These notes refer to the Lords amendments to the Anti-social Behaviour, Crime and Policing Bill as brought from the House of Lords on 27 January 2014.

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

INTRODUCTION

1. These explanatory notes relate to the Lords amendments to the Anti-social Behaviour, Crime and Policing Bill as brought from the House of Lords on 27 January 2014. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform the debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes refer to Bill HL52, the Bill as first printed for the Lords.

3. These notes need to be read in conjunction with the Lords amendments, the text of the Bill and the Explanatory Notes accompanying the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords amendments.

4. Most Lords amendments were tabled in the name of the Minister. Lords amendments 1 and 5 originate in amendments that were opposed by the Government but subsequently modified by way of Government amendments. On Lords amendments 104, which would insert a new clause *Use of amplified noise equipment in the vicinity of the Palace of Westminster*, and the associated amendment 123, the Government was neutral. Finally, Lords amendment 112 was opposed by the Government.

5. In the following commentary, an asterisk appears in the heading of each of the paragraphs dealing with non-Government amendments.

COMMENTARY ON LORDS AMENDMENTS

Part 1: Injunction to prevent nuisance and annoyance

Lords amendments 1* and 5: Test for grant of an injunction to prevent nuisance and annoyance

6. **Lords amendments 1 and 5** originated in a non-Government amendment made at Report, which was subsequently modified by Government amendments at Third Reading. Their combined effect would be to modify the first limb of the test for the grant of an injunction under Part 1.

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7. The amendments would replace the first limb of the test, which requires that the relevant conduct must be "capable of causing nuisance or annoyance to any person", with a requirement that the conduct "has caused, or is likely to cause, harassment, alarm or distress to any person". However, Lords amendment 5 also provides that the "nuisance or annoyance" test would apply where anti-social behaviour occurs in the context of housing. It includes two scenarios, which encompass social housing, the private rented sector and owner-occupiers. The first is where the applicant is a local authority, housing provider or chief officer of police and the anti-social behaviour relates to the victim's occupation of residential premises. The second is where the anti-social behaviour relates to the housing-management functions of a local authority or housing provider.

8. The second limb of the test for an injunction – that the court considers it just and convenient for the purpose of preventing further anti-social behaviour – would continue to apply.

9. **Lords amendments 14, 66, 68** and **168** make various consequential amendments, including to the definition of anti-social behaviour used in the context of the community remedy (clauses 93 and 94).

Lords amendments 2, 19 and 138: Conflict with a respondent's religious beliefs

10. In response to a recommendation made by the Joint Committee on Human Rights in its fourth and ninth reports (HC713 and HC951), **Lords amendments 2** to clause 1(5), **Lords amendment 19** to clause 21(9) and **Lords amendment 138** to paragraph 2(4) of Schedule 2 would remove the specific requirement that a court avoid, so far as practicable, any conflict between the respondent's religious beliefs and any prohibitions or requirements attached to an injunction under Part 1 or a criminal behaviour order under Part 2. The courts would, however, under the Human Rights Act 1998, have a duty to consider whether prohibitions or requirements were compatible with the respondent's rights under the European Convention on Human Rights.

Lords Amendments 3, 4, 6, 7, 8, 9, 12 and 15: Multiple respondents for an injunction including over and under-18s; defendant attaining the age of 18 after injunction made

11. Applications for injunctions against respondents aged under 18 will be heard by the youth court. **Lords amendments 3** and **4** to clause 1 and **Lords amendment 12** to clause 18 would make provision for cases where one (or more) of the respondents is aged 18 or over and one (or more) is under that age. In such a case the amendments would enable an applicant for an injunction against a respondent aged under 18, to apply at the time of the application to the youth court for permission for the application in respect of the adult(s) to be heard in that court. The youth court would be able to grant the application if it was in the interest of justice. **Lords amendment 6** to clause 7, **Lords amendments 7** and **8** to clause 8 and **Lords amendment 9** to clause 9 would ensure that subsequent proceedings against a defendant who has attained the age of 18 since the injunction was made would take place in the appropriate adult court. **Lords amendment 15** is a consequential amendment.

Lords amendments 10: Power to exclude a person from own home

12. Clause 12 provides that an injunction may include prohibitions that exclude a person from the place they normally live in cases of violence or risk of harm. **Lords amendment 10** to clause 12 would have the effect of exempting under-18s from the effects of this provision, so that a young person could not be excluded from their own home.

Lords amendments 11, 16 and 17: Tenancy injunctions

13. The provisions in Part 1 of the Bill are tenure neutral save for those in clause 13, which makes special provision for tenancy injunctions in respect of respondents who live in social housing. **Lords amendment 11** would remove clause 13 from the Bill. However, in practice, the sanctions and

requirements possible with a tenancy injunction could be included in an injunction under Part 1. **Lords amendments 16** and **17** would make changes consequential on **Lords amendment 11**.

Lords amendments 13, 20 to 22, 25, 35, 43 and 56: Statutory guidance

14. **Lords amendments 13, 20, 21, 22, 25, 35, 43** and **56** would provide for statutory guidance. The new clauses would confer a power on the Secretary of State to issue guidance to the police, local authorities and others in relation to the exercise by them of their functions under Parts 1 to 4 of the Bill.

Part 2: Criminal behaviour order

Lords amendment 18: criminal standard of proof for the criminal behaviour order

15. **Lords amendment 18** to clause 21(3) would provide on the face of the Bill that the criminal standard of proof would apply to proceedings considering the grant of a criminal behaviour order.

Part 3: Dispersal power

Lords amendments 23 and 24: Dispersal powers and freedom of expression and assembly

16. **Lords amendments 23** and **24** to clauses 32 and 34 would provide on the face of the Bill that before authorisation was given permitting the use of the dispersal power in a specified area, the police officer giving such authorisation must have particular regard to the rights of freedom of expression and freedom of assembly. A similar duty would be placed on a constable before issuing a dispersal direction.

Part 4, Chapter 1: Community protection notice

Lords amendments 26 to 28: Defences for failure to comply with a community protection notice

17. **Lords amendments 26, 27** and **28** to clause 45 would remove certain defences for the offence of failing to comply with a community protection notice contained in 45(3) and (4). The grounds of defence to be removed repeat the grounds for appeal against the issue of a notice. Grounds of defence under clause 45(5) will remain.

Lords amendments 29 to 34: Forfeited or seized items resulting from community protection notice

18. Both a local authority and the police can issue a community protection notice (clause 50). If a notice is breached, a court may order forfeiture or seizure of items used in the offence (clauses 47 and 48). A forfeited item must be handed to a constable and disposed of by the relevant police force. Similarly the power to seize items is vested in a constable. **Lords amendments 29** and **30** would allow the local authority to collect forfeited items and dispose of them. **Lords amendments 31** to **34** would provide the local authority with the power to seize items.

Part 4, Chapter 2: Public spaces protection orders

Lords amendments 36, 37, 38 and 42: Duty to consult, Convention rights, etc

19. Before making, varying or extending a public spaces protection order, a local authority (which in this context is a lower tier or local unitary authority) is required to consult the chief officer of police and community representatives as thought appropriate. **Lords amendment 36** to clause 55, **Lords amendment 37** to clause 56, **Lords amendment 38** to clause 57 and **Lords amendment 42** would require the relevant authority to also consult, as far as reasonably practicable, the owner or occupier of the land in question and to inform the county council and any parish or community council before making a public spaces protection order. **Lords amendment 42** would also require a local authority to have

particular regard to the rights of freedom of expression and freedom of assembly before making a public spaces protection order.

Lords amendment 39: Challenging the validity of a public spaces protection order

20. Clause 62 has the effect of blocking persons other than an "interested person" (as defined in that clause) from challenging a public spaces protection order by means of a judicial review. **Lords amendment 39** would ensure that judicial review remains open to persons other than interested persons, such as national bodies.

Lords amendments 40, 41 and 44 to 47: Designated bodies that can issue a public spaces protection order

21. **Lords amendment 41**, which inserts a new clause *Bodies other than local authorities with statutory functions in relation to land*, would allow the Home Secretary to designate by order other bodies, such as the City of London Corporation, who are able to make a public spaces protection order in respect of land that they have the power to regulate by virtue of any enactment. Any public spaces protection order made by a designated body under the provisions of the new clause would not take precedence over a public spaces protection order made by the local authority in whose area the land is situated. But *subsection (6)* of the new clause would allow a body such as the City of London Corporation to give a notice the effect of which would be to ensure that its byelaws took precedence. **Lords amendments 40, 44, 45, 46** and **47** would make consequential amendments to clauses 66 and 67.

Part 4, Chapter 3: Closure powers

Lords Amendments 48 to 55: Service of a closure notice by a local authority

22. **Lords amendments 48** to **55** to clause 72 would allow for local authorities to contract out the service of a closure notice that they have decided should be served. The decision as to whether to issue a notice would remain with the local authority.

Part 5: Recovery of possession of dwelling-houses

Lords amendments 57 and 58: Possession of a dwelling-house

23. Clause 86 introduces a new absolute ground for possession of a dwelling-house let on a secure tenancy by inserting a new section 84A into the Housing Act 1985. Clause 89 introduces a corresponding new ground for possession of a dwelling-house let on an assured tenancy. One of the conditions included in the new ground may be met where a tenant, a person residing in the property or a visitor has been convicted of a "serious offence", defined (for both secure and assured tenancies) as an offence specified in Schedule 2A to the Housing Act 1985 (see subsections (3) and (9) of new sections 84A and condition 1 and the definitions of new ground 7A inserted into the Housing Act 1988 by clause 89). The Secretary of State and Welsh Ministers may amend that Schedule by order (new section 84A(10) and (11)). In response to the Twelfth Report of the Delegated Powers and Regulatory Reform Committee (HL paper 72), **Lords amendments 57** and **58** would make these powers subject to the affirmative resolution procedure.

Lords amendment 59 to 64: Offences connected with riot

24. Clause 91 introduces a new discretionary ground for possession of dwelling-houses let on secure and assured tenancies where the tenant, or a person residing in the dwelling-house, has been convicted of an offence which took place during and at the scene of a riot. **Lords amendments 59 to 64** would limit the operation of this new discretionary ground for possession to cases where the riot-related offence was committed by the tenant or an adult member of the household and only to serious offences, that is, offences triable on indictment.

Part 6: Local involvement and accountability

Lords amendment 65 and 67: Consultation for community remedy

25. When drawing up the community remedy document, Police and Crime Commissioners (and Greater London equivalents) must consult with the chief officer of police for the area, must consult whatever community representatives are considered appropriate and must carry out whatever public consultation is considered appropriate (clause 93). **Lords amendments 65 and 67** to clause 93 would require the Police and Crime Commissioner to consult also with the local authorities in their force area.

Part 7: Dangerous dogs

Lords amendment 69: Keeping dogs under proper control

26. **Lords amendment 69** would increase the maximum penalty for an aggravated offence under section 3 of the Dangerous Dogs Act 1991, currently set at two years' imprisonment and/or an unlimited fine. Its effect would be to amend section 3 of the 1991 Act so that the maximum custodial sentence for the aggravated offence (that is, where a dog is dangerously out of control and injures a person or an assistance dog) would be as follows:

- 14 years' imprisonment if a person dies as a result of the attack;
- 5 years' imprisonment if a person is injured by the attack; and
- 3 years' imprisonment if an assistance dog is either killed or injured.

Part 8: Firearms

Lords amendments 70 and 126: Possession of firearms by persons previously convicted of crime

27. The new clause inserted by **Lords amendment 70** would make two changes to the firearms licensing regime. Under the terms of the Firearms Act 1968, persons who are sentenced to a term of imprisonment of three years or more are never allowed to possess firearms or ammunition, and persons who are sentenced to a term of imprisonment for three months or more but less than three years are banned from possessing a firearm or ammunition until five years have passed since the "date of release". *Subsection (1)* of the new clause would extend this prohibition to people who have been sentenced to a term of three months of more but had their sentence suspended.

28. *Subsection (2)* of the new clause relates to antique firearms. The Firearms Act 1968 includes a number of exemptions to the normal requirement to hold a licence in order to lawfully possess a firearm. One such exception relates to antique firearms possessed as "curiosities or ornaments". Under section 21 of the Act, a "prohibited person" (those with certain criminal convictions) cannot possess firearms, but as a result of the exemption in section 58(2), nothing in the Act (including the prohibition in section 21) applies to antique firearms which are possessed as curiosities or ornaments. *Subsection (2)* of the new clause would close this exemption to prohibited persons.

29. **Lords amendment 126** would provide that the new clause extends to England, Wales and Scotland.

Part 9: Protection from sexual harm and violence

Lords amendments 71 to 75, 116, 119, 139 to 156 and 169: Sexual harm prevention orders and sexual risk orders, etc

30. **Lords amendments 71** and **73** to **75** are consequential on recent amendments to the Sexual Offences Act 2003 made by Northern Ireland legislation.

31. **Lords amendment 155**, on which **Lords amendment 72** is consequential, would enable the courts in Northern Ireland to vary a sexual harm prevention order or sexual risk order made in England and Wales, where the individual subject to the order now resides in or is intending to come to Northern Ireland.

32. **Lords amendments 116 and 119** would provide for a power, exercisable by order made by the Secretary of State, to make consequential amendments to the Sexual Offences Act 2003 arising from amendments to Part 2 of that Act made by the Criminal Justice Act (Northern Ireland) 2013. This is needed because the 2013 Act was unable to make amendments extending beyond Northern Ireland.

33. **Lords amendment 156** to Schedule 5, on which **Lords amendment 139** is consequential, would allow a service court to make a sexual harm prevention order in respect of an individual who has been dealt with by that court. At present, service courts have powers in respect of a sexual offences prevention order but this is replaced by a sexual harm prevention order in England and Wales. The amendment would allow also a service court, on the application of a provost martial or the person in respect of whom the order was made, to vary, renew, or discharge a sexual harm prevention order if that person is subject to service law or service discipline at the time of the application. **Lords amendment 169** would make consequential amendments to the Armed Forces Act 2006 and the Armed Forces Act 2011.

34. **Lords amendments 140, 146, 148** and **151** to Schedule 5 would correct out-of-date references to magistrates' courts commission areas.

35. **Lords amendments 141, 143** to **145, 147, 149, 150** and **152** to **154** to Schedule 5 would provide for an application for a sexual harm prevention order or a sexual risk order made in respect of persons aged under 18 to take place in the youth court; for rules of court to be made to enable linked applications for orders involving individuals aged under 18 and others aged 18 or over to be heard together in the youth court, where the youth court considers this to be in the interests of justice; and for rules of court to be made in relation to individuals who reach the age of 18 after proceedings have begun, including rules prescribing circumstances in which proceedings may or must remain in the youth court and rules about the transfer of proceedings to the magistrates' court.

36. **Lords amendment 142** is a drafting amendment.

Lords amendments 76, 127 and 157: Closure powers in respect of premises used for child sexual exploitation

37. These amendments would extend existing powers in Part 2A of the Sexual Offences Act 2003 ("the 2003 Act") to cover the temporary closure of premises used for child sexual exploitation. The closure power in Part 2A of the 2003 Act operates in a similar way to the new closure powers in Part 4 of the Bill, although the 2003 Act power relates only to prostitution and child pornography offences. The closure powers in the 2003 Act are not therefore available in relation to premises which are used for activities related to other child sex offences, for example rape of a child under 13 and making indecent images of a child.

38. **Lords amendments 76 and 157** would insert new Schedule *Amendments to Part 2A of the Sexual Offences Act 2003* to extend these powers. New section 136BA of the 2003 Act, which would be inserted by the new Schedule, would enable a police officer of at least the rank of superintendent to issue a closure notice where three conditions are met: (i) the officer has reasonable grounds for believing that in the past three months the premises were used for activities related to a specified child sex offence, or the

premises are likely to be used for such activities; (ii) the officer has reasonable grounds for believing that the making of a closure order is necessary to prevent the premises being used for such activities; and (iii) the officer is satisfied that reasonable efforts have been made to consult the relevant local authority, and to establish the identity of any residents or persons who have control of or responsibility for or an interest in the premises. In cases of urgency, where it is not possible to consult the local authority before a closure notice is issued, the authority must be consulted as soon as possible after the closure notice has been issued. A specified child sex offence is defined by reference to the offences in the 2003 Act (these include not just the specific child sex offences in sections 5 to 13 of that Act and offences involving indecent images of children under the Protection of Children Act 1978, but also other sexual offences where the victim is under 18, including rape, sexual assault, abuse of position of trust, and abuse of children through prostitution and pornography).

39. The other existing safeguards in Part 2A of the 2003 Act would continue to apply, in particular the requirement that the court must decide whether or not to make a closure order within 48 hours of the police closure notice being served on the premises to which it relates.

40. **Lords amendment 127** would define the extent of the provisions as covering England, Wales and Northern Ireland. However, **Lords amendment 157** would confine the operation of the new closure powers to England and Wales.

Lords amendment 77 to 79 and 120: Child sexual exploitation at hotels

41. New clause *Information about guests at hotels believed to be used for child sexual exploitation*, inserted by **Lords amendment 77**, would provide a power for the police to require hotels (and other establishments providing accommodation for payment) to provide the name and address, and other prescribed information, to them about guests staying at such premises.

42. *Subsection (1)* confers a power on a police officer, of at least the rank of inspector, to serve a notice on the owner, operator or manager of a hotel that the officer reasonably believes has been or will be used for the purposes of child sexual exploitation (defined in *subsection (7)*) or conduct preparatory to or connected with it. *Subsection (2)* specifies the matters which must be contained in the notice and *subsection (3)* provides that the notice has effect for no more than 6 months. *Subsection (4)* provides that a constable may require a recipient of the notice to provide the constable with the information described in *subsection (5)*; this includes the name and address and other prescribed information about guests (the other prescribed information may be specified in regulations made by the Secretary of State which would be subject to the affirmative resolution procedure (see **Lords amendment 118**)). *Subsection (6)* specifies the requirements with which a notice must comply (for example, it must be in writing). *Subsections (7) and (8)* contain various definitions.

43. New clause *Appeals against notice under section (Information about guests at hotels believed to be used for child sexual exploitation)*, inserted by **Lords amendment 78**, would prescribe a right of appeal. *Subsection (1)* confers a right of appeal to the magistrates' court on a person issued with a notice. *Subsections (2) and (3)* provide that an appeal must be brought within 21 days of the date of issue of a notice and has the effect that any requirement imposed by the notice does not have effect while the appeal is outstanding. *Subsection (4)* prescribes what the court may order on hearing an appeal.

44. New clause *Offences*, inserted by **Lords amendment 79**, would make it an offence (a) to fail without reasonable excuse to comply with a requirement in notice *(subsection (1)*), and (b) to provide in response to a notice incorrect information which a person either (i) fails to take reasonable steps to verify

or (ii) knows to be incorrect. *Subsection (4)* provides that a person guilty of an offence under this clause would be liable on summary conviction to a maximum penalty of a level 4 fine.

45. **Lords amendment 120** provides that these provisions would extend to England and Wales.

Part 10: Forced marriage

Lords amendments 80 to 86: Offence of forced marriage

46. **Lords amendments 80 to 82** relate to the offence of forced marriage where a person lacks capacity to consent. They would ensure that in such cases, the new offence of forced marriage is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage, whether or not the conduct amounts to violence, threats or any other form of coercion.

Lords amendments 83 to 86: Offence of forced marriage: Scotland

47. At the request of the Scottish Government **Lords amendments 83 to 85** to clause 109 would ensure that where a person lacks capacity to consent, the new offence of forced marriage is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage, whether or not the conduct amounts to violence, threats or any other form of coercion. **Lords amendment 86** would increase the maximum sentence from two years to seven years in Scotland bringing it in line with the provision for England and Wales.

Part 11: Policing etc

Lords amendments 87 and 88: Regulations to be prepared or approved by the College of Policing

48. Clause 110 provides, among other things, for the College of Policing to prepare regulations under section 53A of the Police Act 1996, which relates to police practices and procedures. In response to the Twelfth Report of the Delegated Powers and Regulatory Reform Committee (HL paper 72), **Lords amendments 87 and 88** would make such regulations subject to the affirmative resolution procedure.

Lords amendment 89: Charging of fees by the College

49. The new clause inserted by **Lords amendment 89** would regulate the College of Policing's ability to sell products and services of a public nature, for example, police promotion examinations and assessments. The new clause provides that it may charge for these services only to the extent specified by the Home Secretary in secondary legislation, subject to the negative resolution procedure.

Lords amendments 90 to 97: Appointment of chief officers of police

50. Clause 126 amends the eligibility criteria for appointments at the rank of chief constable and the Commissioner of the Metropolitan Police Service to include service at a designated rank in designated countries and police forces. **Lords amendments 90 to 97** would provide that such designations would be recommended by the College of Policing but made by the Secretary of State in secondary legislation subject to the negative resolution procedure.

Lords amendments 98, 99, 121 and 170: Personal samples and DNA profiles

51. Two new clauses would be inserted by **Lords amendments 98 and 99**, to address two issues identified during work to implement the new regime for retention of DNA under the Police and Criminal Evidence Act 1984 ("PACE") as amended by the Protection of Freedoms Act 2012.

52. New clause *Power to take further fingerprints or non-intimate samples*, inserted by **Lords amendment 98**, would allow the taking of fingerprints and DNA in an investigation if the previous prints, samples or profile taken during that investigation had been deleted. PACE currently allows DNA

sampling only once in an investigation. If the Crown Prosecution Service ("CPS") decides not to proceed with a case where the accused person has not previously been convicted or charged with a qualifying offence, that person's DNA must be deleted. However the CPS has now introduced a new procedure, *Victims' Right to Review*, under which an investigation may be restarted. If this is done, there is no power to retake DNA as it has already been taken during the investigation. A successful review of a decision not to prosecute will thus allow no way to retake DNA as it has already been taken during the investigation. The same considerations apply to fingerprinting as to DNA sampling.

53. Under existing legislation, if a person is arrested or charged then released without having had their DNA or fingerprints taken, the police may take them later, but only within the following six months. The consequential amendments to PACE made by **Lords amendment 170** to Schedule 9 to the Bill would apply this principle to the scenario involving retaking above, putting a time limit of six months from the restarting of the investigation on the power to retake DNA or fingerprints.

54. New clause *Power to retain fingerprints or DNA profile in connection with different offence* would be inserted by **Lords amendment 99** and in turn would substitute a new section 63P into PACE. It would make clear that the question as to whether a person should have their DNA retained should be determined by considering their entire criminal history. It would mean that if a conviction in that history allows retention, then DNA may be retained regardless of whether the arrest for which the profile was obtained was itself followed by a conviction. This affects DNA sampling as normally only one DNA sample would be taken from a first arrest and none from any subsequent arrests because that would incur unnecessary costs to obtain the same profile. At present, language in the primary legislation does not clearly achieve this.

55. **Lords amendment 121** would make consequential amendments to the extent provisions.

Lords amendments 100 and 158 to 166: Port and border controls

56. **Lords amendments 158 to 166** to Schedule 8 to the Bill, on which **Lords amendment 100** is consequential, would amend Schedules 8 and 14 to the Terrorism Act 2000.

57. **Lords amendments 162 and 165** together would specify periods for review of detention and aspects of the conduct of reviews. The amendments would provide for detention to be reviewed no later than one hour after the start of detention and subsequent review intervals of no more than two hours. The amendments would also specify that the review officer must give a detained person or their solicitor an opportunity to make representations about their detention, must ensure that the detained person is informed of their rights, must make a written record of the review and must inform the detained person if continued detention is authorised. **Lords amendments 164 and 166** would make provision for statutory codes of practice to be issued for certain functions under Schedules 7 and 8 to the Terrorism Act 2000, including the functions of reviewing officers.

58. **Lords amendments 159 and 160** would clarify the right of a detained person to consult a solicitor in England, Wales and Northern Ireland and in Scotland respectively. They would put the legislative position beyond doubt: that where a person detained for examination requests to consult a solicitor privately he or she may not be questioned until he or she has consulted a solicitor (or no longer wishes to do so) but not if the examining officer reasonably believes that postponing questioning would prejudice the purpose of the examination. The amendments would also clarify that a detained person is entitled to consult a solicitor privately in person (as opposed to by telephone), but not if the examining officer reasonably believes that the time it would take for that consultation would prejudice the purpose of the examination. The entitlement to consult a solicitor in person is not an absolute right. **Lords**

amendments 158 and **161** would make technical consequential amendments to Schedule 8 to the Terrorism Act 2000.

Lords amendment 101 and 172: Serious Fraud Office

59. Clause 133 provides for the inspection of the Serious Fraud Office and amends the Crown Prosecution Service Inspectorate Act 2000 to that end. An Order has been laid before Parliament to abolish the office of the Director of Revenue and Customs Prosecutions and transfer its functions to the Director of Prosecutions (the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014). The Order repeals existing section 2(4) of the 2000 Act. This has drafting implications for clause 133 and for Schedule 9. **Lords amendment 101** to clause 133 and **Lords amendment 172** to Schedule 9 modify those provisions to take account of that Order.

Lords amendment 102, 128 and 134: Investigatory Powers Tribunal oversight of surveillance commissioners

60. **Lords amendment 102** would correct an error in legislation which could mean that the Investigatory Powers Tribunal has no jurisdiction to consider complaints against Surveillance Commissioners' decisions, including their approval of police and other agencies' use of intrusive and covert surveillance and of property interference, although problems have not arisen in practice to date. This appears to be the result of a missed consequential amendment that should have been made to the Police Act 1997 when the Regulation of Investigatory Powers Act 2000 was enacted. Subsection (3) of the new clause inserted by **Lords amendment 102** would make the necessary clarifying amendment to section 91 of the Police Act 1997 to this end (and subsection (2) makes another very minor amendment to section 91 which also appears to have been missed previously). **Lords amendment 128** to clause 159 and **Lords amendment 134** to clause 160 would provide for United Kingdom extent and commencement on Royal Assent.

Lords amendments 103, 122, 167 and 171: Powers of community support officers

61. The new clause and new Schedule inserted by **Lords amendments 103** and **167** respectively would add to the powers that a chief constable may confer on a police community support officer. They include the power to issue a fixed penalty notice for the following:

- the cycling-related offences of cycling through a red light, failing to comply with a red light and carrying a passenger;
- contravening road regulations by failing to stop, driving the wrong way down a one-way street, contravening cycle lanes, contravening a bus lane, contravening a route for buses/cycles only sign, sounding the horn while stationary or at night, not stopping the engine when stationary, causing unnecessary noise and opening a door to cause injury/danger;
- parking in a restricted area outside a school; and
- unlicensed street vending.

62. The new Schedule also includes the power to require house-to-house charitable collectors to confirm their identity and proof of licence.

63. Finally, the new Schedule would allow chief constables to confer on community support officers powers to seize and retain materials relevant to the investigation of a crime.

64. **Lords amendment 122** would provide for the new clause and new Schedule to extend to England and Wales. **Lords amendment 171** would make a consequential amendment to Schedule 4 to the Police Reform Act 2002.

Lords amendments 104* and 123*: Use of amplified noise equipment in Parliament Square

65. Part 3 of the Police Reform and Social Responsibility Act 2011 ("the 2011 Act") authorises constables and authorised persons (the Greater London Authority and Westminster City Council) to direct that certain types of activity should not take place in the controlled area of Parliament Square, that is the central area of Parliament Square and the pavements immediately adjoining that area. The prohibited activities are set out in section 143(2) of the 2011 Act and include operating any amplified noise equipment. Section 147 of the 2011 Act provides the Greater London Authority and the Westminster City Council (as the responsible authority) with the power to authorise a person to operate amplified noise equipment within the controlled area. **Lords amendment 104** would extend the controls on amplified noise equipment to the new "Palace of Westminster controlled area". Use of amplified noise equipment would for the purposes of Part 3 of the 2011 Act become a "prohibited activity" in the extended area, unless it was authorised by Westminster City Council or, in relation to land in the extended area that is owned by the Royal Parks, the Secretary of State. **Lords amendment 123** would make an appropriate change to the extent clause.

Lords amendments 105 and 123: Littering from vehicles

66. **Lords amendment 105** would insert a new clause *Littering from vehicles*. This would in turn insert new section 88A into the Environmental Protection Act 1990, which would confer on the Secretary of State a power to make regulations providing for the keeper of a vehicle (who would be presumed to be the registered keeper if the vehicle is registered) to pay a civil fixed penalty in a case where a littering offence has been committed in respect of the vehicle. It also provides a power to make consequential amendments to Part 4 of the Environmental Protection Act 1990 and/or Part 2 of the London Local Authorities Act 2007. Regulations under the new section 88A would be subject to the affirmative procedure on the first use of the power. Any subsequent regulations dealing with the amount of the fixed penalty notice or making consequential amendments to Part 4 of the Environmental Protection Act 1990 or Part 2 of the London Local Authorities Act 2007 would also be subject to the affirmative procedure. Otherwise, regulations under the new power would be subject to the negative procedure.

67. The new clause sets out the various matters which may or must be included in the regulations, including the amount of the fixed penalties (or how the amount is to be determined), provision for the issue of a written notice to the keeper, the persons authorised to issue a penalty notice, rights of appeal and enforcement.

68. **Lords amendment 123** would provide for the new clause to extend to England and Wales, although the power to make regulations under new section 88A of the Environmental Protection Act 1990 is limited to littering offences in England.

Part 12: Extradition

Lords amendment 106: Proportionality

69. **Lords amendment 106** would confer a power on the Lord Chief Justice for England and Wales, with the concurrence of the Lord Justice General of Scotland and the Lord Chief Justice of Northern Ireland, to issue guidance to the National Crime Agency ("NCA") on the operation of an administrative proportionality check and places a duty on the NCA to follow such guidance when deciding whether to issue a certificate under section 2 of the Extradition Act 2003. This would be intended to facilitate the operation of an administrative filter prior to extradition cases reaching court.

Lords amendment 107: Extradition to the United Kingdom to be sentenced or serve a sentence or to serve a sentence ("unlawfully at large")

70. **Lords amendment 107** would replace section 142(2A) of the Extradition Act 2003, which deals with the issue of European Arrest Warrants ("EAW") in cases where the person is wanted in order to be sentenced or to serve a sentence in the United Kingdom. This amendment follows a recent case where a justice of the peace refused to issue an EAW because the person was in prison in the requested State, on the basis that he could not be considered to be "unlawfully at large". **Lords amendment 107** would make clear that it is no barrier to the issue of an EAW that the person is in prison in the requested State.

Lords amendments 108, 124, 129 and 176: Detention of extradited person for trial in England and Wales for other offences

71. **Lords amendment 108** flows from the United Kingdom's intended ratification of the Fourth Additional Protocol to the European Convention on Extradition ("ECE"), a multilateral treaty that governs extradition between Council of Europe Member States where the EAW does not apply. Article 3 of the Fourth Additional Protocol deals with the rule of speciality (that is, the bar on a person being proceeded against for offences other than those listed on the extradition request) and replaces the existing Article 14 of the ECE. The new Article provides an optional mechanism whereby States can, if certain conditions are satisfied, restrict the personal freedom of a person whilst a request to waive the rule of speciality is being considered by the State that originally extradited the person. The amendment would implement this provision. **Lords amendments 124** and **129** would make consequential amendments to the extent provisions in the Bill, while **Lords amendment 176** would make a consequential amendment to the extent provision of the Extradition Act 2003.

Lords amendments 109 and 174: Electronic transmission of European arrest warrant etc

72. The new clause inserted by **Lords amendment 109**, and the related consequential amendment to Schedule 9 made by **Lords amendment 174**, would make minor amendments to section 204 of the Extradition Act 2003. This section makes provision for the information contained in an EAW to be transmitted to the United Kingdom electronically. The new clause would be intended to support the implementation of the second generation Schengen Information System ("SIS II"). Under SIS II, the NCA will be required to consider whether to issue a certificate under section 2 of the Extradition Act 2003 on the basis of the information received electronically under the SIS II process. This information will be an English language summary of the information contained within the EAW, together with the original language version of the EAW itself. The new clause would amend section 204 so that certification could take place on the basis of this English language summary and the original language version of the EAW, rather than a translation of the full contents of the EAW.

Lords amendments 110, 111, 130 to 132 and 173: Discount on sentence for time spent in custody awaiting extradition in respect of Scotland and Northern Ireland

73. At Commons Report, what became clause 149 was inserted into the Bill to provide that in cases where a person is extradited to the United Kingdom from another EU Member State, for the purposes of serving a sentence of imprisonment, time served in custody in that other State with a view to extradition must be counted as time served towards the UK sentence in all situations. This provision is designed to ensure that the Prison Act 1952 is fully compliant with Article 26 of the EAW Framework Decision. The amendment made in the Commons only made provision for England and Wales.

74. The new clause inserted by **Lords amendment 110** would make related provision for Scotland. Section 210 of the Criminal Procedure (Scotland) Act 1995, which makes provision for taking into account time spent in custody awaiting extradition to the United Kingdom, in cases where a person is extradited to be sentenced, is out of date in that it refers to extradition legislation which is no longer in

force. New clause "*Discount on sentence for time spent in custody awaiting extradition: Scotland*" would amend this provision to update it in respect of extradition.

75. Similarly, the effect of the new clause inserted by **Lords amendment 111** would be to make equivalent provision for Northern Ireland. In Northern Ireland law, section 38 of the Prison Act (Northern Ireland) 1953 makes equivalent provision to section 49 of the Prison Act 1952 in cases where a person is sentenced **pre**-extradition. New clause "*Discount on sentence for time spent in custody awaiting extradition: Northern Ireland*" (and the consequential amendment to Schedule 9, **Lords amendment 173**) would ensure that time spent in custody awaiting extradition to the United Kingdom from an EU Member State is always credited. There is currently no legislative provision in Northern Ireland for taking into account time spent in custody where a person is sentenced **post**-extradition. The new clause would ensure that credit is given in such cases.

76. **Lords amendments 130, 131 and 132** would make consequential amendments to the extent provisions arising from these two new clauses.

Lords amendment 175: Minor and consequential amendments relating to extradition

77. Clause 147 makes provisions to facilitate the transit through the United Kingdom of people being extradited from one country to another. It includes a power for the Secretary of State to designate who should be authorised to exercise powers under that clause. In response to the Fourteenth Report of the Delegated Powers and Regulatory Reform Committee (HL paper 89), **Lords amendment 175** would make such designation subject to the affirmative resolution procedure.

Part 13: Criminal justice and court fees

Lords amendment 112*: Compensation for miscarriages of justice

78. **Lords amendment 112** would broaden the definition of a "miscarriage of justice" for the purpose of determining eligibility for compensation. Clause 151 provides that a "miscarriage of justice" has taken place "if, and only if, the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence". This Lords amendment would replace this definition with a requirement that "the new or newly discovered fact shows conclusively that the evidence against the person at trial is so undermined that no conviction could possibly be based on it".

Lords amendments 113, 125 and 135: Marital coercion

79. **Lords amendment 113** would insert a new clause, which would abolish the defence of marital coercion in England and Wales. (The defence of duress is unaffected.) The Law Commission concluded in 1977 (*Criminal Law: Report on Defences of General Application*, Law Com. No. 83) and in 1993 (*Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com. No. 218) that the marital coercion defence was not appropriate to modern conditions as it only applies to married women and called for it to be abolished. **Lords amendment 125 and 135** would make consequential amendments to the Bill's extent and commencement provisions respectively.

Lords amendments 114 and 115: Court and tribunal fees

80. In response to the Fourteenth Report by the Delegated Powers and Regulatory Reform Committee (HL Paper 89), **Lords amendments 114 and 115** would make the power to make regulations setting enhanced fees subject to the affirmative resolution procedure in all cases, except where the fee increase is made solely to reflect inflation.

Part 14: General

Lords amendments 117, 133, 136 and 137: Powers of the Welsh Ministers to make consequential amendment and commencement in Wales

81. These Lords amendments would make drafting corrections. **Lords amendment 117** to clause 156 would allow the Welsh Ministers to make amendments to any Act of Parliament or Welsh Measure or Act that are consequential upon the provisions in Schedule 3 to the Bill so far as they apply in Wales. **Lords amendments 133 and 137** to clause 160 would ensure that the power to appoint different commencement dates in different areas applied to the Welsh Ministers as well as to the Secretary of State. **Lords amendment 136** would provide for the Welsh Ministers to commence Schedule 3 to the Bill in so far as it relates to Wales (again bringing the treatment of Schedule 3 into line with that of clauses 86 and 90).

Lords amendment 118: Orders and regulations

82. **Lords amendment 118** would make the order-making powers in the following clauses subject to the affirmative resolution procedure, in response to recommendations by the Delegated Powers and Regulatory Reform Committee (Fourteenth Report): clause 4(5) (which provides that the Secretary of State may by order amend clause 4, which specifies those who may apply for an injunction under Part 1); and clause 50(4) (which provides that the Secretary of State may specify a description of persons who may be designated by a local authority to issue a community protection notice). (See also paragraph 42 above.)

Lords amendments 177 to 180: Title

83. **Lords amendments 177 to 180** make consequential amendments to the Bill's long title, arising from amendments made to the Bill.

FINANCIAL EFFECTS OF THE LORDS AMENDMENTS

84. The Lords amendments would not be expected to have significant financial effects.

DEVOLUTION

85. Since the Bill's introduction in the House of Lords, the Scottish Parliament has adopted legislative consent motions on the following provisions that triggered the Sewel Convention. (The Sewel Convention provides that Westminster will not normally legislate with regard to matters which apply to Scotland and have a devolved purpose or alter the executive competence of the Scottish Ministers, without the consent of the Scottish Parliament.) Legislative consent motions were adopted on 14 January 2014 in respect of provisions to restrict the possession of firearms by persons who have received a suspended sentence (Lords amendment 70) and on 22 January 2014 in respect of forced marriage (clause 109 and Lords amendments 83 to 86).

EUROPEAN CONVENTION ON HUMAN RIGHTS

86. Supplementary memoranda on the European Convention on Human Rights were prepared in respect of the following Lords amendments:

- Lords amendments 81 to 82 (forced marriage);
- Lords amendment 70 (firearms);
- Lords amendment 98 and 99 (personal samples and DNA profiles).

87. These are in Annexes A to C.

ANNEX A: FORCED MARRIAGE

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office published an ECHR memorandum on introduction of the Anti-social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 23 January 2014 for Lords Third Reading.

Forced marriage

1. The amendments to clause 119 modify the criminal offence in subsection (1) so that, in the specific case of a victim who lacks the capacity to consent to marriage, the offence can be committed by any conduct carried out for the purpose of causing the victim to enter into marriage, even if that conduct does not amount to violence, threats or any other form of coercion. Equivalent amendments are made to the Scottish offence in clause 120.

2. The Government accepts that these amendments may have the potential to engage Articles 12 and 8, given that the effect may be to criminalise the conduct of a person such as a partner or family member of a victim who believes that they are acting in the victim's best interests. This impact is considered below.

Article 12

3. Article 12 sets out the right for men and women of marriageable age to marry, according to the national laws governing the exercise of this right. In R (on the application of Baiai and others) v SSHD (2008) All ER (D) 411, the House of Lords confirmed that although the right to marry is a strong and fundamental right, contracting states may impose proportionate restrictions on the right to marry in pursuit of legitimate aims.

4. The case of Hamer v United Kingdom (1979) is authority for the proposition that generally it will be a matter for national law to decide on such matters as capacity to marry, and the relevant formalities for marriage. States may lay down rules of substance based on generally recognised considerations of public interest, including rules concerning capacity to marry, provided that national laws do not deprive a person of full legal capacity of the right to marry.

5. Pursuant to section 12 of the Matrimonial Causes Act 1973, a marriage is already voidable on the grounds that a party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind, or otherwise. The procedure is via an application to a court for a decree of nullity. This operates to annul the marriage from the point that the decree has been made absolute.

6. The amendments takes the approach a stage further by criminalising conduct carried out for the purpose of causing a person to marry where they lack the capacity to do so. This is based on the view that, where a person lacks the capacity to consent to marriage, it is never acceptable for another person (even if a parent or a partner) to cause them to enter into a

marriage. This proposition is already reflected in section 27 of the Mental Capacity Act 2005 (which applies to England and Wales), which states that nothing in that Act permits a decision on consenting to marriage or civil partnership, or consenting to sexual relations, to be made on behalf of another person.

7. Here, the legitimate aim being pursued by the Government is the aim of combating forced marriage, and in particular to protect a specific sub-class of victim; namely those who lack the capacity to consent to marriage, on the basis that they are a particularly vulnerable group who require additional protections.

8. In the context of Article 8, it has already been established in R (on the application of Quila) v SSHD (2010) 1 FCR 51 that the problem of forced marriage is a real one, which has a self-evident negative impact on victims. Burnett J found that the problem of forced marriage is a substantial one, and one which is under-reported. Given that forced marriage involves a serious violation of individual rights, it calls for a vigorous policy response.

9. The Government's view is that it is entitled to restrict the right to marry of persons who lack the capacity to consent to marriage in pursuit of the legitimate aim of preventing forced marriage, and that this is consistent with the case law cited above, in particular Hamer v United Kingdom (1979).

10. The Government recognises that these amendments may interfere with the Article 12 right of a partner (A) who does have the capacity to consent to marriage, but who risks being prosecuted for marrying a person (B) who lacks the capacity to consent to marriage. The Government's view is that any such interference is in the pursuit of a legitimate aim; namely protecting those who lack the capacity to consent to marriage from being caused to enter into a marriage where they are unable to make this decision for themselves. In this regard, the amendments can be viewed as a rights-enhancing measure, as it strengthens the protection conferred by this clause on those who cannot give consent.

11. Any such interference is necessary because the evidence considered by the Government indicates that the current system in section 12 of the Matrimonial Causes Act 1973 is insufficient, in that it affords a measure of protection to victims in the aftermath of a marriage, but does not have the effect of preventing such marriages from taking place in the first place. It is anticipated that a criminal offence will have a deterrent effect, which will modify the conduct of those surrounding the victims.

12. Any such interference is proportionate, because of the way in which the mental element of the offence is framed. The alleged offender (A) must believe or ought reasonably to believe, that the conduct may cause the other person (B) to enter into marriage without free and full consent. Therefore, if A did not appreciate and could not have reasonably appreciated that B lacks the capacity to consent to marriage, the offence will not be made out. Furthermore, In accordance with the code for crown prosecutors, a prosecution will only take place where it is judged to be in the public interest.

Article 8

13. Very similar considerations arise when the issue is considered by reference to Article 8. In particular, it might be argued that the right to respect for family life of the victim's parent includes the right to make arrangements for their dependent child to be cared for in marriage by another person, where the parent is motivated by a desire to protect the best interests of

their child. Similarly, it could be argued that the right to respect for family life of the victim's partner includes the right to marry, live with, and support the "victim".

14. The Government's response here is materially the same as the arguments arising under Article 12. Any interference is in pursuit of a legitimate aim within Article 8(2), namely the protection of the rights and freedoms of those who lack the capacity to consent to marriage. The Government's position on necessity and proportionality is as set out in the text on Article 12 above.

Home Office
23 January 2014

ANNEX B: FIREARMS

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office published an ECHR memorandum on introduction of the Anti-social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 26 November 2013 for Lords Committee Stage.

New Clause: "*Possession of firearms by persons previously convicted of crime"*

2. This new clause achieves two main changes. The first is to ensure that the prohibition on possession of firearms by persons previously convicted of crime in section 21 of the Firearms Act 1968 also applies to persons who have received suspended sentences. Subsection (3) of the new clause sets out a transitional provision which secures the result that, where a person is in possession of a firearm before the day on which this clause comes into effect, and by reason of a suspended sentence imposed before that day, their possession of a firearm would otherwise have become prohibited, the prohibition will not apply to them if they have an extant certificate.

3. The second change is to ensure that this same prohibition in section 21 of the Firearms Act 1968 applies to antique firearms, which have until now been covered by a very broad exemption in section 58(2) of that Act. At present, it is possible to possess an antique firearm by virtue of section 58(2), which provides that the provisions in the Act do not apply to an antique firearm which is possessed as a curiosity or ornament. The amendment would apply to individuals who currently possess antique firearms lawfully, but who have been convicted and sentenced to a term of imprisonment for three years or more. When the new law comes into force, their possession of the antique firearm would become a criminal offence for which they could be prosecuted. The firearm could be seized under section 46 of the Firearms Act 1968, or subject to a forfeiture order upon conviction for the offence in section 21.

<u>ECHR Article 1 Protocol 1</u>

4. Article 1 Protocol 1 (A1P1) provides that no one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law. It also protects controls on the use of the property by the state, except where such controls are necessary in accordance with the general interest.

5. The Government accepts that the change in the legal position in respect of antique firearms may engage A1P1, in that the change in the law will mean that what has hitherto been lawful possession of an antique firearm by a person with a previous conviction will constitute a criminal offence.

6. The Government's position is that any interference with A1P1 is in pursuit of a legitimate public interest, because the aim is to prevent persons with criminal convictions from

possessing antique firearms in order to protect the public from the threat of firearms being used for criminal purposes.

7. Further, the Government considers that any interference would be in accordance with the law, in that there would be an underpinning in primary legislation (via this Bill), stating that the criminal offence in section 21 of the Firearms Act 1968 applies to antique firearms, and that the other provisions of the same Act, so far as they apply to an offence under section 21, would apply to antique firearms (powers relating to seizure and forfeiture orders in sections 46 and 52 respectively).

8. The case law on A1P1 draws a distinction between deprivations of property and controls on the use of property. This distinction is an important one, because a deprivation gives rise to a right to compensation, save in the most exceptional circumstances, whereas a control of use does not, albeit that the availability of compensation will be taken into account when deciding whether a fair balance has been struck between the general interest and the right of the individual to peaceful enjoyment of possessions.

9. Taking into account the relevant case law, the Government's view is that the proposed interference represents a "control of use" rather than a "deprivation". This is because the owners of antique firearms affected by this change in the law will be able to sell the firearm at market value before the provisions come into force, or to place the firearm into the possession of someone else who could sell it on their behalf.

10. It will also be possible (under section 21 of the Firearms Act 1968) for the person subject to the prohibition to apply to the Crown Court (or, in Scotland, to the Sheriff) to have the prohibition on possession removed. Therefore it is not the case that all the person's ownership rights have been extinguished or that the antique firearm has become unusable. What flows from this analysis is that, in the Government's view, payment of compensation is not necessary to render the measures compatible with A1P1.

11. More generally, the Government considers that the proposed approach is proportionate for a number of reasons. Firstly, there is a graduated approach to the prohibition on antique firearms. This is because it only applies to persons sentenced to 3 months imprisonment or more, which ensures that the offending behaviour is of a minimum level of severity. Similarly, for those sentenced to three months or more but less than three years, the prohibition is limited to five years, rather than indefinite.

12. Secondly, there is provision in section 21 of the Firearms Act 1968 for a prohibited person to apply to a court to have the prohibition removed, which adds a layer of independent scrutiny and acts as an important safeguard. In applying its discretion as to whether to remove the prohibition, the court would be bound by section 6 of the Human Rights Act 1998 to act compatibly with convention rights.

13. Thirdly, the Government intends to give persons likely to be affected advance notice of the change in the law to enable them to make arrangements to avoid committing a criminal offence, including by enabling them to sell the firearm prior to commencement, so as to realise its value and therefore mitigate any loss.

14. Lastly, there is a degree of fault on the part of the antique firearm owner, in that they have committed an offence which is sufficiently serious to attract a penalty of at least 3 months imprisonment.

15. In conclusion, it is therefore the Government's view that the new clause is compatible with A1P1.

Home Office
26 November 2013

ANNEX C: PERSONAL SAMPLES AND DNA PROFILES

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office published an ECHR memorandum on introduction of the Anti-social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 19 November 2013 for Lords Committee Stage.

New clause: *"Power to take further fingerprints or non-intimate samples"* and consequential amendments to Schedule 9 to the Bill.

2. This new clause amends the Police and Criminal Evidence Act 1984 ("PACE") to address a loophole whereby the police might be prevented from taking a person's DNA or fingerprints during an investigation into an offence. PACE currently allows DNA sampling only once in an investigation. If an investigation comes to an end, then, unless the person in question has a previous conviction (or there are other grounds justifying retention) that person's DNA and fingerprints must be deleted. However, sometimes the discovery of fresh evidence can lead to an investigation being resumed, and in particular the CPS has now introduced a new procedure, the *Victims' Right to Review*, under which victims of crime can ask for reconsideration of an initial decision not to charge, to discontinue proceedings or to offer no evidence. If this is done and an investigation therefore resumes, there is no power to retake DNA as it has already been taken during the investigation. This new clause will allow the taking of fingerprints or DNA in an investigation if the previous prints, sample or profile taken during that investigation have been deleted. Consequential amendments to Schedule 9 to the Bill make corresponding provision to allow the police to require a person to attend a police station for the purpose of having their fingerprints or DNA taken.

3. The Government accepts that the taking of fingerprints and samples constitutes an interference with a person's right to a private life under Article 8 of the ECHR. However, the interference will be prescribed by law and it is, in the Government's view, necessary and proportionate for the prevention of disorder or crime and for the protection of the rights and freedoms of others to give the police these powers, taking into account in particular the substantial contribution fingerprints and DNA databases have made to the prevention and detection of crime. As the powers are permissive, it will be for the police to decide whether exercising the powers in an individual case can be justified in accordance with their duty under section 6 of the Human Rights Act 1998, and safeguards in the legislation will assist them in complying with this duty. In some cases, it will also be possible to justify the taking of samples and fingerprints in the interests of national security.

4. The interference with a person's physical integrity involved in taking fingerprints and/or non-intimate sample is short-lived and, unless the person is not compliant, painless. While the use to which the data can be put could have a significant impact on a person if a speculative search of the national DNA or fingerprint database matches the person with crime scene samples from

other criminal offences, this stems from the fact of retaining the data rather than simply the taking of them.

5. Parliament has already approved the principle that it may be necessary and proportionate for the police to retain a person's fingerprints and DNA pending an investigation or proceedings (see section 63E of PACE). Where an investigation is halted and restarted, either because new evidence comes to light or as a consequence of an application of the *Victims' Right to Review* policy, the Government considers that it would be anomalous and contrary to the public interest if the resuming investigation was hampered because a person's fingerprints and DNA had been destroyed in the interim and could not be taken again. The power to re-sample a person will not apply, however, in cases where a person's DNA profile or sample were destroyed because the circumstances in which they were taken was unlawful, or they were taken on the occasion of an arrest that was unlawful or based on mistaken identity.

6. The inconvenience caused to a person required to attend a police station is limited by safeguards in Schedule 2A to PACE. Under the amendments in this Bill, the police will have to impose such a requirement within six months of the investigation being resumed. Moreover, existing provisions in paragraph 16 of that Schedule contain further protections, including the requirement that a person is (except in urgent cases authorised by a senior officer) given a period of at least seven days within which he must attend a police station.

7. In conclusion, the Government is satisfied that the proposed amendment is proportionate and compatible with Article 8.

New clause: "*Power to retain fingerprints or DNA profile in connection with different offence*"

8. The Protection of Freedoms Act 2012 introduced changes to the framework (set out in PACE) for the retention of fingerprints and DNA by the police in order to secure a better balance between the rights of those who have never been convicted of a criminal offence and the need to protect the public. The new retention regime came into force on 31 October 2013. It provides, broadly speaking, that material must be destroyed unless it can be retained under one of a number of specified powers.

9. The question as to whether a person should have their material retained should be determined by considering their entire criminal history. If a conviction in that history allows retention then it is important that a DNA profile or fingerprints can be retained regardless of whether the arrest for which the material was obtained was itself followed by a conviction. This particularly affects DNA sampling as normally only one DNA sample would be taken from a first arrest and none from any subsequent arrests, because it would incur unnecessary costs to obtain the same profile. However, the language in the primary legislation does not clearly achieve this. New section 63P of PACE as inserted by new clause *Power to retain fingerprints or DNA profile in connection with different offence* makes the position clear.

10. The Government accepts, following *S and Marper v United Kingdom* (2008) 48 EHRR 1169, that the retention of DNA profiles and fingerprints must of itself be regarded as interfering with the right to respect for the private lives of the individuals concerned. However, as before, the interference will be prescribed by law and is, in the Government's view, necessary and proportionate for the prevention of disorder or crime and for the protection of the rights and

freedoms of others. The power to retain is permissive, and will be exercised by the police who are subject to the duties of public authorities under section 6 of the Human Rights Act 1998.

11. In reaching this conclusion, the Government is mindful that Parliament has already approved the principle that a person's fingerprints and DNA profiles can be retained for varying periods according to certain trigger events (e.g. conviction for a recordable offence; being charged with a qualifying (i.e. a serious) offence, being given a penalty notice, etc.). All that this amendment achieves is that the appropriate retention period will apply, regardless of whether the specific arrest which led to a person's DNA or fingerprints being taken led to such a trigger. This will prevent the police having to take a fresh sample or fingerprints when there is already in existence something that would otherwise, but for a technicality, be a satisfactory sample. To that extent, therefore, the amendment can be regarded as a human rights-enhancing measure, which will prevent unnecessary interferences with people's Article 8 rights.

12. In conclusion, the Government is again satisfied that the proposed amendment is proportionate and compatible with Article 8.

Home Office
19 November 2013

LORDS AMENDMENTS TO THE ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EXPLANATORY NOTES

These notes refer to the Anti-social Behavior, Crime and Policing Bill as first printed for the Lords
[HL Bill 52]

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