

*These notes refer to the Lords Amendments to the Counter-Terrorism Bill,  
as brought from the House of Lords on 17th November 2008 [Bill 168]*

# COUNTER-TERRORISM BILL

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## EXPLANATORY NOTES ON LORDS AMENDMENTS

### INTRODUCTION

1. These explanatory notes relate to the Lords Amendments to the Counter-Terrorism Bill, as brought from the House of Lords on 17th November 2008. 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 Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These notes, like the Lords Amendments themselves, refer to HL Bill 65, the Bill as first printed for the Lords.
3. The 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 the Lords Amendments were in the name of the Minister, except for amendments 2–15, 106 and 133. (In the following Commentary, an asterisk appears in the heading of each of the paragraphs dealing with a non-Government amendment which was opposed by the Government).

### COMMENTARY ON LORDS AMENDMENTS

#### ***Lords Amendment 1: Power to remove documents for examination***

5. This amendment would redraft the existing clause 1(4). The redraft is not intended to change the effect of the clause

#### ***\*Lords Amendment 2: National guidelines on fingerprints and sample databases***

6. This amendment would insert into the Bill a clause requiring the Secretary of State to publish national guidelines on fingerprint and sample databases. The guidance would apply to fingerprints and samples held by governmental agencies and would cover the following matters: a procedure for an individual to request what information relating to fingerprints and samples is held on them or on a dependant, a procedure for

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requesting the destruction of such information, and the circumstances when such a request can be refused. Where such an application is refused there would be an obligation to write to the individual who submitted the request explaining why the information will not be destroyed and setting out when the circumstances that prevent destruction will no longer apply. The clause would require the Secretary of State to consult before publishing the guidelines. The regulations containing the guidelines would have to be laid before and approved by both Houses of Parliament before being made.

***\*Lords Amendment 3: Pre-charge detention***

7. This amendment would provide that nothing in the Bill would allow the Secretary of State to extend the maximum period of pre-charge detention beyond 28 days.

***\*Lords Amendments 4–14 and 115: Pre-charge detention***

8. These amendments would remove clauses 22 to 32 and Schedule 2 from the Bill. They would have the effect of removing the reserve power to extend pre-charge detention from the Bill. The effect would be that the limit for pre-charge detention would remain at 28 days with no power to extend this in exceptional circumstances.

***\*Lords Amendment 15: Pre-charge detention: minor amendments***

9. This amendment would remove clause 33 of the Bill. Clause 33 was added by Government amendment in Committee in the Commons and made minor amendments to Schedule 8 to the Terrorism Act 2000 (Schedule 8). The clause (which is unrelated to the reserve power to extend pre-charge detention) makes a consequential amendment to Schedule 8 and removes the requirement in paragraph 29(4) of that Schedule for the Lord Chief Justice to consult the Lord Chancellor when designating a judicial authority.

***Lords Amendments 16–21: Authorisation of post-charge questioning***

10. Amendments 16 to 20 would remove the ability of a police Superintendent to authorise the first 24 hour period of post-charge questioning. Instead all post-charge questioning under these provisions would be authorised by a Crown Court judge in England and Wales, a Sheriff in Scotland and a District Judge (Magistrate's Court) in Northern Ireland. The amendments would mean that the judge could authorise questioning for a terrorism offence or an offence which he considered to have a terrorist connection. In order to authorise the questioning the judge would need to be satisfied that further questioning was in the interests of justice, that the investigation was being conducted diligently and expeditiously and that it would not interfere unduly with the preparation of the person's defence to the charge in question or any other criminal charge.

11. The amendments would also mean that the judge authorising post-charge questioning must specify the period during which questioning is authorised and may

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impose such conditions as appear to be necessary in the interests of justice, which may include conditions as to the place where the questioning is to be carried out.

12. The amendments would limit the period during which questioning was authorised to a maximum of 48 hours before further authorisation must be sought; this 48 hour period would begin when questioning begins and would run continuously from that time irrespective of whether or not questioning stopped.

13. Amendment 21 would provide that the correct terminology is used in relation to Northern Ireland.

***Lords Amendments 22–24: Video recording of post-charge questioning***

14. These amendments would remove the order-making power which allows the Secretary of State to disapply the requirement that all post-charge questioning must be video-recorded with sound.

***Lords Amendments 25–29, 31, 32, 35, 36, 110 and 116: Ancillary offences***

15. These amendments are technical and drafting amendments which would ensure that ancillary offences are dealt with consistently throughout the Bill, including ensuring correct references are given in relation to each jurisdiction of the UK. Ancillary offences relate to conduct which falls short of carrying out the main offence but are linked to it, for example conspiracy, incitement or aiding and abetting. There are various lists of terrorism offences in the Bill and in each case the associated ancillary offences are also included. These lists of offences relate to post-charge questioning, aggravated sentencing, forfeiture and notification.

16. Amendments 27 to 29 would remove the provision in clause 40 which provides that the clause (which confers United Kingdom-wide jurisdiction on listed terrorism offences) applies to listed ancillary offences. The removal of this provision is not intended to change the effect of that clause, as the offences ancillary to the terrorism offences specified in clause 40(2) would have United Kingdom-wide jurisdiction by virtue of the general law (which provides that jurisdiction for ancillary offences follows that for the substantive offence).

***Lords Amendments 30, 111 and 114: Sentences for offences with a terrorist connection: service courts***

17. These amendments would require a Service court, the Court Martial for example, when considering the seriousness of a service offence as respects which the corresponding civil offence is an offence specified in Schedule 3 to the Bill, to determine whether the offence has a terrorist connection if it appears to it that this may be the case. Here, the reference to a civil offence means an offence under the law of England and Wales.

***Lords Amendment 33: Forfeiture***

18. This amendment would mean that should the Secretary of State change by Order the list of offences to which new section 23A of the Terrorism Act 2000 applies

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(in exercise of the power established by new section 23A(5)), the effect of the change would apply only in relation to offences committed after the Order comes into force. This amendment was made in response to the Report on the Bill by the House of Lords Delegated Powers and Regulatory Reform Committee.

***Lords Amendments 34, 42, 79 and 126: Notification requirements for Service courts offences***

19. These amendments would provide that sentences or orders made by a Service court, equivalent to sentences or orders made by civilian courts which trigger the notification requirements, would have the same effect in terms of the application of the notification requirements in Part 4 of the Bill. So, for example, a person who is convicted by a Service court of a service offence, to which Part 4 of the Bill applies, and sentenced to 12 months or more imprisonment would be subject to the notification requirements just as they would be if they had been convicted and sentenced in a civilian court.

***Lords Amendments 37 to 41, 43–45, 59 and 60: Notification requirements (minor amendments)***

20. Amendments 37 and 41 would clarify the effect of removing an offence from the lists of offences in clause 52 and Schedule 3.

21. Amendments 38 and 39 would make clause 53 consistent with Clause 43.

22. Amendment 40 would provide that the effect of a successful appeal by a defendant against a court's determination that an offence has a terrorist connection is that the notification requirements are treated as never having applied to that person.

23. Amendment 43 is a minor drafting change.

24. Amendments 45 and 60 would amend Part 4 to reflect the fact that a person may be on licence only after the custodial part of a sentence. Amendments 44 and 59 address a related point for immigration detention.

***Lords Amendment 46: Notification: persons aged under 16***

25. Amendment 46 would ensure that the notification requirements would not apply to anyone under age of 16 on the date of their being dealt with by the court for an offence which would otherwise trigger those requirements.

***Lords Amendments 47–57: Sentences or orders triggering notification requirements***

26. Amendments 47 to 56 would make minor and technical amendments in relation to the provisions concerning sentences in clause 56. Amendment 57 would ensure that the correct references are specified in the definition of the phrase 'an offence carrying a maximum term of imprisonment of 12 months or more'.

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***Lords Amendments 58, 61, 62, 67 and 73: Immigration detention***

27. Amendments 58, 62, 67 and 73 would mean that immigration detention is treated in the same way as are other forms of detention in Part 4. They would mean that the period within which initial notification, notification of change and periodic notification must be made would be suspended for periods the person is in immigration detention; and that the notification period would also be suspended for such periods. Amendment 61 would make it a requirement for a person to notify the police on their release from immigration detention (in the same way that it is already a requirement to make such notification on release from other forms of detention).

***Lords Amendments 63, 64, 68 and 74–78: Time spent abroad***

28. Amendments 77 and 78 would provide for cases where a person who is subject to the notification requirements spends time abroad, either voluntarily or following removal by the authorities, for example having been deported or extradited. These amendments would mean that, generally, for periods of time spent abroad voluntarily, initial notification or notification of change must be made before departure; but that while a person is abroad, the requirement to make notification of change or periodic notification does not apply. Within three days of their return (provided the notification period is still running), the person would have to notify any changes to their most recently notified information or make their periodic notification if this would have fallen due during their absence. Where a person is removed from the UK however the person would not have to comply with the requirements unless and until they return to the UK within the currency of the applicable notification period. Amendments 63, 64, 68 and 74 to 76 would make consequential amendments.

***Lords Amendments 65 and 66: Periodic re-notification***

29. These two amendments would make a minor drafting change to clause 60.

***Lords Amendments 69, 70, 81, 122 and 123: Notification: meaning of ‘dealt with’***

30. Amendment 81 would clarify the meaning of the various references in Part 4 of the Bill (notification) to a person or an offence being ‘dealt with’. Generally, this term is to mean when the court of first instance sentences a person or makes the person subject to a hospital order in respect of the offence. However, the amendment would also make provision for circumstances where the original decision is varied (for example the original sentence being altered, set aside or quashed). Where a conviction for a different offence is substituted and the conditions for the application of the notification requirements are also met in respect of that substitution, the person would be treated as if they had been dealt with at the time of the original decision. Otherwise, if the result of the variation is that the sentence threshold is not met, the notification requirements would be treated as never having applied; and if the sentence met the threshold for the first time, the notification requirements would apply from the date of the variation. If the sentence is varied across one of the sentence thresholds for the notification periods that apply to adults, the notification period would be adjusted accordingly. Amendments 69, 70, 122 and 123 would make related amendments.

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***Lords Amendments 71 and 72: Notification periods***

31. Amendment 71 would mean that that the notification period for those aged 18 or over on the date of conviction would be: 10 years for those sentenced to 12 months or more but less than 5 years; 15 years for those sentenced to 5 years or more but less than 10; and 30 years for those sentenced to 30 or more years. The period would always be 10 years where the person is 16 or 17 on the date of their conviction or is given a hospital order.

32. Amendment 72 would correct the description of findings referred to in clause 64(5).

***Lords Amendment 80: Hospital orders***

33. This amendment ensures that references to a hospital order include such an order made by a Service court anywhere in the world.

***Lords Amendments 82, 113 and 127: Financial restriction measures***

34. These amendments would insert a clause and Schedule into the Bill providing the Treasury with powers to act against terrorist financing, money laundering, and the proliferation of chemical, biological, radiological or nuclear weapons, as set out in the new Schedule.

35. Part 1 of the Schedule sets out the conditions for giving a direction. The Treasury may act in circumstances where: (a) the Financial Action Task Force ('FATF') has called for measures to be taken against a country because of the risk it presents of money laundering or terrorist financing; (b) the Treasury reasonably believe a country poses a significant risk to the UK's national interests because of the risk of money laundering or terrorist financing there; or (c) the Treasury reasonably believe a country poses a significant risk to the UK's national interests because of the development or production of nuclear, radiological, biological or chemical weapons there, or facilitation thereof.

36. Part 2 provides that a direction may be addressed to a particular person operating in the financial sector, any description of persons operating in that sector, or all persons operating in that sector; and defines credit institution and financial institution. The Treasury may by order amend the definitions of credit and financial institution.

37. Part 3 sets out the requirements that may be imposed by a direction. The Treasury may issue a direction imposing requirements in relation to transactions or business relationships with a person carrying on business in the country, the government of the country, or a person resident or incorporated in the country. A direction may require enhanced customer due diligence measures to be undertaken before entering into or during a business relationship or transaction; enhanced ongoing monitoring of a business relationship; the provision of specified information

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and documents relating to transactions and business relationships; and that new business relationships or transactions should not be entered into or existing relationships or transactions should cease.

38. Part 4 sets out the procedural requirements for directions. Directions addressed to a description of persons in the financial sector or to all persons in the sector must be contained in an order. Where such a direction requires the limitation or cessation of business it is subject to the affirmative procedure, otherwise it is subject to the negative procedure. A direction to an individual person need not be contained in an order. General directions must be publicised, and directions addressed to an individual person must be brought to the attention of that person. Provision is made for the issue of licences to exempt acts which would otherwise be subject to the requirements of a direction to cease or limit business.

39. Part 5 makes provision for enforcement by the Financial Services Authority, the Commissioners for HM Revenue and Customs, the Office of Fair Trading and the Department of Enterprise Trade and Investment in Northern Ireland. Enforcement officers have power to require information or documents, and to enter and inspect premises with or without a warrant.

40. Part 6 provides for the imposition of civil penalties by enforcement authorities on a person who fails to comply with a requirement imposed by a direction or by a condition of a licence, and for review and appeals mechanisms.

41. Part 7 makes it an offence to fail to comply with a requirement imposed by a direction, or to provide false information in order to obtain a licence. Conduct outside the UK by a UK national or body may constitute an offence.

42. Part 8 provides for the Treasury to report annually to Parliament on their exercise of powers under the Schedule. Provision is also made for the monitoring and supervision by the Financial Services Authority, the Commissioners for HM Revenue and Customs, the Office of Fair Trading and the Department of Enterprise Trade and Investment in Northern Ireland of persons operating in the financial sector in relation to their compliance with the requirements of any directions.

43. Amendment 113 would provide for the new clause and schedule to come into force on the day after the day on which the Act is passed.

***Lords Amendments 83, 84 and 130: Statutory basis of challenge for all financial restrictions decisions***

44. Amendment 83 would insert a new clause which provides a statutory basis for any challenge to a decision mentioned in subsection (1) of the clause. This includes a challenge to any decision made by the Treasury under the UN terrorism orders as well

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as to any decision made under Part 2 of the Anti-Terrorism Crime and Security Act 2001 ('ATCSA') or the new Schedule inserted by Amendment 127. Amendment 84 defines UN terrorism orders for this purpose. Amendment 130 would revoke provisions in the UN terrorism orders which contain a narrower statutory basis for challenge.

45. Amendment 83 provides that judicial review principles are to apply to challenges made under this section, that the full range of judicial review remedies are available to the court, and that the new procedure would apply to decisions already made by the Treasury (as well as future decisions), but only where the application challenging the decision is made after the commencement of this clause. The procedure governing challenges would be set out in Rules of Court to be made under Part 5 of the Bill.

***Lords Amendments 85–102: Financial restriction proceedings***

46. These amendments would extend the scope of Part 5 of the Bill, so that it applies in relation to any claim under the clause inserted by Amendment 83 (and related claims). This would extend the scope of Part 5 of the Bill to challenges to (i) 'freezing orders' made under Part 2 of the ATCSA, and (ii) decisions made under the Schedule inserted by Amendment 127.

47. Amendment 98 introduces an exception to the duty under ATCSA to give reasons for the making of a freezing order under that Act. This would mean that where a freezing order was made on the basis of closed material, the closed material would be exempt from the duty to give reasons.

***Lords Amendments 103–105, 107 and 132: Coroners inquests***

48. These amendments would remove clauses 77, 78, 79 and 81 relating to inquests from the Bill. The title would be amended accordingly to remove the reference to inquests. These clauses provide for the Secretary of State to issue a certificate in relation to an inquest if, in his or her opinion, the inquest would involve consideration of material that should not be made public in the interests of national security, international relations or for other public interest reasons. The effect of such a certificate would be that the inquest would be held without a jury, and a suitably cleared coroner or a judge would be appointed to hold the inquest and consider the material in question.

***\*Lords Amendments 106 and 133: Intercept: inquests***

49. These amendments would allow a High Court judge sitting as a coroner to order the disclosure of intercept material to juries and other interested parties. Amendment 133 would make a consequential amendment to the long title of the Bill.

***Lords Amendments 108 and 109: Control orders***

50. These amendments clarify that, in relation to premises to which the controlled person has in the past but is no longer required to grant access in accordance with an

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obligation imposed by or under a control order, the police powers of entry and search are dependent on there being reason to believe that the controlled individual is or was recently connected to the premises.

***Lords Amendments 112: Repeals and revocations***

51. This amendment would make a minor drafting change.

***Lords Amendments 117–121: Notification orders***

52. Amendment 117 would mean that a notification order could not be made if the court considering the application for the order was satisfied on the balance of probabilities that the foreign conviction, which was the basis for the application, was obtained as a result of a flagrant denial of the person's right to a fair trial. The concept of a 'flagrant' denial of the right to a fair trial derives from case law of the European Court of Human Rights, also adopted in domestic courts. The term is to be read in this amendment as having the same meaning which it is given by that jurisprudence, rather than having its dictionary meaning (see for example the case of *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64). Amendments 118 to 120 would mean that the notification order proceedings would be heard by the High Court in England & Wales and Northern Ireland, and the Court of Session in Scotland. Amendment 121 is consequential on this change.

***Lords Amendments 124 and 125: Foreign travel restriction orders***

53. Amendment 124 would correct the terminology used in paragraph 7(3) of Schedule 6.

54. Amendment 125 would make it an offence for a person who is subject to a foreign travel restriction order to fail, without reasonable excuse, to comply with a requirement imposed on them by such an order.

***Lords Amendments 128 and 129: Offences relating to information about members of the armed forces etc***

55. These amendments would amend Schedule 8A to the Terrorism Act 2000, inserted by Schedule 7 to the Bill. In the House of Commons, clause 83 was extended so that it applied to information about a member of any of the intelligence services or to a constable, as well as to members of Her Majesty's forces. These amendments reflect those changes.

***Lords amendment 131: Long title***

56. This amendment would alter the long title of the Bill to reflect the material added by these amendments.

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## **FINANCIAL EFFECTS OF THE LORDS AMENDMENTS**

57. The provisions on financial restriction measures would have the effect of increasing costs in the event that a direction is issued under them, for

- a) the Treasury in considering the issuing of directions;
- b) the four supervisory bodies in enforcing directions; and
- c) businesses in complying with them.

58. The Government expects that any costs to the Treasury and supervisory bodies will be small, and managed within current resource capacities.

59. The potential costs to firms is highly contingent on the nature of any direction issued, and will vary according to the type of measure employed; the number of persons affected; and the country concerned. The Government expects that any compliance costs would be less than they otherwise would be, on account of the fact that these provisions employ similar language and mechanisms to those in the Money Laundering Regulations 2007. There will be no cost impacts upon firms whose business is not covered by a particular direction.

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