27 would have the effect that the circumstances in which the relevant authority (the school or college) is not required to notify a parent are the same as those in which the consent of a parent would not be required.

21. The effect of **Lords Amendment 14** to clause 28 would be to require that where none of the parents of a child can be notified or their consent obtained then notification must be sent to all those caring for the child and written consent must be obtained from at least one carer.

***Lords Amendments to Part 2: Regulation of Surveillance and Part 3: Protection of Property from Disproportionate Enforcement Action***

22. **Lords Amendments 15, 24 and 93** would clarify the meaning of the 40-day period for the Parliamentary approval of any alteration to, or replacement of, the surveillance camera code of practice and the powers of entry code of practice for the purposes of clauses 31 and 49 respectively. These amendments would provide that "the 40-day period" for the purposes of the negative resolution procedure would apply to the alteration of either code as well as to any replacement of those codes (clauses 31(8) and 49(8)).

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23. **Lords Amendments 16\* to 18\*** to clause 40 would provide that any power of entry may only be exercised either with the agreement of the occupier of the premises or by warrant, unless the authority using the power “can demonstrate that the aim of the use of the power would be frustrated if a warrant or agreement were sought”. This restriction is disapplied where the power of entry is being exercised by a Trading Standards Officer, a constable or member of the Security Service, or in pursuance of the protection of a child or a vulnerable adult.

24. **Lords Amendments 19 and 20** to clause 44 would clarify that any order made by the Welsh Ministers under clauses 39(1), 40 or 41 (repeal of powers of entry etc.) which is subject to the negative resolution procedure can only be made using that procedure if it does not amend or repeal a provision in a UK Act or in a Measure or Act of the National Assembly for Wales.

25. **Lords Amendments 21 to 23 and 116** to clauses 45, 47 and Schedule 9 would ensure that the Secretary of State’s order and code making powers in clauses 45 and 47 (powers of entry) and the new order-making power inserted into the Regulation of Investigatory Powers Act 2000 by clauses 37 and 38 and Schedule 9 may make provision in respect of a Northern Ireland transferred matter, where it is ancillary to a reserved or excepted matter.

26. **Lords Amendments 25, 26 and 94** to clause 51 and Schedule 3 would provide that an order made by the Secretary of State to specify or describe a “relevant person” for the purposes of the powers of entry code would, in the first use of the power, be subject to the affirmative resolution procedure. The amendment to Schedule 3 would make an equivalent change to the parallel order-making power exercisable by the Welsh Ministers.

27. **Lords Amendments 95 to 97** to paragraphs 7, 8 and 9 of Schedule 4 would provide that any notice issued by the creditor to recover unpaid parking charges must include the full details of any available arrangements for the resolution of disputes and complaints, including those arrangements that are independent of the creditor (landowner or parking contractor). **Lords Amendment 100** to paragraph 14 of Schedule 4 would make similar provision in relation to hire vehicles.

28. **Lords Amendments 98 and 99** to paragraph 13 of Schedule 4 would amend the definition of ‘hire agreement’ in relation to hire vehicles so as to include vehicles leased for longer than a six month period.

#### ***Lords Amendments to Part 4: Counter-Terrorism Powers***

29. **Lords Amendments 27 and 28** relate to the process by which an order to temporarily increase the maximum period of pre-charge detention from 14 to 28 days (when Parliament is dissolved or before the first Queen’s speech after a general election) may be made and revoked. **Lords Amendment 27** to clause 58 would require a draft of an order to be laid before Parliament (once it has reassembled

following a general election). **Lords Amendment 28** would provide that any order revoking the temporary extension is not subject to any parliamentary procedure.

30. **Lords Amendment 29** to clause 61 would insert the word “reasonably” to clarify that, when a senior chief officer makes an authorisation to allow a constable in uniform to stop a vehicle or pedestrian in order to search for anything that may constitute evidence that a person is a terrorist, or that the vehicle is being used for the purposes of terrorism, the senior chief officer must not only ‘reasonably’ suspect that an act of terrorism will take place, but the officer must also ‘reasonably’ consider that the authorisation is needed to prevent such an act. **Lords Amendment 101** to Schedule 6 would make the same change in respect of the powers in Northern Ireland.

***Lords Amendments to Part 5: Safeguarding Vulnerable Groups, Criminal Records Etc.***

31. **Lords Amendments 30 and 31** to clause 64 would amend the definition of ‘day to day supervision’ of a worker (who would, if unsupervised, be in regulated activity) so that the level of day to day supervision must be ‘reasonable in all the circumstances for the purpose of child protection’. **Lords Amendments 102 and 103** would make equivalent changes to Schedule 7 in respect of Northern Ireland.

32. **Lords Amendments 32 and 104** to clause 66 and Schedule 7 would bring within the scope of regulated activity all work carried out by chiropodists and podiatrists. The current drafting in the Bill excludes nail care provided by such professionals from regulated activity.

33. **Lords Amendments 33 to 36** would amend clause 67 to provide that where a person meets the criteria for automatic barring by the Independent Safeguarding Authority (ISA) without the right to make representations, that person will continue to be barred automatically by the ISA in all circumstances, even if that person has no link to regulated activity. **Lords Amendments 105 to 108** to Schedule 7 would make the equivalent changes in Northern Ireland. **Lords Amendments 120 and 121** are consequential upon those amendments.

34. **Lords Amendments 63, 117, 119, 138, 140** are consequential upon the proposed abolition of controlled activity, which is provided for by clause 68.

35. **Lords Amendments 118 and 139** to Schedules 9 and 10 are consequential upon the proposed abolition of monitoring, which is provided for in clause 69.

36. Clause 77(4) provides that the ISA must, on request, provide to the police information as to whether a person is barred, if that information is needed in connection with one of a number of specified purposes. **Lords Amendments 37 and 38** would provide that the ISA must also provide to the police on request either or both of the entire barred lists held by the ISA. **Lords Amendments 109 and 110** to Schedule 7 would make equivalent changes in Northern Ireland. Clause 77(4) also

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provides that the ISA must, on request, provide to the Secretary of State (in practice, the Prison Service) or to the Probation Service, information as to whether a person is barred, if that information is needed in connection with the protection of children or vulnerable adults. **Lords Amendments 39 and 111** would ensure that the ISA cannot provide the whole barred list in those circumstances.

37. **Lords Amendment 40** to clause 79 would insert a new section 120AC into the Police Act 1997 to provide for registered bodies to continue to be able to track online progress of an application for a criminal record certificate or enhanced criminal record certificate, including whether it has been issued. This new section would also provide for a registered body to be informed that the certificate does not contain any relevant information when that is the case. **Lords Amendment 47** would make the same arrangements for update certificates. **Lords Amendments 122, 129, 130 and 131** to Schedule 9 would be consequential upon **Lords Amendment 40**.

38. Clause 79(2) provides that the Secretary of State, in practice the Criminal Records Bureau (CRB), will in future send criminal record certificates and enhanced criminal record certificates only to applicants, rather than also to registered bodies, as is the case now. A registered body is typically a large employer or voluntary organisation responsible for counter-signing applications for criminal record certificates or enhanced criminal record certificates. **Lords Amendment 40** would also provide that the CRB must in certain circumstances send a copy of the certificate to the registered body. Those circumstances would be where the new updating service has advised that a new certificate should be applied for, such a certificate is applied for and, within a prescribed period, the applicant does not send a copy of that certificate to the relevant person. A copy would be sent only if the registered body makes a request for it within a prescribed period and no prescribed circumstances apply.

39. **Lords Amendment 125** to Schedule 9 would amend the Police Act 1997 to provide that, when the CRB makes a request to the police to provide relevant police information in connection with the operation of the updating service, the police must comply with such a request as soon as possible.

40. **Lords Amendments 128 and 142** to Schedules 9 and 10 would remove from subsection (4) of section 124 of the Police Act 1997 the redundant references to subsection (5), which is being repealed by clause 79.

41. **Lords Amendment 41** would insert a new clause after clause 80 which would allow for the CRB to refuse to register a 'registered body' (this is typically a large employer or voluntary organisation responsible for counter-signing applications for criminal record certificates or enhanced criminal record certificates) in circumstances where a registered body has previously been de-registered or had their registration suspended as a result of their failure to pay any fees or other breach of the conditions of CRB registration. **Lords Amendments 127 and 141** to Schedules 9 and 10

respectively are consequential upon **Lords Amendment 41**.

**42. Lords Amendments 42 and 43** to clause 81 would ensure consistency with other provisions in Part 5 of the Police Act 1997, by requiring a person acting on behalf of an applicant who disputes the accuracy of the information contained on that person's enhanced criminal record certificate, or a person who applies to the independent monitor in connection with information contained on such a certificate, to do so in writing.

**43. Lords Amendments 44 to 46** to clause 82 and **Lords Amendments 123 and 124** to Schedule 9 would clarify the processes under the new continuous updating arrangements. **Lords Amendments 44 to 46** would ensure that where a person successfully disputes the accuracy of information in a criminal record certificate or an enhanced criminal record certificate and a new certificate is issued by the Secretary of State (in practice the CRB), then in circumstances where the applicant has agreed to be subject to the updating arrangements, those arrangements will continue with the issuing of the new certificate. **Lords Amendment 123** would extend the power of the CRB (and in future the new Disclosure and Barring Service) to require fingerprints from a person at any stage during the updating process to ensure that the correct information (such as a record of a new conviction) has been assigned to the correct individual. **Lords Amendment 124** would provide that the CRB can access barred list information for the purposes of providing updated certificates.

**44. Lords Amendment 126** to Schedule 9 would extend the functions of the independent monitor appointed under section 119B of the Police Act 1997 to review police information that is disclosed for the purposes of the new updating arrangements.

**45. Lords Amendment 143** would repeal spent provisions in the Safeguarding Vulnerable Groups Act 2006, which amended sections 114 and 116 of the Police Act 1997.

**46. Lords Amendment 48** would introduce a new clause before clause 84 which would amend section 27 of PACE to provide for a statutory basis to record cautions on the Police National Computer in a similar manner to that of convictions.

**47. Lords Amendments 112 and 113** to Schedule 8 would provide an additional condition to the terms of the appointment for members of the Disclosure and Barring Service. The amendments would provide that the Secretary of State may remove from the Disclosure and Barring Service, any appointed member who is subject to a debt relief order, an interim debt relief restrictions order, or the Northern Ireland equivalent of such an order.

#### ***Lords Amendments to Part 7: Miscellaneous and General***

**48. Lords Amendments 49 and 50** would introduce two new clauses in Part 7 of



the Bill. These amendments would make the necessary legislative changes to enable implementation of the criminal law aspects of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating the trafficking of human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA. **Lords Amendment 49** would insert a new clause which combines into a single integrated offence the existing offences in sections 57 to 59 of the Sexual Offences Act 2003 (which make it an offence to traffick a person into, within or out of the UK for purposes of sexual exploitation) whilst adding the provisions necessary to be able to prosecute a UK national regardless of where the arrangement or facilitation of the trafficking takes place and regardless of where in the world the trafficking occurs or is intended to occur. **Lords Amendment 50** would provide for equivalent changes to existing offences of trafficking persons for the purpose of labour and other exploitation. **Lords Amendment 50** would also criminalise trafficking which takes place wholly within the UK by removing the requirement that the defendant must believe that the victim may previously have been trafficked into the UK. **Lords Amendment 132** to Schedule 9 would make consequential amendments to other enactments which refer to sections 57 to 59 of the Sexual Offences Act 2003; **Lords Amendments 57, 58, 60 and 144** would make consequential amendments to the extent clause, the repeals Schedule and the long title. **Lords Amendment 55** would amend clause 112 so that the changes made by **Lords Amendment 50** may be extended to the Channel Islands and the Isle of Man by Order in Council. The estimated costs to the Criminal Justice System arising from the new clauses in respect of the trafficking of people for the purposes of sexual and other exploitation are £0.8m per annum from the year 2013/14.

49. **Lords Amendment 51** would insert a new section 2A and a new section 4A into the Protection from Harassment Act 1997 creating two new offences of stalking and stalking involving fear of violence respectively. New section 2A would be a summary only offence and new section 4A an either way offence, the maximum penalties for which would mirror those in sections 2 and 4 of the Protection from Harassment Act 1997.

50. **Lords Amendment 52** would insert a power of entry into the Protection from Harassment Act 1997 in relation to the new section 2A offence of stalking. It would confer on the police a power, subject to the authorisation of a magistrate, to enter and search premises if there are reasonable grounds for believing that there is material on the premises which is likely to be of substantial value to an investigation into the summary only offence of stalking. The power would allow police to seize and retain property found by them on those premises and for which a search has been authorised.

51. **Lords Amendment 133** to Schedule 9 would amend the offence in section 32 of the Crime and Disorder Act 1998 to include the new offences and add the new offences to the list of offences in Schedule 5 to the Sexual Offences Act 2003. It would also add the new power of entry to the list in Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001; and add the offence in new section 4A to the list of violent offence in Schedule 15 to the Criminal Justice Act 2003. **Amendments**

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**59 and 68** are consequential upon **Amendments 51 and 52**.

52. **Amendments 53 and 54** to clause 110 would confer on the Welsh Ministers a power to make transitional, transitory and saving provisions in respect of those provisions in the Bill to be brought into force by Welsh Ministers. This order-making power mirrors the existing power conferred on the Secretary of State.

53. **Amendments 61, 62, 64 and 65** would make consequential amendments to the extent provisions (clause 113) as a result of other Lords Amendments.

54. **Amendments 67 and 69** to clause 113 would provide that the Bill adopts the usual drafting practice in respect of the application of certain provisions in the Bill, most notably clause 112, to the Channel Islands and the Isle of Man. **Amendments 56 and 66** to clause 113 would limit the extent of the powers of entry code of practice to be issued by the Welsh Ministers (clause 53 and Schedule 3 refer) to England and Wales only. **Amendment 137** to Schedule 10 would provide that the repeal of the power of entry in the Milk (Cessation of Production) Act 1985 extends to England and Wales only. **Amendment 145** is consequential upon **Amendments 49 to 52** and would amend the long title.

# PROTECTION OF FREEDOMS BILL

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Bill as brought from the House of Lords on 12 March 2012 [Bill 317]*

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