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Policing and Crime Bill - Lords Amendments

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Summary

The *Policing and Crime Bill* will return to the Commons for consideration of Lords Amendments on 10 January 2017. 307 amendments were made in the Lords, and these are set out in HL Bill 118, *Lords Amendments to the Policing and Crime Bill*. Most of these were Government amendments. The Home Office has produced Explanatory Notes.

This paper looks at the main amendments, and briefly summarises the debate on them.

There were a number of controversial amendments which the Government opposed. These are:

- **Lords Amendments 24** and **159** (introduced by the crossbencher, Baroness O'Neill) which would require the Government to instigate an independent enquiry into police handling of complaints about allegations of corrupt relationships between the police and newspaper organisations. The proposals are similar to the original proposal for the second part of the Leveson Inquiry as agreed in 2012; the Government have been consulting on whether to proceed with this. Peers in favour argued that the Government should "get on with" a commitment that had already been made; others queried whether the likely outcome would justify the cost. The Government maintained that the Government's consultation (which closes on 10 January 2017) was proportionate and in the public interest.
- **Lords Amendments 96** and **302** (moved by Labour's Lord Rosser) concerning parity of funding at inquests. Where a PCC is an interested person at an inquest, he or she would have to recommend to the Secretary of State whether or not the family of the deceased needs financial support to ensure parity of legal representation. Where this was recommended, the Secretary of State would have to provide financial assistance. Lord Rosser cited the Hillsborough hearings and other cases, where bereaved families were not able to match the kind of funding for legal representation which the police had. The Government argued that it would be "premature" to proceed with the amendment, and that it should first consider the recommendations of a report commissioned into the experiences of the Hillsborough families.
- **Lords Amendments 134** and **305** (moved by Labour's Baroness Royall of Blaisdon) which would increase the maximum penalty for the offence of stalking involving fear or violence or serious alarm or distress from five years to ten years' imprisonment. The Government argued that in such serious cases, other offences with longer sentences can apply, and that it would review the operation of this stalking offence, including looking at the maximum sentence. However, on 6 January 2017, the Government announced that it would introduce an amendment going further than Baroness Royall's amendment.
- **Lords Amendments 136** to **142** and **307** (moved by the Liberal Democrat Baroness Brinton) which would set out various rights for victims in primary legislation and establish a framework for reviews in homicide cases which have not resulted in convictions; the Government is committed to bringing forward proposals on victims' rights in due course, and argues that more time is needed; it also says that proposals for homicide reviews are unnecessary.

A number of amendments tabled by Opposition party and crossbench peers and backbenchers have been supported by the Government. These include amendments on pardons for homosexuality offences; and an amendment to remove the duty of coroners to conduct an inquest in all cases where the deceased had an authorisation for the deprivation of their liberty in place.

1. Introduction

The *Policing and Crime Bill* is a carry-over bill, which was introduced in the House of Commons in February 2016. The Bill completed Report stage in the House of Lords on 7 December 2016. It had Third Reading on 19 December 2016 and will return to the Commons for consideration of Lords Amendments on 10 January 2017. The Bill's progress can be followed on the Policing and Crime Bill page on the Parliament website.

307 amendments were made in the Lords, and these are set out in HL Bill 118, *Lords Amendments to the Policing and Crime Bill*. The Home Office has produced Explanatory Notes.[1]

This paper looks at the main amendments, and briefly summarises the debate on them in the Lords. It is intended to complement:

- Commons Library Briefing Paper 7499, *Policing and Crime Bill 2015-16* (which provides an analysis of the Bill as originally introduced in the Commons), 2 March 2016
- Commons Library Briefing Paper 7563, *Policing and Crime Bill Committee Stage Report*, 22 April 2016
- Lords Library Note 2016-0035, *Policing and Crime Bill: Briefing for Lords Stages*, 5 July 2016

The sections of this paper broadly follow the structure of the Bill. Unless otherwise stated, clause numbers are based on the version of the Bill as introduced in the Lords (HL Bill 55).

[1] Home Office, *Policing and Crime Bill: Explanatory Notes #on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016

2. Part 1 – Emergency Services Collaboration

2.1 Overview

Part 1 of the Bill places a duty on police, fire and rescue, and ambulance services to collaborate. It also proposes a number of possible models for the way in which Police and Crime Commissioners (PCCs) can become involved in the provision of fire and rescue services. A raft of Government amendments were agreed to in Committee and on Report in the Lords, many of which were minor or technical in nature. However, some were more substantial, and the Government tabled some in response to backbench or Opposition frontbench amendments.

2.2 Collaboration agreements

The Government moved **Lords Amendment 2** on Report in response a similar amendment moved by the Labour peer Lord Rosser in Committee.

Clause 3 of the Bill makes it clear that an emergency service is not required to enter a collaboration agreement if this would adversely affect its efficiency or effectiveness. Lord Rosser's amendment in Committee would have added a further restriction, so that a service wouldn't have to enter into such an agreement if it would not be in the interests of public safety.[2] The Home Office minister, Baroness Williams of Trafford, said she was "minded to give further consideration to the amendment."[3] The Government's amendment was agreed to without debate on Report.[4]

2.3 PCCs taking over Fire and Rescue Authorities

Clause 6 and **schedule 1** would allow the PCC to take over governance of the Fire and Rescue Authority, or to go one step further and appoint a single employer to employ all police and fire personnel. These provisions proved controversial in the Commons and the Lords.

A large number of minor and technical Government amendments to schedule 1 were agreed to. One of these, **Lords Amendment 215** was in response to an amendment by the Conservative MP Amanda Milling at Commons Report stage. Ms Milling had proposed that where a PCC had taken over a Fire and Rescue Authority (FRA), his or her title should reflect this. The then Policing minister, Mike Penning, undertook to consider this before the Bill went to the Lords.[5]

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2 HL Deb 14 September 2016 c1471
3 Ibid, c 1476
4 HL Deb 30 November 2016 c207
5 HC Deb 26 April 2016 c1339

In Committee in the Lords, Baroness Williams of Trafford said that the Government that the Government had consulted police and fire partners and found "broad support".[6] Lords Amendment 215 would accordingly change the title to "police, fire and crime commissioner" when the PCC takes over a FRA; Lords Amendment 219 would amend the title of Police and Crime Panels (PCPs, which scrutinise PCCs) to "Police, Fire and Crime Panel" in such cases. In the debate, Labour's Lord Harris of Haringey and Lord Rosser did raise some questions about how helpful this would be, and also questioned how effective PCPs are.[7]

2.4 London Fire Commissioner

The Government introduced **Lords Amendments 226, 95, 149** and **304** on Report[8] in response to arguments in Committee by Labour's Lord Harris of Haringey.[9] They would ensure that no elected councillor would have to resign their council position if they are appointed deputy mayor for policing and crime.

6 HL Deb 14 September 2016 c1539
7 Ibid cc1539-40
8 HL Deb 30 November 2016 c221
9 HL Deb 14 September 2016 c1551

3. Police complaints, discipline and powers

3.1 Complaints alleging corrupt relationships between police and newspaper organisations

Lords amendments 24 and **159**, which are opposed by the Government,[10] would require the Government to instigate an independent inquiry into the police handling of complaints relating to allegations of corrupt relationships between the police and newspaper organisations. They were introduced on report by crossbencher Baroness O'Neill of Bengarve.[11] The proposals are similar to the original proposals for the second part of the Leveson Inquiry as agreed in 2012, and the amendment was clearly designed to achieve a similar end. Background on this is in Library Briefing Paper 7576, *Press regulation after Leveson - unfinished business?*.

Speaking to her amendment, Baroness O'Neill highlighted the recent conviction of the undercover journalist Mazher Mahmood and the findings of the Hillsborough Independent Panel:

> The Government could have begun proceedings for Leveson 2 weeks ago, when the relevant trials had finished. Doing so would help draw a line under Hillsborough, Orgreave, Daniel Morgan and countless other scandals involving both the police and the press.
>
> I do not think this is a trivial matter. A commitment was made to Leveson 2; the victims want it; the public want it; and, for democracy to function well, we all need it. The Government should get on with what they promised in 2011 and 2012 and begin Leveson 2 now.[12]

Viscount Hailsham (Con) hoped that the Government would be "robust" in resisting the amendment. He said:

> There is a proportionality rule: is the likely outcome of the inquiry and the chances of its recommendations being implemented sufficient to justify the cost of setting it up and the bureaucracy involved? In the majority of cases in which I have been involved, the answer to that question is no, and I strongly suspect that this time the answer is no again.[13]

The amendment was supported by Lord Paddick (Lib Dem), himself a victim of phone-hacking, and Lord Blair of Boughton, a former Chief Constable of the Metropolitan Police.[14] For the Opposition, Lord Rosser said that "honouring a repeated undertaking given by a Government

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10 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016
11 HL Deb 30 November 2016 c227
12 HL Deb 30 November 2016 c229
13 HL Deb 30 November 2016 c229
14 HL Deb 30 November 2016 cc230-2

through a Prime Minister, to victims in particular, and with all-party support, is the issue that this amendment seeks to address".[15]

Responding for the Government, Baroness Williams of Trafford said that the Government's current consultation was seeking views on whether going ahead with Part Two was "still appropriate, proportionate and in the public interest". Given this, she suggested it was not "an appropriate matter for further legislation". She also pointed out that the first part of the inquiry had cost £5.4m and the second could be expected to cost a similar amount. The amendment therefore had "very real financial implications".[16]

On a Division, the amendment was passed by 246 votes to 196. The Explanatory Notes make it clear that the Government oppose the amendment.[17]

3.2 Investigations by the IPCC: whistle-blowing

Part 2 of the Bill would reform the police complaints system. In particular, **clause 27** and **schedule 6** would give the Independent Police Complaints Commission a new power to investigate whistle-blowing concerns without the matter having to be raised with the force first, and protecting the whistle-blower's identity.

Lords Amendments 25 to **26**, **239** and **240** were introduced on Report[18] in response to arguments made in Committee by the Liberal Democrat Lord Paddick and Labour's Lord Kennedy of Southwark.[19] They would modify the definition of a "whistle-blower" to include those raising concerns about historic misconduct which occurred in the force before they joined. Other modifications provide further clarity on the definition of a whistle blower.

3.3 Disciplinary action against former police officers

Clause 28 allows for the extension of the disciplinary regime to former police officers where the allegation arose before they resigned, or arose within a period of time following their resignation or retirement. The relevant period will be specified in regulations, but the Government have made it clear that it will be 12 months. During the Bill's progress in the Commons, there was concern that, where there were allegations of serious wrongdoing, that time limit should not apply. The then Shadow Home Secretary, Andy Burnham, tabled an amendment on Report to

15 HL Deb 30 November 2016 c234
16 HL Deb 30 November 2016 c235
17 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para. 6. There was a similar proceeding when amendments in the Lords to the *Investigatory Powers Bill* sought to replicate some of the effects of s40 of the *Crime and Courts Act 2013* but were overturned in the Commons.
18 HL Deb 30 November 2016 c239
19 HL Deb 26 October 2016 c233

allow proceedings to take place a specified period after the allegation first came to light rather than after the person left the force.[20] In response, Mike Penning promised to bring forward changes so that, in exceptional circumstances, there could be an unlimited extension to the twelve month time limit.[21]

Lords Amendments 30 to 33, which were introduced on Report,[22] would allow investigations to take place outside the time limit, and for disciplinary proceedings to be brought in the most serious and exceptional cases, where the former officer could have been dismissed if he or she had still been serving. The test of exceptional circumstance would be applied by the IPCC, who will have to determine that such proceedings would be reasonable and proportionate having regard to factors such as seriousness and public confidence.

3.4 Power to remove disguises

The Government moved **Lords Amendment 94** on Report in response to an amendment in Committee by the crossbench peer Lord Dear.

Currently under section 60AA of the *Criminal Justice and Public Order Act 1994*, the police have powers in some circumstances to require the removal of facial disguises. These powers depend on one of three kinds of authorisation having been made by a senior officer. These are

- An authorisation under section 60 of the 1994 Act (which covers violent or potentially violent situations)
- An authorisation under section 60AA(3) (where the commission of offences generally is likely) for an initial period of 24 hours
- A direction under section 60AA(4) that the initial 24 hour period is to be extended for a further 24 hours.

The section 60 authorisation has to be made in writing, unless that is not practicable, in which case it has to be recorded in writing as soon as practicable. The same is true for the direction to extend the 24 hour period under section 60AA(4). However, the initial authorisation under section 60AA has to be made in writing.[23]

Lord Dear argued in Committee that the wording of section 60AA was leading to confusion in the context of "flash demos" of which the police had no prior warning.[24] Labour's Lord Harris said that Lord Dear had identified an issue which needed to be addressed, but that it needed to be developed "quite carefully to avoid some potential pitfalls", particularly in relation to religious face coverings.[25] Baroness Williams of Trafford undertook to give the matter "sympathetic consideration".[26]

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20 HC Deb 13 June 2016 c1457
21 c1466
22 HL Deb 26 October 2016 c238
23 Section 60AA(6)
24 HL Deb 2 November 2016 c740
25 Ibid c 741
26 Ibid c742

On Report, Baroness Williams moved a similar amendment (now **amendment 94)** allowing oral authorisation under section 60AA(3) where this is the only practicable course of action; this must then be put in writing as soon as practicable. Lord Dear supported this, and it was agreed to without Division.[27]

[27] HL Deb 7 December 2016 c751

4. Parity of funding at inquests

Lords Amendment 96 would insert a new clause into the Bill regarding parity of funding at inquests. It is opposed by the Government.[28] The amendment,[29] moved by Lord Rosser, was agreed on Division at Report stage (243 votes to 208).[30]

The new clause would provide that where the police force for which a PCC is responsible is an interested person for the purposes of an inquest,[31] the PCC must make recommendations to the Secretary of State as to whether the family of the person who has died (or group of families of persons who have died) requires financial support to ensure parity of legal representation between parties to the inquest. If a PCC makes such a recommendation, then the Secretary of State must provide financial assistance to the individual family (or the group of families) for the purposes of funding legal representation, to ensure parity of funding between the individual family or the group of families and the other party to the inquest.

Lord Rosser explained that the amendment sought to establish the principle of parity of legal funding for bereaved families at inquests involving the police:

> Many bereaved families can find themselves in an adversarial and aggressive environment when they go to an inquest. They are not in a position to match the spending of the police or other parts of the public sector when it comes to their own legal representation. Bereaved families have to try, if possible, to find their own money to have any sort of legal representation. Public money should pay to establish the truth. It is surely not right, and surely not justice, when bereaved families trying to find out the truth—and who have done nothing wrong—find that taxpayers' money is used by the other side, sometimes to paint a very different picture of events in a bid to destroy their credibility.[32]

He stated that the Hillsborough hearings had highlighted the issue but that the issue extended to other cases:

> The lack of such funding and the associated injustice was highlighted by the somewhat sorry saga of the Hillsborough hearings, and the extent to which the scales were weighted against the families of those who had lost their lives. Publicity was given to the issue because of the high-profile nature of the Hillsborough tragedy and the steps that were taken in its aftermath to pin the blame for what had happened on supporters at the game, perhaps in an attempt to cover up where responsibility really lay, and which emerged only years later.
>
> However, inquests at which the police are legally represented are not confined to major tragedies such as Hillsborough; numerically,

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28 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para. 6
29 Then amendment 157
30 Lords Deb 7 December 2016 c764
31 As defined in section 47 of the *Coroners and Justice Act 2009*
32 Lords Deb 7 December 2016 c756

> they are more likely to cover the death of a member of an individual family.[33]

Baroness Williams said that the Government's position was that it premature to proceed with the amendment. She said it was appropriate that the Government consider the conclusions and recommendations of the report commissioned from Bishop James Jones on the experiences of the Hillsborough families before deciding what action to take. She also said that it must be right that any consideration of the amendment take account of the financial implications.

Viscount Halisham argued that it should not be the PCC who would make a recommendation to the Secretary of State and stated that a more appropriate person would be the coroner.[34]

The issue of parity of funding for legal representation at inquests had previously been raised in the Commons at Report stage of the Bill when Andy Burnham pressed an amendment to insert a new clause to a Division. The new clause was defeated by 264 votes to 155.[35]

The new clause was also debated at Committee Stage in the Lords when Lord Rosser moved an amendment to introduce the new clause and subsequently withdrew it.[36]

Background information on the issue of provision of publicly funded legal services to bereaved families at inquests is available in the Library Briefing Paper, *Legal aid for representation at an inquest*, 21 June 2016.

33 Lords Deb 7 December 2016 c756
34 Lords Deb 7 December 2016 c757
35 HC Deb 13 June 2016 c1515
36 HL Deb 2 November 2016 c753

5. Firearms and pyrotechnic articles

5.1 Government amendments

Airsoft

Clause 111 would define the term "lethal" within the context of a firearm being defined as a lethal barrelled weapon. The clause would provide for an exception for airsoft guns.

At Report stage, Government amendments (now **Lords Amendments 97 to 100**) were agreed concerning the exception for airsoft weapons.

The agreed amendments to the clause:

- amend the definition of airsoft weapons for the purposes of the exemption so that it would apply to weapons designed to discharge only a small plastic missile, regardless of whether they were capable of discharging other kinds of missile;
- provide that an airsoft weapon must have been designed only to discharge spherical plastic missiles;
- provide for a maximum allowable diameter of the small plastic missile discharged to be 8 millimetres (rather than 6); and
- make a technical amendment to the definition of automatic fire airsoft weapons.

Speaking to these amendments, Baroness Williams said that they:

> …would allow legitimate business in the airsoft industry to continue operating while setting clear standards of compliance required to protect public safety.[37]

Antique firearms

Lords Amendments 101 to 106 are Government amendments to **clause 112** regarding the definition of antique weapons. They were agreed at Report and Committee stage

Baroness Chisholm explained that concerns had been raised with the Government that the definition originally proposed in the Bill could create further uncertainty in the law:

> … it would be difficult, if not impossible, to rule out the possibility that some antique firearms may be capable of being used with cartridges other than those for which they were originally designed. This would mean that a significant proportion of antique firearms currently regarded as exempt would not be covered by the new definition and in consequence could become prohibited.[38]

The clause as amended in the Lords would provide that the regulations to be made by the Secretary of State concerning the meaning of "antique firearms" would relate to the chamber that the firearm had

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37 HL Deb 7 Dec 2016 c766
38 HL Deb 9 Nov 2016 c1154

when it was manufactured, or an identical replacement chamber, and to the propulsion system of the firearm.

The amendments agreed would also enable the Secretary of State to specify a number of years since the date of manufacture which must have elapsed for a firearm to be an antique or to specify that the firearm must have been manufactured before a specified date. The *Explanatory Notes on Lords Amendments* state that this will prevent modern reproductions benefitting from the exemptions available for antique firearms.[39]

The clause as amended in the Lords would also allow for antique air weapons to be included in the definition of antique firearms. This would apply in England and Wales only and not in Scotland where the regulation of air weapons is a devolved matter.

Controls on deactivated weapons

Government amendments were agreed at Report stage (**now Lords Amendments 107 and 108**) which would remove the reference to the EU technical specifications in **clause 114** and instead provide for the Secretary of State to set out the relevant technical standards.

Further Government amendments (**Lords Amendments 109 and 110**) were agreed to provide that the offence provided for in the clause concerning defectively deactivated weapons would not apply if the sale or gift was from one museum to another where both museums had a museum firearms licence.

5.2 New Government clauses

Government amendments (now **Lords Amendments 111, 112 and 113**)[40] were agreed which would add three new clauses that are the Government's response to amendments tabled by Geoffrey Clifton Brown at Commons Report stage.[41]

Expanding ammunition

The first new clause concerns expanding ammunition and would allow the possession, purchase, acquisition, sale or transfer of expanding ammunition for rifles where the individual is in possession of a valid firearm certificate or a visitors firearms permit. This would remove the additional requirement for special authority for such ammunition for rifles. The new clause would extend to England, Wales and Scotland (**Lords Amendment 152**).

Limited extension of firearms certificates

The second new clause would extended the validity of firearms and shotgun certificates past their expiry date for a limited period of up to eight weeks. This is intended to address issues that currently arise where

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39 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016

40 Amendments 203J and 203K at Committee stage and amendment 169A at Report stage,

41 HC Deb 26 April 2016 c1335

an application for renewal is made prior to expiry but has not been determined by the police in time. The new clause would extend to England, Wales and Scotland (**Lords Amendment 153**).

Authorised lending and use of firearms

This new clause concerns the authorised lending and use of firearms for hunting, shooting game or vermin or shooting artificial targets. It would allow a person to borrow a shotgun or rifle from a person who holds a certificate in respect of the rifle or shot gun for use on private premises for the purposes of hunting, shooting game or vermin or shooting artificial targets. The person lending the firearm must be aged 18 or over and the borrower must not be prohibited from possessing a firearm. The borrower must remain in the presence of either the lender or another relevant certificate holder for the duration of their possessing the firearm.

In a letter to Lord Rosser, Baroness Williams explained that the new clause would repeal and replace existing provisions in firearms legislation which enable a person who does not hold a certificate to borrow a shotgun or firearm from the occupier of private premises. The new clause would, she said, help to clarify the current law addressing ambiguities identified by the Law Commission and others.[42]

Pyrotechnic articles at music events

A Government amendment was agreed (**Lords Amendment 114**) adding a new clause to the bill concerning pyrotechnic articles, including fireworks or flares, at musical events. The clause would provide for a new offence of possession of pyrotechnic articles at qualifying music events in England or Wales. Qualifying musical events would be live musical performances as defined in regulations. The amendment was the Government's response to the amendment tabled by Nigel Adams at Commons Report Stage.[43]

42 Letter from Baroness Williams, Home Office, to Lord Rosser, 6 December 2016
43 HC Deb 26 April 2016 c1387

6. Alcohol licensing

6.1 Cumulative impact assessments

What are they?

Cumulative impact policies (CIPs) are not referred to in the *Licensing Act 2003*. They are discussed in Home Office guidance (March 2015) issued under section 182 of the Act where "cumulative impact" means "the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area."[44] The licensing objectives are:

- the prevention of crime and disorder
- public safety
- the prevention of public nuisance
- the protection of children from harm[45]

As the Home Office guidance explains, section 5 of the Act requires a licensing authority to prepare and publish a statement of its licensing policy at least every five years.[46] This statement can, following consultation, include a CIP, the aim of which is to limit the growth of licensed premises where the promotion of the licensing objectives is being compromised.[47]

The effect of adopting a CIP is to "create a rebuttable presumption" that applications for licences which are likely to add to the existing cumulative impact will normally be refused (or subject to certain limitations) unless the applicant can demonstrate that there will be no negative cumulative impact on the licensing objectives.[48]

There are over 200 CIPs in England and Wales.[49]

Further information on CIPs is available in chapter 13 of the Home Office guidance.

Modern Crime Prevention Strategy (March 2016)

The Home Office's Modern Crime Prevention Strategy was published in March 2016. This included a range of measures on preventing alcohol-related crime and disorder.[50] These included a commitment to put CIPs "on a statutory footing, to strengthen the ability of authorities to control the availability of alcohol and reduce alcohol-related crime and

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44 Home Office, *Amended guidance issued under section 182 of the Licensing Act 2003*, March 2015, para 13.20
45 Section 4(2) of the 2003 Act
46 Ibid, para 13.2
47 Ibid, para 13.20
48 Ibid, para 13.30
49 Home Office, *Impact Assessment on putting cumulative impact strategies on a statutory footing*, November 2016, p5; see also chart E1 on p10
50 Home Office, *Modern Crime Prevention Strategy*, March 2016, chapter 7

disorder, as well as providing industry with greater clarity about how they can be used".[51]

The Bill

Lords Amendment 117 would add a new clause to the Bill to place CIPs on a statutory footing.[52]

When speaking to the amendment in the House of Lords, Baroness Chisholm of Owlpen (the then Lords Whip), said this was needed because "not all licensing authorities are making effective or consistent use of" CIPs. In addition, the licensed trade has "concerns about the transparency of the process for putting a CIP in place and the quality of evidence used as the basis for some".[53]

A Home Office Impact Assessment on the proposal also noted:

> (…) Under the present arrangements CIPs can be implemented on relatively weak grounds and remain in place for a number of years based on limited or outdated evidence. This can lead to disproportionate restrictions on new business and potentially an associated impact on communities where a CIP places restrictions on new leisure venues in town centres where this is not necessarily appropriate. Conversely, it could lead to a failure of CIPs to stand up to scrutiny and effectively prevent the escalation of problems caused by cumulative impact. This can mean that the public are left unsure about the level of protection offered by CIPs in their area. We are also aware that some LAs feel unclear about their role as a responsible authority when making decisions in CIP areas, in particular where the evidence base is weak.[54]

Putting CIPs on a statutory footing would "provide greater clarity and legal certainty about their use".[55]

The new clause would allow a licensing authority to publish a cumulative impact assessment if it considered that the number of licensed premises in an area was such that granting further licences would be inconsistent with its duty to promote the licensing objectives. The licensing authority would have to publish the evidence for its opinion and consult the list of persons set out in section 5(3) of the 2003 Act before publishing an assessment.

A cumulative impact assessment would not prevent the grant or variation of a licence. A responsible authority or other person would need to make a representation to challenge an application. If no representations were made, the licensing authority would have to grant the licence or variation.[56]

The new clause would require a licensing authority to review the evidence supporting a CIP at least every three years, and set out the

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51 Ibid, p36
52 Lords amendments to the Policing and Crime Bill, 19 December 2016, pp29-30
53 HL Deb 9 November 2016 c1192
54 Home Office, *Impact Assessment on putting cumulative impact strategies on a statutory footing,* November 2016, p8
55 Ibid, p8 and Baroness Chisholm of Owlpen at HL Deb 9 November 2016 c1192
56 If the other conditions for granting a licence or variation are met (see chapter 9 of the Home Office guidance)

evidence for its opinion. At present, a statement of licensing policy is reviewed every five years.

The new clause would confer a discretionary power: licensing authorities would not be required to consider the cumulative impact of licensed premises in their area.[57]

According to the Home Office Impact Assessment, licensing and enforcement partners welcomed the proposal to put CIPs on a statutory footing. Most industry partners were "not opposed in principle" but "all wanted to use the opportunity to ensure clarity on the process and function of CIPs and transparency over the evidence used to implement CIPs".[58]

6.2 Late night levy

What is it?

Local authorities were given the power to introduce a late night levy through the *Police Reform and Social Responsibility Act 2011*.[59]

The levy is a discretionary power enabling licensing authorities in England and Wales to raise a contribution towards policing the late-night economy from holders of premises licences or club premises certificates. The levy must cover the whole of the licensing authority's area. The licensing authority chooses the period during which the levy applies every night, between midnight and 6am.

The amount of the levy is prescribed nationally and is based on the current licence fee system under the *Licensing Act 2003*, with holders being placed in bands based on their premises rateable value.[60]

The net levy revenue must be split between the licensing authority and the relevant police and crime commissioner (PCC). At least 70% of the net revenue must be given to the police.[61]

The licensing authority can retain up to 30% to fund the services it provides to manage the night-time economy. These must be in connection with the supply of alcohol during the late night supply period and related to arrangements for:

- the reduction of crime and disorder;
- the promotion of public safety;
- the reduction or prevention of public nuisance; or

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57 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016,, para 85

58 Home Office, *Impact Assessment on putting cumulative impact strategies on a statutory footing,* November 2016, p7; the Home Office ran a series of workshops and discussions on the proposal

59 Part 2 chapter 2 of the 2011 Act

60 Regulations 4 & 5 and Schedules 1 and 2 of the *Late Night Levy (Application and Administration) Regulations 2012* (SI 2012/2730)

61 Regulation 8 of the *Late Night Levy (Application and Administration) Regulations 2012* (SI 2012/2730)

- the cleaning of any relevant highway or relevant land in the local authority area.[62]

The licensing authority can choose to amend the portion of net revenue given to the PCC in future years. This decision must be subject to consultation in the same way as a decision to introduce the levy.

A November 2010 Impact Assessment on the *Police Reform and Social Responsibility Bill* calculated that 94 licensing authorities had enough late opening premises to generate sufficient revenue from the levy to have an incentive to implement it in their area.[63] However only seven licensing authorities have implemented a late night levy.[64]

Further information on the levy is available in Home Office guidance (December 2012).

Modern Crime Prevention Strategy (March 2016)

The Home Office's Modern Crime Prevention Strategy said that the late night levy would be improved "by making it more flexible for local areas, fairer to business and more transparent. At the same time, the Government will create a greater role for Police and Crime Commissioners [PCCs], by giving them a right to request that local authorities consult on introducing a levy to contribute towards the cost of policing the evening and night time economy".[65]

The Bill

Lords Amendments 118 and 299 would add a new clause and schedule to the Bill to reform the late night levy.[66] The intention is to "encourage local authorities to consider whether to implement a levy in their area, leading to more revenue being raised to help police the night time economy".[67] In summary, the changes would:

- allow licensing authorities to target specific geographical locations (rather than, as now, the whole of the local authority area);
- extend the levy to include late night refreshment outlets;
- enable PCCs to request the licensing authority to propose introducing a levy; and
- require licensing authorities to publish information about how funds raised by the levy are spent so that those paying it are clearer about how it is being used[68]

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62 Ibid
63 Home Office, *Impact Assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p21
64 Home Office, *Impact assessment on changes to the late night levy*, September 2016, p1; the seven local authorities are: Newcastle City Council, Cheltenham, Islington, City of London, Nottingham, Chelmsford and Southampton
65 Home Office, *Modern Crime Prevention Strategy*, March 2016, p36
66 Lords amendments to the Policing and Crime Bill, 19 December 2016, pp30-1 and pp90-5
67 Home Office, *Impact assessment on changes to the late night levy*, September 2016, p1
68 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para 86

When speaking to the amendments in the House of Lords, Baroness Chisholm of Owlpen gave the following context to the proposed changes:

> (…) Licensing authorities, the police and the licensed trade feel that the levy in its current form is inflexible. Currently, licensing authorities must apply the levy to the whole licensing authority area, and businesses which are not in night-time economy areas feel they are being unfairly charged…The provision of late-night refreshment is defined in the Licensing Act 2003 as hot food and drink sold to the public between 11 pm and 5 am. Such premises are often linked to alcohol-fuelled crime and disorder; for example, fast-food shops are often premises at which late-night drinkers congregate.
>
> PCCs have told us that they would like a formal role in relation to the levy, and we think this is appropriate as 70% of the revenue raised must go to them. The amendment will allow a PCC to request that a licensing authority formally propose a levy, thereby triggering a consultation on whether to implement one in its area. It will need to set out its reasons for doing so with reference to the cost of policing incurred as a result of the night-time economy…[69]

Further background and information on the levy is available in a Home Office Impact Assessment.[70]

6.3 The Bill and the Lords Committee on the Licensing Act

A House of Lords Select Committee is looking at the *Licensing Act 2003*.

After speaking to the Government's amendments relating to cumulative impact and the late night levy, Baroness Chisholm of Owlpen said there was no intention to pre-empt the Committee's findings.[71] She pointed out that the reforms were announced in the Government's Modern Crime Prevention Strategy, published two months before the Lords Select Committee was established. She also said that the Government "would take into consideration the request that the cumulative impact and late night levy provisions are not implemented until after the Select Committee has reported next March."[72]

Baroness McIntosh of Pickering (Conservative), the Chair of the Lords Committee on the Licensing Act, raised concerns about the Government taking action on certain alcohol-related issues (i.e. the levy and cumulative impact) before the Committee had heard all the evidence or reached any conclusions about what it would be recommending in its report.[73] She also said that some of the evidence received by the Committee "conflicts" with the Government's position.[74]

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69 HL Deb 9 November 2016 cc1191-2
70 Home Office, *Impact assessment on changes to the late night levy*, September 2016
71 HL Deb 9 November 2016 c1193
72 HL Deb 9 November 2016 c1193
73 HL Deb 9 November 2016 c1194
74 HL Deb 9 November 2016 c1194

In response, Baroness Chisholm of Owlpen repeated that it was right to proceed with the amendments as alcohol provisions were included in the Bill when it was introduced in the Commons in February 2016.[75] She also said that the Government would look carefully at the Committee's recommendations before implementing the provisions.[76]

6.4 Other licensing amendments in the Bill

Lords Amendment 115 (on summary reviews of premises licences) would make clear that the conditions of a premises licence are modified if any of them is altered or omitted or any new condition added.[77]

Lords Amendment 116 (on the powers of licensing authorities where a personal licence holder has been convicted of a "relevant offence") amends the *Licensing Act 2003* consequential to the *Immigration Act 2016*.[78]

75 HL Deb 9 November 2016 c1198
76 HL Deb 9 November 2016 c1198
77 Home Office, *Explanatory Notes on Lords amendments*, December 2016, para 82; For further background see pp71-2 of the Library's Briefing Paper 7499 and Home Office Impact Assessment (HO 0222, 22 December 2015)
78 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para 83; For further background see pp72-3 of the Library's Briefing Paper 7499.

7. Pardons for homosexuality offences

The Lords agreed a number of new clauses which would pardon people cautioned for or convicted of certain historic gay sex offences. The new clauses were moved by Lord Sharkey, Lord Lexden and Lord Cashman, in each case with Government support.

Policy background

For the full policy background on this issue, please see Library Briefing Paper 7741 *Commons Library analysis of the Sexual Offences (Pardons Etc.) Bill 2016-17*.

The new clauses build on the "disregard scheme" that was introduced by the *Protection of Freedoms Act 2012*. Under the scheme, men with historic cautions or convictions for certain gay sex offences (namely buggery and gross indecency) can apply to the Home Secretary to have their convictions disregarded. The Home Secretary must be satisfied that the following conditions have been met:

- the other person involved in the conduct constituting the offence consented to it and was aged 16 or over; and
- any such conduct now would not be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).

The aim of these two conditions is to ensure that the only convictions disregarded are those for behaviour that is no longer criminal.

If an application for a disregard is successful, the applicant is treated for all purposes in law as if he had not committed the offence or been convicted for it.

The disregard system is a different legal process to a pardon. A pardon can be used to recognise that a person was unjustly convicted. Pardons are normally only recommended where there are convincing reasons for believing a person to be both morally and technically innocent.[79]

Following numerous public campaigns, in December 2013 mathematician Alan Turing received a posthumous pardon from the Queen. Turing had been convicted of gross indecency in the 1950s for activity that would have been legal under today's laws.[80]

The decision to pardon Turing was met with mixed reaction. Some queried whether it represented good legal principle, given that the usual requirements for a pardon (namely moral and technical innocence) had

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79 In practice pardons for wrongfully convicted people are extremely rare these days, as most such cases are now dealt with by the Criminal Cases Review Commission instead. The Commission is an independent body set up to investigate suspected miscarriages of justice.

80 Ministry of Justice press release, *Royal pardon for WW2 code-breaker Dr Alan Turing*, 24 December 2013

not been met. Others queried why the same action was not being extended to all the other men who had been convicted in similar cases.[81]

The Conservative Party Manifesto 2015 included a commitment to legislate to "to lift the blight of outdated convictions of this nature" by pardoning other men – living and deceased – in Turing's position.[82]

In October 2016, John Nicolson introduced the *Sexual Offences (Pardons etc.) Bill*, a Private Member's Bill that would have legislated to automatically pardon deceased and living men with cautions and convictions for historic gay sex offences (subject to certain conditions).[83] However, the Government declined to support this Bill. Justice Minister Sam Gyimah said that the Government's preferred option was to tie pardons for the living to the disregard process under the 2012 Act, rather than making such pardons automatic. The Bill was talked out at Second Reading.[84]

The Government has instead chosen to fulfil its manifesto commitment by lending its support to Lord Sharkey, Lord Lexden and Lord Cashman's new clauses.

Pardons in England and Wales

The Lords agreed two new clauses tabled by Lord Sharkey (with Government support) to pardon certain men cautioned for or convicted of historic gay sex offences. These are now **Lords Amendments 124** and **125.**

The first new clause would grant a posthumous pardon to anyone who has been convicted of, or cautioned for, a specified offence (namely buggery or gross indecency) and who has died before the clause comes into force.[85] The pardon would only be issued if the following two conditions were met:

- the other person involved in the conduct constituting the offence consented to it and was aged 16 or over; and
- any such conduct at the time this section comes into force would not be an offence under section 71 of the *Sexual Offences Act 2003* (sexual activity in a public lavatory).

Equivalent offences committed by members of the armed forces and dealt with by way of service disciplinary proceedings are also covered by the new clause.

The second new clause would pardon anyone who has been convicted of, or cautioned for, an offence listed in section 92(1) of the *Protection*

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81 See, for example, "Enigma codebreaker Alan Turing receives royal pardon", Guardian, 24 December 2013
82 *Conservative Party Manifesto 2015*, p46
83 Library Briefing Paper 7741 *Commons Library analysis of the Sexual Offences (Pardons Etc.) Bill 2016-17*
84 HC Deb 21 October 2016 c1072 onwards
85 HL Deb 9 November 2016 c1260 onwards

of Freedoms Act 2012 and who is living at the time the clause comes into force.[86]

Pardons for living men would not, however, be granted automatically. They would instead only be granted to those who have also successfully applied to have their conviction or caution disregarded under the 2012 Act.

During the debate, Baroness Williams reiterated the Government's position that it was "important that we link the pardons for the living to the disregard process so that the necessary checks can be carried out to identify whether the individual in question engaged in activity that constitutes an offence today".[87]

Lord Cashman spoke to an amendment that would have put pardons for the living on the same footing as pardons for the deceased, rather than requiring the living to obtain a disregard before being eligible.[88] He argued that it was illogical to create two different systems for pardoning people in respect of these offences, and that to do so confused the purpose of a pardon and the purpose of the disregard scheme. However, he did not press the amendment to a Division.

Relevant offences

At Committee stage Lord Cashman spoke to an amendment that would have added cautions and convictions under section 32 of the *Sexual Offences Act 1956*[89] to the list of offences eligible for a pardon.[90] Section 32 made it an offence for a man "persistently to solicit or importune in a public place for immoral purposes".

Lord Cashman said that his amendment made clear that anyone cautioned or convicted for conduct that would now constitute the offence of soliciting under the *Sexual Offences Act 2003* would not be eligible for a pardon. The intention was only to grant pardons for those punished for "importuning for immoral purposes", which Lord Cashman said in many cases amount to nothing more "than one man chatting up another man".[91]

In response, Baroness Williams said that section 32 had covered a broad range of behaviours, and it would not therefore be straightforward to formulate additional conditions to exclude behaviour which would still be illegal today. However, she said that despite the challenges she would consider the matter further ahead of Report.[92]

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86 The offences listed under section 92(1) are sections 12 and 13 of the *Sexual Offences Act 1956* (buggery and gross indecency) and their precursor offences under section 61 of the *Offences against the Person Act 1861* or section 11 of the *Criminal Law Amendment Act 1885*

87 HL Deb 9 November 2016 c1267

88 HL Deb 9 November 2016 c1265. This would have created a similar system to that proposed by John Nicolson's *Sexual Offences (Pardons Etc.) Bill 2016-17*

89 And its corresponding earlier provisions under the *Vagrancy Act 1898*

90 HL Deb 9 November 2016 c1263

91 HL Deb 9 November 2016 c1264

92 HL Deb 9 November 2016 c1268

On Report, the House agreed a revised amendment moved by Lord Cashman (with Government support).[93] The revised amendment would give the Home Secretary the power to lay regulations to add further offences to the list of those eligible for a disregard or a pardon.

Lord Cashman said that this approach would give the Home Office more time to do "due diligence" on the section 32 offence to ensure that conduct that is still illegal today would not be eligible for a disregard or a pardon. It would also enable the Home Office to look at other more general offences that were used to prosecute men for activities – such as kissing in public – that would be legal today.

Northern Ireland

At Committee stage Lord Lexden spoke to a number of amendments that would have extended both the existing disregard scheme under the *Protection of Freedoms Act 2012* and the proposed pardons in the Bill to Northern Ireland.[94]

Lord Lexden acknowledged that justice and policing are transferred matters, but indicated that "the impetus for the extension to Northern Ireland of the arrangements proposed in England and Wales has come from Northern Ireland itself".[95] He said that the Minister of Justice in Northern Ireland had announced that a legislative consent motion would shortly be introduced in the Assembly to enable the amendments to be added to the Bill.

In response, Baroness Williams said that subject to the proposed legislative consent motion making sufficient progress, the Government was "ready to look favourably" at amendments relating to Northern Ireland at a later stage of the Bill.

The legislative consent motion was duly passed by the Assembly on 28 November 2016.[96] Lord Lexden subsequently returned to the matter at Report (with Government support), when the House agreed a number of amendments to extend disregards and pardons to Northern Ireland.[97]

Under the proposed disregard scheme, individuals would be able to apply to the Justice Department to have convictions and cautions for historic gay sex offences disregarded. Successful applications would be followed by an automatic pardon. Automatic pardons would also be given in eligible posthumous cases.

The Northern Ireland Justice Department would have the power to add further offences to the disregard scheme by means of regulations (similar to the provision made for England and Wales by Lord Cashman's amendment described above).

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93 Lords amendment 126

94 The existing disregard scheme under the 2012 Act currently only extends to England and Wales. The Scottish Government has announced its own intention to legislate on this matter: see Scottish Government press release, *Righting the wrongs of historic discriminatory law*, 25 October 2016

95 HL Deb 9 November 2016 c1263

96 Northern Ireland Assembly, Official Report 28 November 2016

97 Lords amendments 128-132. See HL Deb 12 December 2016 c1015 onwards for the Report stage debate.

The disregard and pardon schemes would operate subject to the same conditions as the equivalent schemes in England and Wales, but with one key difference: disregards and pardons would only be available in cases where all parties were at the time at least 17 years of age (rather than 16 in England and Wales). Northern Ireland Justice Minister Claire Sugden offered the following explanation for this difference during the legislative consent motion debate in the Assembly:

> In Northern Ireland, the age of consent was set in 1950 at 17 for heterosexual activity. However, all sexual activity between men was criminalised up to 1982. Again, it was 2000 before the age of consent was equalised for both genders, but here the age was set at 17. After that, it is hard to see any further discrimination between the genders and, therefore, my view is that there is no obvious requirement to offer disregards and pardons for offences where the other party was 16, as this age of consent applied to all sexual activity of whatever gender.
>
> (…) It is my opinion that the policy basis for the disregard arrangements and the proposed pardons is not just to address convictions for offences purely on the basis that the activity is no longer considered to be unlawful, although that of course is part of it, but rather to right the fundamental wrongs brought about by a criminal law which allowed and perpetrated discrimination and social injustice for a long period against a specific group of people.[98]

Ms Sugden went on to offer a commitment "to look again at the whole issue of consensual sexual offences involving 16-year-olds" and to bring it back to the Assembly for consideration following proper consideration of the policy.

8. Stalking

The *Protection of Freedoms Act 2012* amended the *Protection from Harassment Act 1997* and created a criminal offence of stalking involving fear or violence or serious alarm or distress (section 4A of the 1997 Act).

The maximum penalty is five years' imprisonment, or an unlimited fine, or both.

Further background is available in a Library Briefing Paper *Stalking: criminal offences* and Crown Prosecution Service guidance.

On 7 December 2016, the Government announced plans for stalking protection orders:

> (…) In future, when victims seek help police will be able to apply to the courts for an order to impose restrictions on perpetrators, such as staying away from their target or restricting their internet use. They may also be subject to requirements such as attending a rehabilitation program or seeking treatment for mental health issues. Breaching the conditions will be a criminal offence with a maximum sentence of five years in jail…[99]

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98 Northern Ireland Assembly, Official Report 28 November 2016

99 "New protection for victims of 'stranger stalking'", Home Office news story, 7 December 2016

Calls for tougher sentencing

Paladin (the National Stalking Advocacy Service) has been campaigning for the maximum sentence for the section 4A offence to be increased to ten years' imprisonment.

Alex Chalk has introduced the *Stalking (Sentencing) Bill 2016-17* that would increase the maximum prison sentence to ten years. When introducing his Bill, Mr Chalk said:

> (…) In practice, a five-year maximum means that a stalker who pleads guilty in the face of overwhelming evidence for the worst imaginable offence will serve just 18 to 20 months. In reality, sentences are far shorter than the maximum—typically around 10 months. That means stalkers are out in five, often unreformed, untreated and ready to carry on where they left off…[100]

He gave three reasons for increasing the maximum sentence:

> First, the most fundamental imperative is to protect the victim…
>
> The second reason is the need for rehabilitation… Longer sentences, in appropriate cases, can provide the prison system with greater opportunity to rehabilitate and treat stalkers.
>
> The third point is that the five-year maximum makes no sense when compared with other offences. To put it in perspective, the equivalent maximum for shoplifting is seven years—two years longer. For fraud, it is 10 years; for burglary, another violating offence, it is 14 years; and for street robbery, it is life. Despite stalking being such a violating, intrusive crime and despite it having the capacity to do such significant physical and mental harm, it is still treated as a minor offence. That will not do… [101]

The Bill

Lords Amendment 134, opposed by the Government,[102] would increase the maximum penalty for the offence of stalking under section 4A of the 1997 Act to ten years' imprisonment.

Where the offence is racially or religiously aggravated, it would amend the *Crime and Disorder Act 1998* and increase the maximum penalty from seven to fourteen years' imprisonment.[103]

The amendment was moved at Report stage by Baroness Royall of Blaisdon (Labour)[104] who said that it "would give judges the greater flexibility they require in sentencing to allow the sentence to fit the crime and thus better protect the victim whose life is being torn apart".[105]

The amendment "mirrors" Alex Chalk's Private Members' Bill.[106]

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100 HC Deb 12 October 2016 c310
101 HC Deb 12 October 2016 cc311-2
102 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para 6
103 Ibid, p18
104 HL Deb 12 December 2016 cc1078-9
105 HL Deb 12 December 2016 c1080
106 HL Deb 12 December 2016 c1079

When replying for the Government, Baroness Williams of Trafford pointed out that for the type of offending under consideration, other offences can apply – e.g. assault, criminal damage and grievous bodily harm (GBH) with intent. When an offender is convicted for one of these offences, they will face a maximum penalty of 10 years for criminal damage or life imprisonment for GBH with intent.[107]

She also said that the Government would review the operation of the section 4A stalking offence, consider the maximum custodial sentences available to the court, and consider mental health sentences "to consider how best to identify and address the underlying issues that are present in the most serious cases".[108]

Baroness Royall of Blaisdon put her amendment to a Division. It was passed by 160 votes to 149.[109]

Paladin have welcomed the amendment and Alex Chalk's Bill.[110]

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107 HL Deb 12 December 2016 c1082
108 HL Deb 12 December 2016 c1083
109 HL Deb 12 December 2016 c1083
110 "Tougher Laws for Stalkers – One Step Closer", Paladin News, 14 December 2016
111 Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para 6
112 Ibid, p18
113 HL Deb 12 December 2016 cc1078-9
114 HL Deb 12 December 2016 c1080
115 HL Deb 12 December 2016 c1079
116 HL Deb 12 December 2016 c1082

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Paladin have welcomed the amendment and Alex Chalk's Bill.[119]

On 6 January 2016, the Government tabled its own amendment[120] which would, it said, "go further" than the Lords amendment:[121]

> The maximum custodial sentence available to the courts for stalking will increase from 5 to 10 years, and from 7 to 14 years if the offence was racially or religiously aggravated.
>
> Ministers say the plans will help make sure the punishment reflects the severity of the crime and its damaging consequences on victims.
>
> Justice Minister Sam Gyimah said:
>
> "Stalkers torment their victims and can make everyday life almost unbearable. We are doubling the maximum sentences available to the courts so these awful crimes can be properly punished.
>
> "I would like to thank Alex Chalk MP and Richard Graham MP for their considerable efforts in highlighting this issue.
>
> "We are also working across the criminal justice system to ensure mental health issues associated with these crimes are properly addressed."
>
> The government will seek to implement the change through an amendment to the Policing and Crime Bill, currently going through Parliament. It will go further than the amendment recently passed in the House of Lords, as it will also raise the maximum sentence for harassment – from 5 to 10 years and 7 to 14 years if racially or religiously aggravated.

9. Coroners' investigations into deaths: meaning of "state detention"

9.1 Background

Coroner's duty to investigate a death

A coroner has a duty to investigate a death where (s)he is made aware that the body is within that coroner's area and (s)he has reason to suspect that:

- the deceased died a violent or unnatural death,

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117 HL Deb 12 December 2016 c1083
118 HL Deb 12 December 2016 c1083
119 "Tougher Laws for Stalkers – One Step Closer", Paladin News, 14 December 2016
120 *Notices of amendments given up to and including 6 January 2017*
121 Ministry of Justice, *Maximum sentence for stalking to double*, 6 January 2016

- the cause of the death is unknown, or
- the deceased died while in custody or state detention.[122]

Section 48(2) of the Coroners and Justice Act 2009 defines state detention for these purposes:

> A person is in state detention if he or she is compulsorily detained by a public authority within the meaning of section 6 of the Human Rights Act 1998.

A coroner may not discontinue an investigation if he or she suspects that the deceased died a violent or unnatural death, or died whilst in custody or state detention, meaning that an inquest will be held as part of that investigation. [123]

Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) (part of the *Mental Capacity Act 2005*) aim to protect people who lack mental capacity, but who need to be deprived of liberty so they can be given care and treatment in a hospital or care home. If a person's right to liberty needs to be infringed in other settings, an authorisation must be obtained from the Court of Protection.[124]

A Supreme Court judgment in May 2014 (known as "Cheshire West") widened the definition of deprivation of liberty.[125] The Court held that the key feature is whether the person concerned is under continuous supervision and control and is not free to leave. The person's compliance or lack of objection, the relative normality of the placement, and the purpose behind it are irrelevant to this objective question.[126] This meant that more people were subsequently judged to have their liberty deprived, and therefore have access to the Deprivation of Liberty Safeguards.[127]

Chief Coroner guidance

The Chief Coroner subsequently issued guidance which set out his view, subject to a decision of the High Court, that any person subject to a DoL is 'in state detention' for the purposes of the 2009 Act. Accordingly, when that person dies, the death should be the subject of a coroner investigation, even when the death was from natural causes.

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122 Coroners and Justice Act 2009 section 1
123 Coroners and Justice Act 2009 section 4
124 Law Commission, Mental Capacity and Deprivation of Liberty [accessed 5 January 2017]
125 P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor [2014] UKSC 19
126 Supreme Court Press Summary, 19 March 2014
127 At Committee stage in the House of Lords, Baroness Finlay of Llandaff said "After the Cheshire West judgment, the number of DoLS applications has risen enormously. … Prior to the Cheshire West judgment, in 2012-13, there were 11,887 DoLS. In 2014-15, 122,775 individuals had an active DoLS application either granted or in process. That is more than a tenfold increase in the number of DoLS (HL Deb 16 November 2016 c1514)

The Chief Coroner has since noted the practical difficulties this has caused:

> As a consequence the caseload of all coroners has substantially increased for no good purpose. There were 7,183 DoLS cases in 2015. They have all had to be processed and taken to inquest. Bereaved families have been caused considerable distress. Why, they ask, should their elderly relative, who suffered from dementia and has died a natural death, suffer the indignity of the coroner process? There has been unnecessary work for coroners and additional cost for local authorities.[128]

The Chief Coroner has called for the law to be changed to remove such cases from the category of 'in state detention'.[129]

Law Commission

The Law Commission is conducting a project on Mental Capacity and Deprivation of Liberty. In May 2016, following consultation, the Commission published an interim statement, setting out some initial conclusions. This also spoke of the difficulties caused by the current law:

> The current law – which requires an inquest where a person dies while under a DoLS, even if the cause of their death was entirely natural – was seen to be causing unnecessary work for coroners and upset to families. We received reports, for example, of police arriving at the deceased's deathbed; one consultee reported their impression of a "crime scene"; another referred to issues over whether the deceased's body should be taken to the official mortuary rather than to the family's preferred funeral director.[130]

The Law Commission's provisional recommendation was that the death of a person subject to a DoLS authorisation should be scrutinised by a Medical Examiner and not subject to coroner investigation unless there is a specific reason for referral to the coroner.

9.2 Lords Amendments 135 and 306

Lords Amendment 135 would insert a new clause (**Clause 180** in HL Bill 84) to amend the definition of "state detention" in section 48 of the Coroners and Justice Act 2009, to exclude people subject to a deprivation of liberty authorisation either under Deprivation of Liberty Safeguards or a Court of Protection Order or where the deprivation of liberty was otherwise authorised by the Mental Capacity Act 2005. The amendment would remove the duty on coroners to conduct an inquest in DoL cases.

Lords Amendment 306 would make a consequential amendment to the long title.

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[128] Report of the Chief Coroner to the Lord Chancellor, Third Annual Report: 2015-2016, paragraph 147

[129] Ibid paragraph 149

[130] Law Commission, Mental Capacity and Deprivation of Liberty Interim Statement, 25 May 2016, paragraph 1.31

The amendments were moved at Committee stage in the House of Lords by Baroness Finlay of Llandaff (Crossbench), [131] and were supported by the Government. [132]

Baroness Finlay reiterated that the amendment would not remove the obligation to inform the coroner if there was any suspicion about the death. She said that she would expect there to be a routine review of any death in a mental health trust or similar organisation and that the Care Quality Commission would be better placed to detect poor care than a coroner looking only at one death:

> Such a review should be available to the Care Quality Commission inspectors and I would expect the inspectors to ask about the number of deaths that had occurred in people subject to a deprivation of liberty safeguard application or authorisation. They should look in depth at the quality of the review of care that had taken place. Additionally, anyone who has concerns at any stage should raise those concerns, whether through whistleblowing or through the complaints process.
>
> Complaints and how they are handled also form part of CQC inspections and I believe that such searching questions are far more likely to detect poor care than relying on a referral to the coroner, who is only looking at one instance and cannot see how care is delivered across a whole organisation. The recent incidents of poor care of those with leaning difficulties that have come to light are certainly alerting inspectors that they must be more rigorous in their inquiries than before.[133]

Baroness Chisholm of Owlpen confirmed the Government's support of the amendments.

At Report stage in the House of Commons, Ann Coffey had spoken to a probing amendment intended to have similar effect.[134] At that stage, Mike Penning confirmed that the Government was looking at the issue.[135]

131 HL Deb 16 November 2016 cc1514
132 HL Deb 16 November 2016 cc1516
133 HL Deb 16 November 2016 cc1515-6
134 PBC Deb 13 June 2016 cc1488-90
135 PBC Deb 13 June 2016 cc1490

10. Victims

10.1 Statutory rights for victims

Lords Amendments 136-142 were added to the Bill on Report following a Government defeat.[136] They would place a number of victims' rights on a statutory basis. The Government opposes these amendments, [137] as it has already undertaken to bring forward its own proposals in due course.

Background

There have been many recent calls for reform to the law on victims' rights and services in England and Wales. In the run up to the 2015 General Election, Conservative, Labour and Liberal Democrat manifestos all promised legislation on victims.

Victims of sexual and violent crime have certain statutory rights under Part 3 of the *Domestic Violence, Crime and Victims Act 2004* **if** the perpetrator is sentenced to 12 months or more. Other victims' rights are set out in the *Code of Practice for Victims of Crime*. This sets out what victims should expect from various criminal justice agencies.

Although the Code is a statutory one,[138] failure to comply with it does not of itself make a person liable to criminal or civil proceedings. Courts can take such failure into account in other proceedings. Also, under section 5 of the *Parliamentary Commissioner Act 1967*,[139] MPs can refer complaints about failure to perform duties under the Code to the Parliamentary Ombudsman.

However, a number of commentators have called for rights under the Code to be legally enforceable. Further background is given in Library Briefing Paper 7139, *A new victims' law in England and Wales?*, (26 May 2016).

The Government's 2015 Queen's Speech Background Briefing Notes referred to "putting the key entitlements of the Victims Code in primary legislation". In a PQ answered in February 2016 the then Victims' Minister acknowledged this commitment, and said that further detail would be published in due course. [140] The 2016 Queen's Speech did not mention victims.

Sir Keir Starmer, then a Shadow Home Office minister, supported a Private Members' Ten Minute Rule Bill in the last session which would have provided for enforcement of the Victims' Code and put victims' entitlements on a statutory footing.[141] The Bill had its first reading on 20 October 2016, but made no further progress.

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[136] HL Deb 12 December 2016 c1096
[137] Home Office, *Policing and Crime Bill: Explanatory Notes on Lords Amendments*, Bill 118-EN 2016-17, 19 December 2016, para 6
[138] Provided for in Chapter 1 of the *Domestic Violence, Crime and Victims Act 2004*
[139] as amended by the 2004 Act
[140] PQ 26033 [on Crime: Victims] 10 February 2016
[141] *Victims of Crime Etc (Rights, Entitlements and Related Matters) Bill 2015-16*

The amendments

In Committee, Liberal Democrat Baroness Brinton moved an amendment to provide for a direct route of complaint by a member of the public the Parliamentary Ombudsman where the police had failed to comply with a duty under the Code.[142] Currently under section 5 of the *Parliamentary Administration Act 1967*, the usual "MP Filter" would apply to such complaints.

Other related amendments were tabled which would have covered similar ground to Sir Keir Starmer's Private Member's Bill. The intention, Baroness Brinton said, was to "outline a statutory framework for victims' rights".[143] Both she and Labour's Lord Rosser argued that the Code was not legally enforceable and that feedback from victims suggested that agencies often failed to fulfil their obligations under the Code.[144] Responding, the then Government spokesperson, Baroness Chisholm of Owlpen, said that the Government had committed to bringing forward proposals to strengthen the victims' rights, and it was "important that we take the time to get this right".[145] Baroness Brinton asked the Minister if there could be talks on the issue.

On Report, Baroness Brinton moved the amendment again, thanking the Minister for talks:

> I was pleased that she said that the Government would bring proposals forward to strengthen victims' rights; I was slightly less that it was "in due course".[146]

Baroness Owlpen argued that placing these entitlements on a statutory footing would be "merely symbolic" and would not ensure compliance.[147]

The main amendment, to allow victims a direct route of complaint Parliamentary Ombudsman where the complaint concerns police failures to perform duties under the Code, was agreed to on Division by 136 votes to 130.[148] This is now **Lords Amendment 136**.

Other amendments were agreed to without Division. These are:

- **Lords Amendment 137** which would require the Victims' Code to set out entitlements to accurate and timely information from criminal justice agencies, and provide other statutory entitlements including to information from the police, to be treated with dignity and not to be subjected to unnecessary delay;
- **Lords Amendments 138** and **139**, which would require the Home Secretary to publish a strategy on training for criminal justice agencies, and report on training and non-compliance with the Code;

142 HL Deb 16 November 2016 c1489
143 c1492
144 c1491 and c1493
145 c1495
146 HL Deb 12 December 2016 c1092
147 Ibid c1095
148 Ibid c1096

- **Lords Amendment 140**, which would give elected local policing bodies (such as PCCs) a statutory duty to assess the needs of victims and the adequacy of available services, and produce an Area Victims' Plan;
- **Lords Amendment 141**, which would require the Commissioner for Victims and Witnesses to assess the adequacy of these plans and produce quality standards;
- **Lords Amendment 142**, which would establish a framework for reviews in homicide cases, where a person over 16 may have been a victim of homicide and either no-one has been charged, or the person charged has been acquitted.

When the proposed amendments were considered in Committee, Baroness Chisholm of Owlpen said that proposals for homicide reviews were "unnecessary":

> (…) If the family of a victim has concerns about a closed homicide case, this can be looked at again under the Crown Prosecution Service's recent guidance, Reviewing Previously Finalised Cases, to determine whether or not a review should be conducted…[149]

The Crown Prosecution Service policy, referred to above, is available online.

[149] HL Deb 16 November 2016 c1495

11. Requirement to produce nationality documents

Clauses 139 and 140 of the Bill would amend the *UK Borders Act 2007* to give police and immigration officers the power to require a person to provide their nationality following arrest, and to require suspected foreign nationals to produce their nationality documentation.

In Committee, Baroness Hamwee, a member of the Joint Committee on Human Rights, moved an amendment proposed by that Committee.[150] In a report published in October 2016, the Committee had said that were a UK citizen is asked to provide a nationality document, and is not in possession of such a document, "it should instead be possible for him or her to provide documentation sufficient that such a document would be issued by the passport authority".[151] This, the Committee argued, should be on the face of the Bill, rather than in guidance as the Government had proposed.

On Report, the Government moved what is now **Lords Amendment 122**, to respond to this recommendation.[152] **Lords Amendment 123** would enable the new provisions to be piloted in one or more police force areas.

[150] HL Deb 9 November 2016, c1259
[151] JCHR, *Legislative Scrutiny: (1) Children and Social Work Bill; (2) Policing and Crime Bill; (3) Cultural Property (Armed Conflict) Bill*, 13 October 2016, HL 48/HC 739 2016-17, para 87
[152] HL Deb 12 December 2016 c1015

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