

# PROTECTION OF FREEDOMS ACT 2012

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 3: Protection of property from disproportionate enforcement action**

#### **Chapter 1: Powers of Entry**

#### **Section 39 and Schedule 2: Repealing etc. unnecessary or inappropriate powers of entry**

189. *Subsection (1)* confers on the appropriate national authority a power, exercisable by order, to repeal any power to enter land or other premises in either primary or secondary legislation which the Minister considers to be either unnecessary or inappropriate. Such an order may also repeal any “associated power”, for example, a power to search or inspect the premises entered into, or to seize material found in such premises; the term is defined in section 46. The power to repeal an associated power may be exercised independently from the power to repeal a power of entry (and vice versa). The term “appropriate national authority” is defined in section 46 as either the Welsh Ministers or a Minister of the Crown; any order made by the Welsh Ministers may only make provision which is within the legislative competence of the National Assembly for Wales.
190. *Subsection (2)* introduces Schedule 2 which directly repeals 15 existing powers of entry that have been identified as unnecessary or that duplicate existing laws. These repeals include a number of antiquated powers of entry relating to agriculture that are no longer required. The list of those powers being repealed also includes a handful of antiquated miscellaneous powers, such as that relating to ‘German Enemy Property’, which are no longer relevant in today’s society.

#### **Section 40: Adding safeguards to powers of entry**

191. *Subsection (1)* confers on the appropriate national authority a power, exercisable by order, to add safeguards to any power of entry or associated power. *Subsection (2)* sets out a non-exhaustive list of the safeguards which may be included in such an order. Any such safeguards prescribed in an order would be in addition to (with or without modifications) those already contained in the legislation conferring the power of entry or any associated power. The safeguards which may be prescribed in an order made under this section may include, amongst other things:
- restrictions as to the types of premises in respect of which the power may be exercised. For example, provision could be made to limit the operation of the power to commercial or business premises, or to exclude private dwellings;
  - restrictions as to the times at which the power may be exercised. For example, provision could be made to limit the operation of the power to reasonable day time hours;

- a requirement for the power of entry to be subject to an authorisation. This could, for example, be an internal authorisation granted by an officer of a specified minimum seniority within the organisation concerned, or a warrant granted by a court (likely to be a magistrates' court or, in Scotland, a sheriffs' court), or both;
- obligations on the person exercising the power. For example, provision could be made to show the occupier of the premises some form of identification; to provide a written receipt for anything taken from the premises following a search; or to provide specified written information to the occupant (such as in respect of the procedure for making a complaint about the way the power of entry or an associated power was exercised).

#### ***Section 41: Rewriting powers of entry***

192. *Subsections (1) and (2)* confer on the appropriate national authority a power, exercisable by order, to rewrite any powers of entry or associated powers with or without modifications. The powers extend to rewording related enactments. Such an order might consolidate a number of powers of entry exercisable for similar purposes or by a defined category of state officials. Whilst an order made under this section may alter a power of entry or associated power and any safeguard linked to such powers, the combined effect of the changes must be to add to the level of protection afforded by the safeguards when taken together (*subsection (3)*).

#### ***Section 42: Duty to review certain existing powers of entry***

193. *Subsection (1)* places a duty on each Cabinet Minister to conduct a review of relevant powers of entry and relevant associated powers for which the Minister is responsible. The terms 'relevant powers of entry' and 'relevant associated powers' are defined in *subsection (3)* as those made under a public general Act or statutory instrument made under such an Act. It would, for example, accordingly fall to the Home Secretary to review powers of entry, and associated powers, exercisable by, amongst others, the police and UK Border Agency staff. In conducting such a review the Minister must consider whether, in relation to each power of entry (and associated power), to exercise the order-making powers in sections 39(1), 40 or 41. Each Cabinet Minister is required to prepare a report on the review and lay a copy of the report before Parliament. These reviews must be completed, and the report of each review laid before Parliament, within two years of Royal Assent to this Act. By virtue of *subsection (2)* any failure to review a particular power of entry (or associated power) does not affect the validity of that power.

#### ***Section 43: Consultation requirements before modifying powers of entry***

194. Before making an order under sections 39(1), 40 or 41 the appropriate national authority must consult with the representatives of persons entitled to exercise the powers of entry (and associated powers) that are to be the subject of such an order. For example, in the case of powers of entry exercised by the police, the Home Secretary would normally consult the Association of Chief Police Officers. The Minister may consult any other persons he or she considers appropriate.

#### ***Section 44: Procedural and supplementary provisions***

195. *Subsection (1)* provides that an order made under sections 39(1), 40 and 41 may modify any enactment and is to be made by statutory instrument, such an order may include any appropriate incidental, consequential, supplementary, transitory, transitional or saving provisions. The power to make consequential amendments could, for example, be used to repeal any offence which becomes redundant as a result of the repeal of a related power of entry. By virtue of *subsections (2) and (4)*, an order made by a Minister of the Crown under sections 39(1), 40 and 41 is subject to the affirmative resolution procedure

where it amends or repeals provisions in primary legislation, but is otherwise subject to the negative resolution procedure.

196. *Subsection (3)* disapplies the hybridity procedure should such procedure apply to an order made by the Minister of the Crown under sections 39(1), 40 and 41. The hybridity procedure is explained in paragraph 155.
197. *Subsections (6) and (7)* provide that a relevant order made by the Welsh Ministers is similarly subject to the affirmative resolution procedure in the National Assembly for Wales so far as it amends or repeals provisions in primary legislation. Otherwise it is subject to the negative resolution procedure.

#### ***Section 45: Devolution: Scotland and Northern Ireland***

198. This section provides that an order made under sections 39(1), 40 or 41 may not make provision that would be within the legislative competence of the Scottish Parliament if it were contained within an Act made by the Scottish Parliament, or the Northern Ireland Assembly if it were contained within an Act made by the Northern Ireland Assembly in so far as it deals with a transferred matter.

#### ***Section 46: Sections 39 to 46: interpretation***

199. *Section 46* contains definitions of various terms used in sections 39 to 46. Amongst other things, it adopts the definition of ‘premises’ used in section 23 of the Police and Criminal Evidence Act 1984 (“PACE”).

#### ***Section 47: Code of Practice in relation to non-devolved powers of entry***

200. *Subsection (1)* places a duty on the Secretary of State to prepare a code of practice in relation to the exercise of powers of entry and associated powers. *Subsection (2)* sets out a non-exhaustive list of matters which may be included in such a code of practice.
201. *Subsection (3)* provides that a code of practice must not make provision in respect of ‘devolved powers of entry and associated powers’ (as defined in *subsection (5)*). A code may make different provisions for different powers of entry and need not contain provision in respect of every power of entry. This ensures that where a power of entry is already subject to an existing code of practice (for example, a code of practice issued under PACE) there is not overlapping guidance in place.
202. *Subsection (4)* requires the Secretary of State, in preparing a code of practice, to consult the Lord Advocate, the representatives of persons entitled to exercise the powers of entry to be covered by the code and such other persons as the Secretary of State considers appropriate.

#### ***Section 48: Issuing of code***

203. This section sets out the parliamentary procedure for approving the first code of practice made under section 47. *Subsection (1)* requires the Secretary of State to lay before Parliament the proposed code together with a draft order bringing the code into force. Such an order is subject to the affirmative resolution procedure (*subsections (2) and (3)*). If the draft order bringing into force the first code of practice is not approved, the Secretary of State is required to prepare a revised code; the draft order bringing such a revised code into force is again subject to the affirmative procedure (*subsection (4)*).
204. *Subsection (7)* disapplies the hybridity procedure should such procedure apply to the first order made under this section. The hybridity procedure is explained in paragraph 155.

***Section 49: Alteration or replacement of code***

205. *Subsection (1)* places a duty on the Secretary of State to keep the powers of entry code of practice under review. The Secretary of State may, in the light of such a review, amend the existing code or substitute a new code (*subsection (1)(b)*). *Subsection (2)* requires that in making any alteration to the code or when introducing a new code the Secretary of State must again consult the Lord Advocate, the representatives of persons affected by the code and such other persons as the Secretary of State considers appropriate. *Subsections (3) to (9)* make provision relating to the issuing of a replacement or amended code. In particular, either House of Parliament has 40 days (excluding any period during which Parliament is not sitting for more than four days) in which to pass a resolution refusing to approve the code. If such a resolution is passed then the Secretary of State may prepare another code of practice or amended code of practice for resubmission. Where no resolution is passed, the replacement or amended code will come into force at the end of the 40-day period.

***Section 50: Publication of code***

206. This section requires the Secretary of State to publish the powers of entry code of practice once approved under section 48, and to publish any subsequent revisions to that code or any replacement code.

***Section 51: Effect of code***

207. *Subsection (1)* provides that a ‘relevant person’ must have regard to the code of practice when exercising the powers of entry or associated powers to which the code relates. *Subsection (5)* provides that a ‘relevant person’ for these purposes is a person specified, or of a description specified, in an order made by the Secretary of State (such an order is subject to the affirmative resolution procedure (*subsection (9)*)). Such an order may provide that a relevant person is only required to have regard to the powers of entry code of practice when discharging specified functions or acting in a specified capacity (*subsections (6) and (7)*). This is intended to provide for those instances where certain bodies have dual or multiple roles or, for example, exercise both public functions and private sector functions, and where the duty to have regard to the code may therefore be limited to the exercise of one, or one part of, their functions. Before making such an order the Secretary of State must consult the representatives of the persons to be affected by it and other persons he or she considers appropriate (*subsection (8)*).
208. *Subsection (2)* provides that a failure to adhere to any aspects of the code of practice would not, of itself, render a person liable to civil or criminal proceedings. However, the code of practice is admissible in criminal or civil proceedings (*subsection (3)*) and a court or tribunal may take into account any failure of a relevant authority to comply with the duty to have regard to the code (*subsection (4)*).

***Section 52: Sections 47 to 51: interpretation***

209. This section applies the definitions of the terms ‘power of entry code’ contained in section 49(10) and of the terms ‘power of entry’ and ‘associated power’ contained in section 46 to the use of those terms in sections 47 to 51.

***Section 53 and Schedule 3: Corresponding code in relation to Welsh devolved powers of entry***

210. **Section 53** introduces Schedule 3 which confers a power on the Welsh Ministers to issue a code of practice about Welsh devolved powers of entry and associated powers. The Schedule makes broadly similar provisions to those contained in sections 47 to 52. The one substantive difference between the two sets of provisions is that section 50 places a duty on the Secretary of State to publish a powers of entry code of practice, whereas under Schedule 3 the Welsh Ministers have a discretion whether or not to issue a code in respect of devolved powers of entry.

**Chapter 2 of Part 3: Vehicles left on land**

**Section 54: Offence of immobilising etc. vehicles**

211. *Subsection (1)* makes it a criminal offence to immobilise a motor vehicle by attaching to the vehicle, or to a part of the vehicle, an immobilising device (typically a wheel clamp), or to move (for example, by towing away) or to restrict the movement of a vehicle (for example, by using another vehicle to prevent it being driven away). To be guilty of the offence, a person must undertake one of these actions with the intention of preventing or inhibiting a person entitled to move the vehicle concerned from moving the vehicle. Consequently, a person who moved an obstructively parked vehicle a short distance intending to regain access to his or her property would not be committing the offence in circumstances where he or she did not intend to prevent the driver of the vehicle from subsequently retrieving it. Similarly, the required intention would not be present in the case of a person applying a wheel clamp to his or her own vehicle to prevent theft. The offence does not apply where a person is acting with lawful authority when immobilising, moving or restricting the movement of a vehicle. There are a number of bodies with statutory powers to immobilise or remove vehicles in specified circumstances, including: local authorities when enforcing road traffic contraventions on the public highway or local authority managed car parks; the police when enforcing road traffic contraventions or otherwise removing vehicles that are illegally, obstructively or dangerously parked; the police and local authorities when exercising their powers to remove abandoned vehicles from public and private land; the Department for Transport's Driver and Vehicle Licensing Authority ("DVLA") in respect of vehicles that have no road tax; the Vehicle and Operator Services Agency in respect of vehicles that are not roadworthy; and the police and local authorities when exercising their powers to remove vehicles forming part of an unauthorised traveller encampment. In addition, bailiffs have a mix of statutory and common law powers to immobilise and tow away vehicles for the purposes of enforcing debts (including those arising out of unpaid taxes and court fines).
212. *Subsection (2)* provides that any consent, whether express or implied, given by a person entitled to remove the vehicle to the immobilisation, movement, or restriction of movement, does not constitute lawful authority for the purposes of subsection (1). A driver of a vehicle, by parking in a commercially run car park, may have impliedly accepted the landowner's offer to park (or that of the parking company acting as the landowner's agent). He or she may also, depending on what is advertised at the car park, have impliedly agreed to comply with the terms and conditions advertised, including the parking charges and the associated enforcement mechanism for those charges. However, by virtue of this subsection, the operation of the law of contract as it applies to commercially run private car parks does not confer lawful authority on the landowner or operator of a car park to clamp or tow away a vehicle parked there.
213. *Subsection (2)* is subject to the exception in *subsection (3)* the effect of which is to exclude from the ambit of the offence the case of a driver who has given express or implied consent (for example, when entering a privately operated car park) to the movement of his or her vehicle being restricted by a fixed barrier. Accordingly, no offence would be committed where a driver was prevented from leaving a car park because the vehicle's exit was blocked by a fixed barrier which remained in place because the driver had not paid the requisite parking charges (provided the barrier was present when the vehicle was parked, whether or not it only subsequently restricted movement, for example by being lowered into place).
214. *Subsection (4)* contains an exception so that anyone entitled to remove a vehicle cannot commit the subsection (1) offence in respect of that vehicle. This would apply where the owner of a vehicle retrieves a vehicle being used by another person (for example, a car hire company recovering an unreturned vehicle in respect of which the car hire agreement had expired).

215. *Subsection (5)* sets out the maximum penalty for the offence, namely on summary conviction a fine not exceeding the statutory maximum (currently £5,000) and on conviction on indictment an unlimited fine.

### ***Section 55: Extension of powers to remove vehicles from land***

216. This section amends section 99 of the Road Traffic Regulation Act 1984 so as to extend the power to make regulations for the police and others to remove vehicles in certain circumstances. Section 99 of the Act enables the Secretary of State to provide in regulations for the removal of vehicles that are illegally, obstructively or dangerously parked or broken down on a road. A road is defined for these purposes as ‘any length of highway or any other road to which the public has access, and includes bridges over which a road passes’ (section 142 of the Road Traffic Regulation Act 1984). Section 99 of the Road Traffic Regulation Act also enables regulations to be made governing the removal of vehicles that have been abandoned on a road or ‘on any land in the open air’. The current regulations made under section 99 include the Removal and Disposal of Vehicles Regulations 1986 (SI 1986/183), as amended. These regulations give the police, local authorities and others the power (not a duty) to remove vehicles in the circumstances described in section 99. The effect of the amendments to section 99 will be to enable regulations to be made which confer a power on the police, local authorities or others to remove vehicles that are illegally, dangerously or obstructively parked on any land (*subsections (2) and (3)*). The power to remove abandoned vehicles is similarly extended so that it is no longer restricted to vehicles abandoned ‘on any land in the open air’, so ensuring that the power could cover places such as an underground car park.

### ***Section 56: Recovery of unpaid parking charges***

217. *Section 56* gives effect to Schedule 4 which makes provision in certain circumstances for the recovery of unpaid parking related charges from the keeper or the hirer of a vehicle.

### ***Schedule 4: Recovery of unpaid parking charges***

218. *Paragraph 1* introduces the scheme as provided for in Schedule 4. The scheme provides that, subject to certain conditions being met, the keeper or the hirer of a vehicle may be made liable for any unpaid parking charge that has arisen as a result of either: the driver of the vehicle having entered into a contract with a landowner and/or another person authorised to require payment of parking charges on the land in question; or, through the driver of the vehicle committing a trespass or other tort on land where parking is prohibited. The scheme is based on the legal analysis that a driver of a vehicle by parking on private land either expressly or implicitly accepts the landowner’s offer to park (or that of a parking company acting as the landowner’s agent), or prohibition on parking and agrees to comply with any terms and conditions (including any parking charges and the associated enforcement mechanism for those charges) advertised on a notice board at the entrance to and within the land. The driver may commit a trespass by parking on private land without permission or, if the terms and conditions of any agreement which the driver has implicitly accepted are not adhered to, then the driver may be in breach of that agreement. In either situation, whether the existence of a contract can be established or, alternatively, if the driver can be shown to have committed a tort, the Schedule envisages a situation where the vehicle can be “ticketed” for charges due under the terms of that contract or for the pre-estimated damages resulting from the trespass.
219. Under the current law, parking providers wishing to enforce charges against drivers are able to obtain details of the vehicle keeper from the DVLA if they are able to show “reasonable cause” for wanting the information (so as to satisfy regulation 27(1)(e) of the Road Vehicles (Registration and Licensing) Regulations 2002 (SI 2002/2742)). A parking provider managing parking in accordance with industry best practice has reasonable cause to seek from the DVLA the keeper details of a vehicle in respect

of parking related charges that have not been paid. The DVLA requires parking companies requesting keeper details for parking enforcement purposes to be members of an accredited trade association (the British Parking Association's Approved Operator Scheme is the only trade association currently so accredited). Whilst landowners and agents may seek to recover unpaid parking charges from vehicle keepers, as the law is currently understood to stand, any parking contract will be between the driver of a vehicle and the parking provider and any tort is committed by the driver of the vehicle. Accordingly, the keeper may not be liable in law for the charges incurred if he or she was not the driver at the time.

220. *Paragraphs 2 and 3* define various terms used in the Schedule. The scheme applies only to vehicles parked on "relevant land", the definition of which excludes a highway maintainable at public expense and a parking place provided or controlled by a traffic authority. Other land where parking is governed by a statutory scheme including that contained in Part 6 of the Traffic Management Act 2004 (which includes provision for keeper liability) is also excluded from the scheme as set out in this Schedule.
221. *Paragraph 4* provides that the creditor has a right to recover unpaid parking charges from the keeper of the relevant vehicle if the conditions set out in *paragraphs 5, 6, 11 and 12* are satisfied. The creditor is not obliged to pursue unpaid parking charges through this scheme and may seek to do so through other means but they may not use the scheme provided for here to secure double recovery of unpaid parking charges (*paragraph 4(6)*), nor will they have the right to pursue the keeper, as opposed to the driver, of the vehicle where they have sufficient details of the driver's identity. The right to reclaim unpaid parking charges from the vehicle keeper does not apply in cases where the vehicle has been stolen before it was parked, (*paragraphs 4(2) to (3)*), or in certain circumstances where the vehicle in question was a hire vehicle (*paragraph 4(7)*). The creditor may not make a claim against the keeper of a vehicle for more than the amount of the unpaid parking related charges as they stood when the notice to the driver was issued (*paragraph 4(5)*).
222. *Paragraph 5* sets out the first condition which is that the creditor must have the right to enforce the requirement to pay unpaid parking charges against the driver of a vehicle but is unable to do so because the creditor does not know the name and current address of the driver.
223. *Paragraph 6* sets out the second condition which is that the creditor must have served the appropriate notices as set out in *paragraphs 7 and 8 or 9*. Paragraph 7 sets out the requirements for a valid a notice to the driver. This must either have been given to the person in charge of the vehicle or affixed to the vehicle whilst it was still located on the land and comply with the requirements of *paragraph 7(2)* which lists the matters that must be set out in the notice, including the total amount of the parking charges payable and the arrangements for the resolution of disputes and complaints that are available. In the event that the notice is not settled by the driver (within the 28 day window provided for under the Schedule), paragraph 8 sets out the requirements which must be followed in order to serve a subsequent notice on the keeper of the vehicle requiring either payment of the unpaid parking charges or the name and address of the driver of the vehicle at the relevant time. In the event that it is not possible to serve an initial notice on the driver of the vehicle (for example, if parking enforcement is carried out after the event via CCTV), paragraph 9 sets out the requirements which must be adhered to when serving a first notice directly to the keeper of the vehicle.
224. *Paragraph 10* contains a power for the Secretary of State (or the Welsh Ministers) to prescribe in regulations any requirements as to the evidence which must accompany a valid notice to the keeper.
225. *Paragraph 11* sets out the third condition (which applies only to registered vehicles) which is that the creditor has applied to the Secretary of State (in practice, the DVLA) for the name and address of the keeper and that information has been provided.

*These notes refer to the Protection of Freedoms Act  
2012 (c.9) which received Royal Assent on 1 May 2012*

226. *Paragraph 12* contains a power for the Secretary of State (or the Welsh Ministers) to prescribe in regulations any requirements for the display of notices on relevant land. The fourth condition is that if any such requirements are prescribed, they must have been complied with prior to the period of parking in question.
227. *Paragraph 13* contains provisions which are relevant to vehicle-hire firms who may receive notices under the Schedule as registered keepers of hire vehicles for charges incurred when those vehicles are, or have been, on hire. Paragraph 13 provides that where the vehicle-hire firm provides the creditor with a statement confirming that the vehicle was hired at the relevant time, together with a copy of the hire agreement and a statement signed by the hirer confirming that the hirer agrees to be responsible for all parking charges incurred during the period of hire, it is the hirer of the vehicle who is liable for the unpaid parking charges and not the vehicle-hire firm. *Paragraph 14* sets out the procedure and requirements for the creditor to then serve a further notice on the hirer of the vehicle requesting payment of the unpaid parking charges.
228. *Paragraph 15* provides that the scheme applies to Crown vehicles that are required to be registered with the DVLA and to the keeper of such vehicles. The scheme does not, however, apply to vehicles used for military purposes or that belong to visiting forces.
229. *Paragraph 16* confers a power on the Secretary of State (or the Welsh Ministers) to amend certain provisions in Schedule 4 by order (subject to the affirmative resolution procedure); the relevant provisions are the definition of “relevant land” in *paragraph 3(1)*, and any of the conditions to which the right to claim unpaid parking charges is subject. *Paragraph 17* provides that any regulations made by the Secretary of State (or the Welsh Ministers) under the Schedule are subject to the negative resolution procedure.