*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as introduced in the House of Commons on 21 June 2011[Bill 205]*

# LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

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## EXPLANATORY NOTES

### INTRODUCTION

1. These Explanatory Notes relate to the Legal Aid, Sentencing and Punishment of Offenders Bill as introduced in the House of Commons on 21 June 2011. They have been prepared by the Ministry of Justice in order to assist the reader in their understanding of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

### BACKGROUND

3. The Legal Aid, Sentencing and Punishment of Offenders Bill has 4 Parts and 16 Schedules.

**Part 1: Legal Aid**

4. Part 1 of the Access to Justice Act 1999 sets out the current statutory framework for legal aid in England and Wales. That Act established the Legal Services Commission (LSC), the non-departmental public body responsible for administering civil and criminal legal aid schemes in England and Wales. It also gives the Lord Chancellor powers to set the overall scope of legal aid, along with a number of powers and duties in relation to the LSC.

5. In The Coalition: Our Programme for Government, the Government set out its intention to "carry out a fundamental review of Legal Aid to make it work more efficiently."

6. In March 2010, Sir Ian Magee published the conclusions of his review into the delivery of legal aid. A key recommendation was that consideration should be given to transferring the administration of the civil and criminal legal aid schemes to an

executive agency of the Ministry of Justice. The previous Government announced later that month that it had accepted this recommendation. In November 2010 the Ministry of Justice published a consultation paper on proposals for reform of legal aid (see paragraph 7 below). In the paper the coalition Government stated that it had reached a similar conclusion and would seek to legislate when parliamentary time allowed. The Bill therefore contains provisions to abolish the LSC and transfer the day-to-day administration of legal aid to the Lord Chancellor. In practice, this will be done by civil servants in an executive agency of the Ministry of Justice. However, decisions on legal aid in individual cases will be taken by a statutory office holder: a civil servant designated by the Lord Chancellor as the Director of Legal Aid Casework. The Lord Chancellor will have no power to direct or issue guidance to the Director in relation to individual cases.

7. The Ministry of Justice published a consultation paper entitled *"Proposals for the Reform of Legal Aid in England and Wales"*[1] on 15 November 2010. The consultation closed on 14 February 2011. On 21 June 2011 the Government published its response to the consultation, which set out its finalised proposals for reform[2]. This Bill implements many of these proposals.

**Part 2: Litigation funding and costs**

8. The Ministry of Justice published on 15 November 2010 a further consultation paper entitled *"Proposals for reform of civil litigation funding and costs in England and Wales"*[3] which relates to proposals from Lord Justice Jackson's review[4] (published in January 2010). This consultation exercise closed on 14 February 2011. On 29 March 2011 the Government published its response to the consultation exercise, announcing its intention to implement the proposals to reform "no win no fee" Conditional Fee Agreements (CFAs)[5]. This Bill implements these proposals.

9. In some circumstances, the courts have power to order that an amount in respect of costs incurred by a successful defendant, witness or successful appellant is to be paid out of central funds (in other words. out of money provided by Parliament). In the case of *R (on the application of the Law Society of England and Wales) v Lord Chancellor*[6] in June 2010, the court held that the Lord Chancellor cannot cap the

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[1] *"Proposals for the Reform of Legal Aid in England and Wales"* Cm 7967 available at: http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm

[2] The Government's response is available at: http://www.justice.gov.uk. It is Command Paper CM8072.

[3] *"Proposals for reform of civil litigation funding and costs in England and Wales"* Cm 7947 available at http://www.justice.gov.uk/consultations/jackson-review-151110.htm

[4] Ministry of Justice (2010) "*Review of Civil Litigation Costs: Final Report*". Norwich, TSO available at http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports

[5] "*Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*" Cm 8041 available at http://www.justice.gov.uk/consultations/566.htm

[6] *R (on the application of the Law Society of England and Wales) v Lord Chancellor* available at www.bailii.org/ew/cases/EWHC/Admin/2010/1406.html

amounts that the courts award. This Bill will provide the Lord Chancellor with a power to do so for the purposes of proceedings in England and Wales, other than in relation to costs incurred in proceedings in the Supreme Court. It will also largely prevent orders being made in respect of legal costs (that is, lawyers' fees, charges and disbursements including expert witness costs) where legal aid is available.

**Part 3 Sentencing and Punishment of Offenders**

10. The current sentencing framework is broadly governed by the Criminal Justice Act 2003 (the 2003 Act).

11. In *The Coalition: Our Programme for Government*, the Government set out its intention to: *"conduct a full review of sentencing policy to ensure that it is effective in deterring crime, protecting the public, punishing offenders and cutting reoffending."*

12. On 7 December 2010, the Ministry of Justice published a consultation paper entitled *"Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders"*[7]. The document set out the Government's plans to cut crime and reoffending through fundamental changes to the criminal justice system. The consultation paper proposed a number of reforms to the existing sentencing legislation including a number of changes to the sentencing framework, reform of release and recall arrangements, and reforms to the youth justice system. The consultation ran for 12 weeks and concluded on 4 March 2011. The Ministry of Justice published its response to the consultation on 21 June 2011. This Bill implements a number of the sentencing reforms that formed part of the consultation.

**SUMMARY**

13. A summary of the Bill is set out below:

**Part 1: Legal Aid**

14. Part 1 of the Bill abolishes the Legal Services Commission and places a duty on the Lord Chancellor, subject to the provisions of Part 1, to secure the availability of civil and criminal legal aid. The intention is that an executive agency within the Ministry of Justice will administer the delivery of legal aid services in England and Wales. However, in relation to decision-making in individual cases, the Bill requires the Lord Chancellor to designate a civil servant to be the Director of Legal Aid Casework ("the Director"). The Director will have statutory responsibility for taking decisions on legal aid in individual cases. The Bill prevents the Lord Chancellor from giving directions or guidance to the Director in relation to individual cases.

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[7] *"Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders"* Cm 7972 available at www.justice.gov.uk/consultations/consultation-040311

15. Provisions in Part 1 ensure that, together with the powers the Lord Chancellor has as a Minister of the Crown, the Lord Chancellor has power to enter into appropriate arrangements with others for them to provide legal aid. The Lord Chancellor will have power to set quality standards for those providing legal aid services and to make arrangements for accreditation and monitoring of such providers. (The LSC currently have accreditation schemes such as the Specialist Quality Mark, responsibility for which will fall to the Lord Chancellor once the LSC is abolished.). The Lord Chancellor will have power to make provision in regulations about the payment of remuneration to those providing legal aid services.

***Civil legal aid***

16. Part 1 of the Bill defines civil legal services as encompassing advice, assistance and representation by legal professionals and also the services of non-legal professionals, including for example mediation and other forms of dispute resolution.

17. Part 1 of Schedule 1 describes the civil legal services that can generally be made available under the arrangements for civil legal aid.

18. The Bill also provides the Director with the power to require civil legal services not mentioned in Schedule 1 to be made available, *either* where the Director considers that it is necessary to make the services available because the failure to provide legal services to an individual would be a breach of the individual's rights under the European Convention on Human Rights (within the meaning of the Human Rights Act 1998) or of their rights to the provision of legal services under European Union law, *or* where the Director considers that it is appropriate to make services available, in the particular circumstances of the case, having regard to any risk that failure to do so would result in a breach of such rights.

19. The Bill requires the Director to determine whether an individual qualifies for civil legal services by reference to their financial resources (clause 20) and the criteria set out in regulations prepared by the Lord Chancellor. The Bill lists the factors which the Lord Chancellor must consider in setting those criteria. They are similar to the criteria that the LSC is currently required to consider when setting the Funding Code criteria (see section 8(2) of the Access to Justice Act 1999).

20. The Bill also provides the Lord Chancellor with a power to make regulations about the making and withdrawal of determinations by the Director about civil legal aid, including regulations about the means by which an application for legal aid must be made. The regulations must make provision about the review of determinations and may make provision about appeals against determinations.

***Criminal legal aid***

21. Part 1 of the Bill makes provision for individuals in custody at a police station or facing criminal investigation to be able to secure the provision of advice and assistance and representation (usually by a duty solicitor). Determinations about whether individuals qualify for such services must be made having regard, in

particular, to the interests of justice. The Bill confers power to require such determinations to be made subject to an assessment of the individual's financial resources and by reference to other criteria.

22. The Bill also provides for individuals to be provided with representation for criminal proceedings. Whether such services should be provided is to be determined having regard to the interests of justice and, where provided for in regulations, following an assessment of the individual's financial resources. Determinations about whether an individual qualifies for criminal legal aid will be made by the Director or by a court. Provisional determinations may be made in favour of individuals involved in a criminal investigation. Such a determination may be made, for example, where plea negotiations are initiated by a prosecutor under the guidelines issued by the Attorney General.

***Contributions and costs***

23. Part 1 of the Bill makes provision about determining the financial eligibility of individuals for civil and criminal legal aid. It also makes provision about when individuals can be required to make payments in connection with the provision of civil or criminal legal aid and about the enforcement of such requirements. The Bill provides for a statutory charge over property that a legally aided person recovers or preserves, or over costs payable to them, in civil proceedings and the settlement of civil disputes. It also makes provision about costs in civil proceedings, including limiting the costs that can be awarded against a person receiving civil legal aid to the amount (if any) that is reasonable, given the financial resources of both parties and their conduct during the case.

***Providers of services***

24. Part 1 of the Bill enables the Lord Chancellor to restrict the choice of provider in certain conditions, for example to providers who hold a contract with the Lord Chancellor to provide such services. In publicly funded cases the professional relationship between provider and client is unaffected. The Bill restricts payments to providers of legal aid from other sources and enables regulations to provide that, where legal aid is withdrawn, the provider is still to be paid for work undertaken.

25. The Bill provides for a code of conduct for any civil servants, or employees of a body established by the Lord Chancellor, who provide legal aid services. The code is to be published and laid before Parliament.

**Part 2: Litigation funding and costs**

26. Part 2 of the Bill contains provisions to implement reforms to the existing arrangements for civil litigation funding and costs as recommended by Lord Justice

Jackson, a judge of the Court of Appeal, in his *Review of Civil Litigation Costs: Final Report*.[8]

27. This part of the Bill also amends the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 to give the court powers to make orders in divorce proceedings, and corresponding civil partnership proceedings, for payments to be made by one party to another for the purposes of paying for legal services.

28. Part 2 of the Bill also amends the Prosecution of Offences Act 1985 by restricting the powers of the courts in England and Wales to order the payment out of central funds of amounts in respect of costs incurred by defendants, witnesses and appellants in criminal proceedings, particularly amounts in respect of legal costs (that is, lawyers' fees, charges and disbursements including expert witness costs). Similar restrictions are to be applied to amounts awarded by courts in England and Wales in respect of costs incurred by persons who make representations to the court in the course of references made by the Attorney General, persons who are discharged following extradition proceedings and persons involved in proceedings before the Court Martial Appeals Court. The restrictions will not apply in relation to costs incurred in proceedings in the Supreme Court.

**Part 3: Sentencing and punishment of offenders**

**Chapter 1: Sentencing**

29. Chapter 1 of Part 3 sets out changes to some general sentencing provisions contained in the 2003 Act and other legislation. In particular it:

- imposes a duty on courts to consider the imposition of compensation orders for certain types of offence;
- simplifies the provision setting out the court's duty to give reasons for and to explain the effect of a sentence imposed by the court;
- amends the court's power to suspend a prison sentence by increasing the length of sentences that can be suspended, giving the court discretion not to impose community requirements as part of the sentence and enabling it to impose a fine for breach of a suspended sentence order.

30. It also makes a number of changes in relation to community orders for adults and offenders who are less than 18 year olds. These are non-custodial sentences with specific treatment or behaviour requirements attached. It clarifies when community orders come to an end and makes amendments to certain requirements, in particular

[8] Ministry of Justice (2010) "*Review of Civil Litigation Costs: Final Report*","", available at http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports

curfew requirements and mental health, drug rehabilitation and alcohol treatment requirements. It also creates a new power to prohibit foreign travel as part of an order.

31. Chapter 1 amends the sentencing provisions of the Powers of Criminal Courts (Sentencing) Act 2000 that apply to youths. These will enable a court to impose a penalty for breach of a Detention and Training Order even where the Order has finished its term. They also amend referral orders to provide more flexibility and discretion for their repeated use.

32. It also repeals a number of unimplemented provisions in the 2003 Act in particular those relating to "Custody Plus", which was a new type of sentence for offenders sentenced to less than 12 months imprisonment, and intermittent custody, which would have enabled offenders to spend part of their sentence in prison and part in the community. It also repeals an unimplemented increase in magistrates' courts' sentencing powers.

**Chapter 2: Bail**

33. Chapter 2 of Part 3 of the Bill makes a number of changes (contained in Schedule 10) to restrict the court's powers to remand adult unconvicted defendants in custody where it is apparent that there is no real prospect that the defendant would receive a custodial sentence if convicted. A court would still be able to remand in custody for the defendant's own protection, or where there was a risk of further offending involving domestic violence.

34. A similar restriction on the remand to youth detention accommodation of defendants under 18 is made by Chapter 3 of Part 3 of the Bill.

35. In addition, the definition of 'young person' in the Bail Act 1976 is amended to include 17 year olds. This amendment is made as a consequence of changes to the provisions about remands for youths, the provisions for which are set out in Chapter 3 of Part 3 of the Bill.

**Chapter 3: Remand of children otherwise than on bail**

36. Chapter 3 of Part 3 creates new custodial remand provisions for under 18s who are charged with or convicted of a criminal offence or concerned in extradition proceedings. It repeals the existing framework set out in the Children and Young Persons Act 1969 and removes provisions under which 17 year olds are currently remanded in prison.

37. This Chapter makes provision for all under 18s who have been refused bail to be remanded in custody according to the same tests. It removes the existing distinctions based on age and gender and imposes a more rigorous test before under 18s can be remanded to youth detention accommodation.

**Chapter 4: Release on licence**

38. Chapter 4 of Part 3 makes amendments to the 2003 Act provisions about the release

and recall of prisoners. As amended by this Chapter, the 2003 Act will apply to all sentences to be imposed for offences committed after 4th April 2005 (the date on which the provisions of the 2003 Act came into force). The Chapter also contains a power to restate earlier enactments and transitional provisions. The exercise of this power will enable the release and recall of all prisoners (including those sentenced for offences committed before 4th April 2005) to be brought within the 2003 Act framework. The amendments to the 2003 Act will:

- make the crediting of remand time an administrative function (rather than dependent on a direction of the court);
- simplify the calculation of crediting periods of remand on bail;
- provide for the unconditional release of prisoners serving sentences of less than 12 months at the half-way point of sentence;
- provide for additional restrictions for early release on Home Detention Curfew;
- make provision for a revocation of a licence to be cancelled where a mistake was made;
- remove some of the restrictions on the use of recalls subject to automatic release;
- allow for the executive release of recalled extended sentence prisoners (subject to a risk test);
- make it clear that, where a prisoner is released on home detention curfew (HDC) before their automatic release date, a recall under section 254 during the HDC period will override automatic release when that date arrives, so that prisoners who have been recalled for misbehaviour may be detained beyond that date;
- prevent prisoners recalled during their HDC period being re-released prior to their automatic release date unless satisfactory arrangements for further HDC electronic monitoring can be put in place;
- provide for supervision of young adult prisoners on release from sentences of less than 12 months;
- confer a power to restate, in the 2003 Act, provisions in earlier legislation (in particular, the Criminal Justice Acts of 1991 and 1967) where such provisions are the subject of transitional or saving provision; and
- allow for foreign national prisoners serving indeterminate sentences to be removed from the United Kingdom when the tariff set by the court expires.

**Chapter 5: Prisoners etc**

39. Chapter 5 gives the Secretary of State the power to make rules in respect of the employment and payment, including reductions in, deductions from or levies upon such payments, of prisoners and persons in young offender institutions aged 18 or over.

40. Chapter 5 also includes amendments to the Repatriation of Prisoners Act 1984, which governs the transfer of prisoners to and from the United Kingdom. The amendments provide for transit through the United Kingdom of prisoners serving sentences of imprisonment and statutory protection from prosecution of prisoners transferred to the United Kingdom under international prisoner transfer arrangements.

**Chapter 6: Out of court disposals**

41. Chapter 6 contains amendments to the legislation under which police constables may issue a penalty notice for disorder and authorised persons may give conditional cautions. This includes the introduction of a penalty notice with an education option and provision for conditional cautions to be given without the need to refer the case to the relevant prosecutor. The amendments also allow new types of conditions to be attached to a conditional caution given to a foreign national offender without leave to enter or stay in the United Kingdom. The Chapter creates a new kind of youth caution. It also makes amendments to youth conditional cautions by making them more flexible.

**Chapter 7: Chapter 7: Knives and offensive weapons**

42. Chapter 7 creates new offences of threatening with an offensive weapon or an article with a blade or point thereby creating an immediate risk of serious physical harm. There will be a minimum sentence of 6 months imprisonment for persons over 18 found guilty of this new offence (unless this would be unjust in all the circumstances).

## TERRITORIAL EXTENT AND APPLICATION

43. Clause 117 sets out the territorial extent of the Bill.

44. The majority of the Bill's provisions extend to England and Wales only, but certain provisions also extend to Scotland or Northern Ireland or both. The Bill addresses non-devolved and devolved matters.

**Provisions in the Bill that extend to Northern Ireland**

45. The following provision extending to Northern Ireland relates to excepted matters:

- Schedule 7 amends the Court Martial Appeals Act 1968 and aligns the availability of legal costs under that Act with the availability of legal costs in

criminal proceedings in England and Wales under the Prosecution of Offences Act 1985, as amended by the Bill.

46. The following provisions extending to Northern Ireland relate to transferred matters:

- Clause 21 enables the Director of Legal Aid Casework and others to obtain access to benefits information from the Department for Social Development in Northern Ireland and the Department of Finance and Personnel in Northern Ireland for the purpose of assessing individual financial eligibility for criminal and civil legal aid.

- Clause 32 restricts the circumstances in which information provided under clause 21 can be disclosed, including providing a criminal offence for disclosure in contravention of clause 32.

- Clauses 104 and 105 relate to the transfer of prisoners. International relations, including the negotiation of prisoner transfers, is an excepted matter, However, as policing and justice in Northern Ireland became a transferred matter in April 2010, implementation of agreements relating to prisoner transfers is a transferred matter. Clause 105 gives the power to issue transit orders to the Department of Justice in Northern Ireland where the transiting prisoner will transit only through Northern Ireland, so it alters the executive functions of Northern Ireland Ministers or departments.

47. As these provisions relate to devolved matters, they will require the consent of the Northern Ireland Assembly through a legislative consent motion. If amendments are made to the Bill which further trigger a requirement for a legislative consent motion, the consent of the Northern Ireland Assembly will be sought for them.

**Provisions in the Bill that extend to Scotland**

48. The following provision relates to reserved matters in relation to Scotland:

- Schedule 7 amends the Court Martial Appeals Act 1968 and aligns the availability of legal costs under that Act with the availability of legal costs in criminal proceedings in England and Wales under the Prosecution of Offences Act 1985, as amended by the Bill.

49. The Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

**Provisions in the Bill that apply in Wales**

The provisions in the Bill relate to non-devolved matters in Wales. The Bill does not affect the powers of Welsh Ministers and does not make different provision in relation to England and Wales. If amendments are made to the Bill that trigger a requirement for a legislative consent motion, the consent of the National Assembly for Wales will be sought for them.

**COMMENTARY**

**Part 1: Legal Aid**

***Provision of legal aid***

**Clause 1: Lord Chancellor's functions**

50. Clause 1 gives the Lord Chancellor overall responsibility for legal aid.

51. *Subsection (1)* provides that the Lord Chancellor must secure that legal aid is made available in accordance with Part 1 of the Bill. "Legal aid" is defined in *subsection (2)* as civil legal services and advice, assistance and representation for criminal investigations and proceedings that are required to be made available under clauses 8, 9, 12, 14 or 15 or paragraphs 3 to 5 of Schedule 3.

52. *Subsections (3) and (4)* ensure that the Lord Chancellor has the power to arrange for the provision of general information about the law and legal system, including information about where people may obtain advice and assistance about the law and legal system, and to perform functions that support the Lord Chancellor's functions in relation to legal aid. For example, the Lord Chancellor may make arrangements for a legal advice helpline which, as well as assisting people who qualify for legal aid, would also be able to assist callers who do not qualify for legal aid by referring them to providers of appropriate services.

**Clause 2: Arrangements**

53. Clause 2 makes provision about the arrangements the Lord Chancellor may enter into in order to fulfil the Lord Chancellor's duty in clause 1 to secure the availability of legal aid and for the purposes of carrying out the Lord Chancellor's other functions under this Part.

54. As a Minister of the Crown, the Lord Chancellor has power, for example, to enter into contracts relating to the Lord Chancellor's functions. *Subsection (1)* ensures the Lord Chancellor may make any other arrangements appropriate for fulfilling the Lord Chancellor's functions in relation to legal aid and *subsection (2)* ensures that arrangements the Lord Chancellor may enter into include arrangements of the type referred to in subsection (2), such as establishing a body to provide services.

55. *Subsection (3)* allows the Lord Chancellor to make regulations about remuneration for

those providing legal aid services. Clause 39(1) provides that remuneration includes disbursements. This would include, for example, power to set the level of fees for lawyers and experts who are providing such services. If such fee levels are set in regulations, or in other arrangements (such as contracts) made by the Lord Chancellor in relation to legal aid, *subsection (4)* provides if the Lord Chancellor makes arrangements for a court or other person to assess such remuneration, the court or other person must apply the remuneration levels set by the Lord Chancellor.

56. *Subsection (5)* allows the Lord Chancellor to make different arrangements for the provision of legal aid in relation to different areas in England and Wales, different types of case and different classes of person. This provides flexibility including, where appropriate, to pilot arrangements.

**Clause 3: Standards of service**

57. Clause 3 makes provision about setting and monitoring standards of legal aid services.

58. *Subsections (1) and (2)* enable the Lord Chancellor to set quality standards for those providing or wishing to provide legal aid services and to establish a system of accreditation of those providers. Accreditation may be by the Lord Chancellor or by persons authorised by the Lord Chancellor. Any accreditation arrangements must make provision about the monitoring of the services provided by those who are accredited and for the withdrawal of accreditation if the services are unsatisfactory.

59. *Subsections (4) and (5)* allow the Lord Chancellor, and those authorised by the Lord Chancellor, to make charges in connection with accreditation and monitoring.

**Clause 4: Director of Legal Aid Casework**

60. Clause 4 makes provision about the Director of Legal Aid Casework, a statutory office holder.

61. *Subsection (1)* requires the Lord Chancellor to designate a civil servant as the Director of Legal Aid Casework. The Director's function is to make decisions on legal aid in individual cases.

62. To enable the Director to perform their functions, *subsection (2)* requires the Lord Chancellor to provide civil servants or other persons to give appropriate assistance to the Director.

63. *Subsection (3)* requires the Director to comply with directions given by the Lord Chancellor and to have regard to guidance issued by the Lord Chancellor. *Subsection (5)* requires the Lord Chancellor to publish such guidance and directions. Examples of directions which may be given include directions about the delegation of the Director's functions under clause 5 and directions about determinations in respect of exceptional cases under clause 9.

64. *Subsection (4)* provides for the independence of the Director in relation to decision-

making in individual cases by providing that the Lord Chancellor may not give directions or guidance to the Director in relation to individual cases.

**Clause 5: Delegation**

65. Clause 5 makes provision about the delegation of the Lord Chancellor's and Director's functions.

66. *Subsection (1)* allows the Lord Chancellor to delegate the functions of the Lord Chancellor under clause 1(3), which would include aspects of the civil legal advice telephone helpline, and under clause 3, which may include delegating the accreditation and monitoring function to an outside organisation.

67. *Subsection (2)* allows the Lord Chancellor to make regulations delegating any functions that may be given to the Lord Chancellor under regulations made under Part 1 of the Bill.

68. *Subsection (3)* allows the Director to delegate the Director's functions. This enables the Director to delegate, for example, decision-making in relation to the merits of a legal aid application, the application of any relevant means test for a particular area of work in relation to a legal aid application and the ongoing monitoring of decisions.

69. *Subsection (4)* enables the Lord Chancellor to make regulations delegating the functions of the Director under regulations made under Part 1 of the Bill to any person or employee of that person authorised by the Director.

70. *Subsection (5)* provides that under clause 4 the Lord Chancellor may give directions to the Director about the delegation of the Director's functions. The Lord Chancellor will be able to require the Director to delegate, or not to delegate, particular functions and to give directions about the persons to whom the Director may or may not delegate those functions.

71. *Subsections (6) to (8)* ensure that a function of the Lord Chancellor or Director may be delegated entirely or subject to limitations or conditions. For example, decision-making in relation to the merits and financial eligibility might be delegated to providers in relation to particular matters, or subject to particular financial limits as to the amount of work that can be carried out before the case must be referred to the Director for a decision on further legal aid funding.

**Clause 6: Authorisations**

72. Clause 6 makes provision about the effect of the delegation of functions under clause 5.

73. *Subsection (1)* gives the Lord Chancellor and the Director the power to limit the duration of a delegation as well as to vary or revoke the delegation at any time. It also reserves the right of the Lord Chancellor and the Director (or another person) to

continue to exercise a function that has been delegated.

74. *Subsections (2)* and *(3)* provide that any act or omission by a person ("authorised person") in exercising a function of the Lord Chancellor or Director delegated to them under clause 5 is to be treated as being done or omitted to be done by the Lord Chancellor or the Director.

75. However the liability of the Lord Chancellor or Director for acts or omissions of an authorised person is not absolute. *Subsection (4)* provides that *subsections (2) and (3)* do not affect the rights and liabilities of the Lord Chancellor and the authorised person between themselves (for example, contractual disputes), do not prevent civil proceedings from being brought against the authorised person, do not apply to criminal offences alleged to have been committed by the authorised person and do not make the Lord Chancellor or Director liable under section 6 of the Human Rights Act 1998 for acts of the authorised person which are private in nature.

***Civil legal aid***

**Clause 7: Civil legal services**

76. Clause 7 defines civil legal services for the purposes of Part 1.

77. *Subsections (1)* and *(2)* explain what is meant by "legal services", namely services comprising advice and assistance provided in relation to the law as it applies to a particular case, legal proceedings and the resolution of legal disputes. Those services include, in particular, representation and mediation (and other forms of dispute resolution).

78. *Subsection (3)* provides that "civil legal services" are all legal services other than those services that are required to be made available under the provisions about criminal legal aid. This is in order to avoid any overlap between civil and criminal legal aid.

**Clause 8: General cases**

79. Clause 8 makes provision about when civil legal services are to be made available.

80. *Subsection (1)* provides that civil legal services are to be made available subject to two conditions. The first is they are civil legal services described in Part 1 of Schedule 1 to the Bill. The second is that the Director has determined, in accordance with the provisions of this Part of the Bill, that the individual qualifies for those legal services and the Director has not withdrawn that determination (that is, the individual continues to qualify for those services).

81. *Subsection (2)* provides that the Lord Chancellor may by secondary legislation omit services from Schedule 1. The Lord Chancellor has no power to add new services to Schedule 1.

82. Clause 8 and Part 1 of Schedule 1 reverse the arrangements in the Access to Justice

Act 1999, which provided for civil legal aid to be available in relation any matter not excluded by Schedule 2 to that Act. Under this Bill, the types of case for which legal aid may be made available are set out in Part 1 of Schedule 1.

**Schedule 1: Civil legal services**

**Introduction**

83. Each paragraph of Part 1 of Schedule 1 describes a type of civil legal services that may be made available under the Bill. Each paragraph is subject to exclusions – either exclusions specific to the paragraph or the general exclusions set out in Parts 2 and 3 of the Schedule. For example, paragraph 2 of Part 1 of Schedule 1 describes civil legal services provided in relation to matters relating to special educational needs. It states that the exclusions in Part 2 and 3 of the Schedule apply.

84. Part 2 of Schedule 1 lists civil legal services that are not to be available, even where they might otherwise fall within the descriptions of services in Part 1. Some paragraphs in Part 1 provide exceptions from the exclusions in Part 2, so that one or more of the general exclusions are disapplied. For example, under paragraph 35 of Part 1 of Schedule 1 civil legal services provided to an individual in relation to an inquest under the Coroners Act 1988 into the death of a member of the individual's immediate family can be made available. However, the services provided cannot include the services listed in Part 2, with the exception of civil legal services provided in relation to personal injury or death. This means that civil legal services in relation to death could be made available by virtue of paragraph 35 of Part 1.

85. Part 3 of Schedule 1 provides that the civil legal services listed in Part 1 of Schedule 1 do not include advocacy unless the type of advocacy in question is listed in Part 3 of the Schedule. Clause 39(1) defines advocacy as meaning the exercise of a right of audience before a court, tribunal or other body.

86. Part 4 of Schedule 1 makes provision about the interpretation of Schedule 1. Paragraph 1 of Part 4 provides that if one paragraph of Part 1 includes a type of civil legal service which is either expressly or impliedly excluded by another paragraph of Part 1, that type of service is still a type of civil legal service that may be made available The remainder of Part 4 of Schedule 1 makes further provision about the interpretation of references to legislation and services that appear in the Schedule.

87. Schedule 1 includes a number of powers for the Lord Chancellor to make regulations to clarify or adjust particular paragraphs. For example, under paragraph 6 of Part 1 civil legal services provided in relation to community care services can be made available. Paragraph 6(3) defines community care services as services which a relevant person may provide under a number of listed enactments. Paragraph (m) of that definition allows other enactments to be prescribed for the purposes of that definition. The definition of "relevant person" allows other relevant persons to be prescribed.

88. There is a table setting out the contents of Schedule 1 at Annex A and a more detailed

explanation of the paragraphs in Schedule 1 at Annex B.

**Clause 9: Exceptional cases**

89. Clause 9 gives the Director the power to provide individuals with civil legal services not included in Schedule 1 in exceptional circumstances subject to certain conditions.

90. *Subsections (1) and (2)* provide that civil legal services not included in Schedule 1 are to be provided to an individual if the Director has, first, made an exceptional case determination and, second, determined that the individual qualifies for those services (provided that neither determination has been withdrawn).

91. *Subsection (3)(a)* provides that an exceptional case determination is a determination by the Director that the failure to provide legal services to an individual would amount to a breach of the individual's rights under the European Convention on Human Rights (ECHR) (within the meaning of the Human Rights Act 1998) or of the individual's rights to the provision of legal services under European Union law.

92. It will be necessary to provide legal aid to an individual under clause 9(3)(a) where the withholding of services would clearly amount to a breach of Article 6 of the ECHR ('right to a fair trial'), Article 2 of the ECHR ('right to life') or any other provision of the Convention giving rise to an obligation to provide such services. There will be a breach of an individual's rights to the provision of legal services under European Union law where the withholding of such services would be clearly contrary to the rights reaffirmed by Article 47 of the Charter of Fundamental Rights, or to the rights to legal services that are conferred on individuals by EU instruments.

93. *Subsection (3)(b)* provides that an exceptional case determination may also be made where the Director considers that the failure to provide legal services would not necessarily amount to a breach of an individual's rights, but that it is nevertheless appropriate for the services to be made available, having regard to the risk of such a breach occurring,

94. *Subsections (1) and (4)* provide that advocacy services are to be made available to an individual for the purposes of an inquest under the Coroners Act 1988 into the death of a member of that individual's family if the Director, first, has made a wider public interest determination in relation to the individual and the inquest and, second, has determined that the individual qualifies for the services (provided that neither determination has been withdrawn). Subsection (4) does not preclude the making available of advocacy services in such inquest proceedings by virtue of an exceptional case determination under subsection (3).

95. *Subsection (5)* provides that a wider public interest determination may be made in relation to advocacy for the purposes of an inquest into the death of a member of an individual's family where, in the particular circumstances of the case, the provision of advocacy is likely to produce significant benefits for a class of person other than the

individual or the individual's family.

96. *Subsection (6)* defines when one individual is a member of another individual's family for the purposes of this section.

**Clause 10: Qualifying for civil legal aid**

97. Clause 10 makes provision about how the Director must determine whether an individual qualifies for civil legal services.

98. *Subsection (1)* provides that in determining whether an individual qualifies for civil legal services, the Director must apply the provisions about means testing (clause 20) and the merits criteria set out in regulations prepared by the Lord Chancellor.

99. *Subsection (2)* provides that when setting the criteria, the Lord Chancellor must consider the circumstances in which it is appropriate to make civil legal services available and provides that in setting the criteria, the Lord Chancellor must in particular consider the extent to which they ought to reflect the factors set out in *subsection (3)*. The factors in *subsection (3)* are similar to the factors that the LSC is currently required to consider when setting the Funding Code criteria under section 8(2) of the Access to Justice Act 1999.

100. *Subsection (4)* provides that if more than one type of service is available for an individual, then the Lord Chancellor, in setting the criteria, must aim to ensure that the individual qualifies for the most appropriate service in all the circumstances (having regard to the criteria).

101. *Subsection (5)* requires the regulations to reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than court proceedings.

**Clause 11: Determinations**

102. Clause 11 makes provision about the procedure for determinations made by the Director about whether an individual qualifies for civil legal aid.

103. *Subsection (1)* provides that in such a determination the Director must state the type of services (for example, advice and assistance) and for what those services are to be available (for example, a claim for judicial review). The Director will be also be able to set out in the determination any qualifications or exclusions that apply.

104. *Subsection (2)* provides that the Lord Chancellor may make regulations about determinations and the withdrawal of determinations. *Subsections (3)* to *(5)* make further provision about those regulations.

105. *Subsection (3)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and

withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, provision requiring applicants to be given reasons for the making or withdrawal of a determination and provision about giving information to unsuccessful applicants about other ways in which they might obtain the advice they are seeking. This is similar to the provision about procedure that may be made in the LSC's Funding Code (see section 8(5) of the Access to Justice Act 1999).

106. *Subsection (4)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.

107. *Subsection (5)* requires the regulations to include provision about the review of determinations and of the withdrawal of determinations. *Subsection (6)* enables the regulations to include provision about appeals against determinations and against the withdrawal of determinations.

***Criminal legal aid***

**Clause 12: Advice and assistance for individuals in custody**

108. Clause 12 makes provision about initial advice and assistance for an individual who has been arrested and is being held in custody at a police station or other premises.

109. The current provision governing police station advice and assistance is at section 13(1)(a) of the Access to Justice Act 1999.

110. *Subsection (1)* requires initial advice and assistance to be made available to individuals who are arrested and held in custody at a police station or other premises if the Director has determined that the individual qualifies for advice and assistance and has not withdrawn that determination. "Initial advice" and "initial assistance" are defined in *subsection (8)* as the sort of advice and assistance that an individual might need while in custody. *Subsection (9)* enables the Lord Chancellor to make regulations providing that certain advice and assistance is not initial advice and assistance for the purposes of this clause.

111. In making a determination, *subsection (2)* places a duty on the Director to have regard to the interests of justice. *Subsection (3)* allows the Lord Chancellor to make regulations which would require the Director to apply the provisions about means testing (clause 20) and any other criteria specified in the regulations. Advice and assistance described in clause 12 is not currently means tested under the equivalent provision of the Access to Justice Act 1999, but clause 12 provides the flexibility to make it so in the future if it is considered appropriate.

112. *Subsection (4)* provides that any determination under this clause must specify the

types of advice or assistance to be made available. *Subsection (5)* provides that the Lord Chancellor may make regulations about determinations and the withdrawal of determinations. *Subsections (6) and (7)* make further provision about the procedure for determinations under this clause.

113. *Subsection (6)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and about how an application or determination must be made or withdrawn. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn and provision requiring applicants to be given reasons for the making or withdrawal of a determination.

114. *Subsection (7)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.

**Clause 13: Criminal proceedings**

115. Clause 13 defines "criminal proceedings" for the purposes of this Part of the Bill and is based on the existing provision at section 12(2) of the Access to Justice Act 1999.

116. "Criminal proceedings" include criminal trials (clause 13(a)), sentencing hearings (clause 13(b)), extradition hearings (clause 13(c)), binding over proceedings (clause 13(d)), appeals on behalf of a convicted person who has died (clause 13(e)), proceedings on a reference on a point of law following acquittal on indictment (clause 13(f)) and proceedings for contempt in the face of a court (clause 13(g)). Clause 13(h) allows the Lord Chancellor to specify in secondary legislation further types of proceedings that are to be considered to be criminal proceedings for the purposes of this Part of the Bill.

**Clause 14: Advice and assistance for criminal proceedings**

117. Clause 14 gives the Lord Chancellor the power to prescribe in regulations when advice and assistance must be made available to individuals in connection with criminal proceedings (*subsection (1)*). The power broadly reflects the provision about advice and assistance in section 13(1)(b) of the Access to Justice Act 1999.

118. *Subsection (2)* describes the individuals in respect of whom provision can be made under this clause. It covers those involved in investigations that could lead to criminal proceedings (other than where the individual has been arrested and held in custody), those who are before a court or other body in criminal proceedings, and those who have been the subject of criminal proceedings.

119. When making the regulations, the Lord Chancellor must take into account the interests of justice (*subsection (3*)) and the regulations must require the Director, in

making a determination whether an individual qualifies for advice and assistance, to take into account the interests of justice (*subsection (4)*).

120. *Subsection (5)* provides that the regulations may also require the Director, in making determinations, to apply the means testing provisions (clause 20) and any other criteria specified in the regulations.

121. *Subsection (6)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (7) to (9)* make further provision about the procedure for determinations under this clause.

122. *Subsection (7)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of a determination.

123. *Subsection (8)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.

124. *Subsection (9)* provides that the regulations may make provision about reviews of and appeals to a court or other person against a decision of the Director that an individual does not qualify for advice and assistance on the grounds that the interests of justice or other criteria set out in regulations made under *subsection (5)(b)* are not met.

125. *Subsection (10)* ensures that under this clause "assistance" can include advocacy (as defined in clause 39(1)) undertaken on behalf of the individual.

**Clause 15: Representation for criminal proceedings**

126. Clause 15 identifies the circumstances and conditions under which representation for the purposes of criminal proceedings is to be made available.

127. *Subsection (1)* provides that representation is to be available if the Director or, as the case may be, a court has determined that the individual is a specified individual in relation to the proceedings (see *subsection (6)*) and qualifies for representation.

128. *Subsection (2)* requires representation for the purposes of criminal proceedings to be made available on appeal to the Crown Court to private prosecutors whom the Director or court has determined qualify for such representation.

129. *Subsection (3)* provides that where an individual qualifies for representation for the purposes of criminal proceedings, representation is also to be made available for the purposes of any related bail proceedings as well as any preliminary or incidental proceedings. *Subsection (4)* enables the Lord Chancellor in secondary legislation to specify whether proceedings are or are not preliminary or incidental for this purpose and also to make exceptions to *subsection (3)*. Under the current regulations made under the Access to Justice Act 1999, for example, proceedings dealing with an individual for non-compliance with a Crown Court order are not to be regarded as incidental.

130. *Subsection (5)* provides that regulations under *subsection (4)(b)* making exceptions from *subsection (3)* may make provision by reference to proceedings that take place more than a specific period of time before or after the main proceedings. This would allow, for example, a period of time to be specified after which the original determination on representation would not cover advice on an appeal or after which a new determination would be needed for the purposes of applying to vary or appeal an order made at the conclusion of the proceedings.

**Clause 16: Qualifying for representation**

131. Clause 16 makes provision about how the Director or a court must make determinations about whether an individual qualifies for representation for the purposes of criminal proceedings.

132. *Subsection (1)* requires the Director or a court to determine whether an individual qualifies for representation by applying the means testing provisions (clause 20) and the interests of justice test provided for in *subsection (2)*.

133. *Subsection (2)* sets out the factors that are to be considered in assessing whether an individual meets the interests of justice. These mirror the existing provision at paragraph 5 of Schedule 3 to the Access to Justice Act 1999. *Subsection (3)* enables the Lord Chancellor to add to or vary these factors. The Lord Chancellor may also make regulations specifying circumstances in which the interests of justice will be considered to be met (*subsection (4)*).

**Clause 17: Determinations by Director**

134. Clause 17 makes provision about the power of the Director to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.

135. *Subsection (1)* provides that the Director may determine whether an individual is eligible for representation for criminal proceedings unless the court is authorised to do so under clause 18. This reverses the default position in the Access to Justice Act 1999 where the decision as to whether to grant legal aid is for the court unless the LSC is given the power to make the decision. However, over recent years, most decision-making powers have transferred in practice to the LSC and there are now

only limited circumstances in which the court can make a determination.

136. *Subsection (2)* requires the Director, in the determination, to specify the criminal proceedings in respect of which the individual qualifies for representation. *Subsection (3)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (4) to (7)* make further provision about the procedure for determinations under this clause.

137. *Subsection (4)* provides that the regulations may include provision about the form and content of applications and determinations and provision that an application or determination must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of determinations. Provision may also be made about the review of a decision by the Director that the individual does not, or no longer, qualifies for representation on the grounds that the interests of justice are not met.

138. *Subsection (5)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.

139. *Subsection (6)* provides that in cases where representation is refused or withdrawn on the grounds that the interests of justice do not require it, the individual has a right of appeal to a court or other person prescribed by regulations. The right of appeal is subject to exceptions specified in regulations under *subsection (7)*.

**Clause 18: Determinations by court**

140. Clause 18 makes provision about the power of a court to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed

141. *Subsection (1)* enables the Lord Chancellor to make regulations providing for a court to determine whether an individual qualifies for representation. Under the current provisions made under the Access to Justice Act 1999, the Crown Court may grant a representation order for contempt proceedings, for proceedings that arise from an alleged failure to comply with an order of the Crown Court where it appears to the court that there is no time to instruct a solicitor and for proceedings where the individual is brought before the court following the issue of a bench warrant. The High Court and the Court of Appeal (Criminal Division) may grant a representation order for proceedings before those courts and the Supreme Court.

142. *Subsection (2)* enables regulations to make provision about the procedure for

determinations, including the form of the application to the court and the form of the determination of the court, provision that applications and determinations may or must be made and withdrawn in writing, by telephone or by other prescribed means, and provision about time limits and circumstances in which a determination may or must be withdrawn.

143. *Subsection (3)* ensures that the circumstances in which a determination may or must be withdrawn may relate to whether an individual has complied with requirements imposed on them under Part 1, for example, a requirement to provide documents or to make a payment under clause 22.

144. *Subsection (4)* requires the regulations to provide that, subject to prescribed exceptions, in cases where representation is refused on the grounds that the interests of justice do not require it, the individual has a right of appeal to such court, or other person, as may be prescribed.

**Clause 19: Provisional determinations**

145. Clause 19 makes provision about the power of the Director or a court to make a provisional determination about whether an individual qualifies for representation in certain cases. This reflects paragraph 1A of Schedule 3 to the Access to Justice Act 1999.

146. *Subsection (1)* enables the Lord Chancellor to make regulations to allow the Director or a court to make a provisional determination about whether an individual qualifies for representation where the individual is involved in an investigation which may result in criminal proceedings, the determination is for the purposes of criminal proceedings that may result from that investigation and other specified conditions are met. A provisional grant of a representation order is currently permitted in investigations where the prosecution has initiated plea discussions under the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud.

147. *Subsection (2)* provides that the regulations may make provision about the stage of an investigation when a provisional determination may be made, provision about when the provisional determination becomes a full determination and ceases to be provisional, and provision about the withdrawal of a provisional determination.

148. *Subsection (3)* provides that the appeal rights in clause 17(6) in respect of a determination that the interests of justice do not require representation to be granted do not apply to a provisional determination.

***Financial resources***

**Clause 20: Financial resources**

149. Clause 20 relates to financial eligibility for legal aid services. In the Access to Justice Act 1999 separate provision is made in respect of financial eligibility for different types of legal aid (in section 7, in respect of civil legal aid and in paragraph 3B of Schedule 3, in respect of criminal legal aid in the form of representation). This clause

contains provisions on financial eligibility that are applicable to both civil and criminal legal aid.

150. *Subsection (1)* specifies the basic rule, applicable to both civil and criminal aid, that legal aid will only be granted to a person who is determined to be financially eligible for the services. As under the Access to Justice Act 1999, the financial eligibility rules will be contained in regulations made by the Lord Chancellor (see *subsection (2)*). The basic rule in *subsection (1)* applies to decisions on granting civil legal aid and decisions on granting criminal legal aid for representation in criminal proceedings. It also applies to decisions on granting criminal legal aid for advice and assistance for individuals in custody and advice and assistance for criminal proceedings, if regulations provide for that *(*see the definition of a "relevant determination" in *subsection (8))*.

151. *Subsection (2)(b)* makes clear that regulations may provide for exceptions from the basic rule, so that a person may receive certain services regardless of their financial means.

152. *Subsections (3) and (4)* enable regulations to provide that a person is to be treated as having or not having particular financial resources, including providing that an individual is to be treated as having financial resources of a person of a specified description. This allows, for example, for regulations on financial eligibility to provide that the resources of the partner of a legal aid applicant are to be treated as the resources of the applicant.

153. *Subsections (5) and (6)* enable regulations to make provision about making and withdrawing financial eligibility determinations. *Subsection (6)* is a non-exhaustive list of matters that such regulations may contain, including provision requiring information and documents to be provided and provision establishing procedures for the review of financial eligibility determinations.

**Clause 21: Information about financial resources**

154. Clause 21 provides a gateway for the disclosure of information to the Director (or other prescribed person) by the Secretary of State (in practice, the Secretary of State for Work and Pensions), the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"), the Department for Social Development in Northern Ireland or the Department of Finance and Personnel in Northern Ireland (a "relevant Northern Ireland Department").

155. *Subsection (1)* enables the Director (or other prescribed person) to make a request for certain information to the Secretary of State, a relevant Northern Ireland Department or the Commissioners. *Subsection (2)* provides that such a request may only be made for the purpose of facilitating a determination about an individual's means, that is, for the purpose of finding out whether they are financially eligible for legal aid.

156. *Subsection (3)* lists the categories of information which may be requested from the

Secretary of State or the relevant Northern Ireland Department. It includes a power to add further categories of information by secondary legislation.

157. *Subsection (4)* sets out the categories of information which may be requested from the Commissioners. It includes a power to add further categories of information by secondary legislation, with the Commissioners' consent (see *subsection (6)*).

158. *Subsection (7)* provides that the Secretary of State, the relevant Northern Ireland Department and the Commissioners may disclose to the Director (or other prescribed person) information specified in an information request made under this clause.

***Contributions and costs***

**Clause 22: Payment for services**

159. Clause 22 concerns payments for services by legally aided persons. The clause largely reflects powers in sections 10, 17 and 17A of the Access to Justice Act 1999 and brings together provisions on payments for services into a single provision applicable (for the most part) to both civil and criminal legal aid.

160. *Subsection (1)* sets out the basic rule that an individual who receives legal aid can only be required to make a payment in connection with the provision of the services where regulations require them to do so. Any regulations made under subsection (1) must provide for repayment to the individual of any amount paid by the individual that exceeds the amount required to be paid by regulations under this clause and clause 23 (see *subsection (11*)).

161. *Subsection (2)* is a non-exhaustive list of ways in which regulations made under this clause can require payments from individuals. Regulations can, in prescribed circumstances, require payment of the cost of the services, a contribution in respect of those costs or an amount in respect of administration costs.

162. *Subsection (3)* permits regulations to provide that, in civil disputes only, legally aided persons may be required to make a payment of an amount which exceeds the costs of the services provided. This allows for a so-called 'Supplementary Legal Aid Scheme' whereby a percentage of certain damages obtained by a successful legally-aided claimant may be required to be paid to a prescribed person, such as the Lord Chancellor. The response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales* confirmed the Government's intention to create such a scheme. There is an equivalent provision at section 10(2)(c) of the Access to Justice 1999.

163. *Subsection (4)* permits regulations made under this clause to include provision about how the costs of services made available to a legally-aided person are to be determined. This reproduces provisions currently found in sections 10(6)(b), 17(3)(c) and 17A(2)(b) of the Access to Justice Act 1999.

164. *Subsections (5), (8) and (9)* make further provisions about the contents of regulations

that may be made under this clause. Regulations may, for example, provide for liability to pay to arise on a determination by a prescribed person (as is currently the case for criminal contributions and orders to pay costs) and for the variation or withdrawal of a determination about liability to make a payment. Regulations may also make provision for payment by periodical payments or lump sums out of income or capital and for procedural matters, such as when payment is to be made and to whom.

165. *Subsections (6) and (7)* make provision in identical to terms to clause 20(3) and (4), explained at paragraph 152 above.

166. *Subsection (10)* permits regulations to provide that a legally-aided person can be required to pay interest on loans, payments required to be made after the provision of the relevant services and overdue payments. Similar provision is currently made in section 10(4) and section 17(2)(d) of the Access to Justice Act 1999.

**Clause 23: Enforcement**

167. Clause 23 permits regulations to provide for the enforcement of a requirement to make a payment imposed by regulations under clause 22. The regulations can include provision for the recovery of the costs of enforcement from the individual *(subsection (2))* and can require documents and information to be provided *(subsection (4))*.

168. Under *subsection (3)* regulations will be able to provide that overdue sums are recoverable summarily as a civil debt, that is to say through magistrates' courts in accordance with the Magistrates' Courts Act 1980. The regulations will also be able to provide that overdue sums are recoverable, if the county court or High Court so orders, as if they were payable under an order of the High Court or county court in accordance with rule 70.5 of the Civil Procedure Rules, thereby making it unnecessary to begin fresh proceedings in respect of the debt. These provisions are similar to the regulation-making powers relating to criminal legal aid in sections 17(4) and 17A(2A) of the Access to Justice Act 1999 (as inserted by the Coroners and Justice Act 2009).

169. *Subsection (5)* introduces Schedule 2.

**Schedule 2: Criminal legal aid: motor vehicle orders**

170. Schedule 2 enables regulations to be made to authorise a court to make motor vehicle orders as a form of enforcement action in relation to criminal legal aid. "Motor vehicle orders" consist of clamping orders and vehicle sale orders. A clamping order is an order that a motor vehicle be fitted with an immobilisation device. Under a vehicle sale order, a motor vehicle which has been fitted with an immobilization device in accordance with enforcement regulations may be sold and the proceeds of sale may be applied in paying the overdue sum. Schedule 2 includes further detailed provision regarding the content of regulations about motor vehicle orders, including procedural matters and requirements that must be met before a court may make an order. Schedule 2 is based on provisions in section 17(2A) to (2E) of, and Schedule

3A to, the Access to Justice Act 1999 (as inserted by the Coroners and Justice Act 2009).

**Clause 24: Charges on property in connection with civil legal services**

171. *Subsection (1)* provides for a statutory charge to arise on any property recovered or preserved by an individual in receipt of civil legal aid, including costs payable to the individual, whether the property or costs are recovered, preserved or payable following legal proceedings or as part of a compromise or settlement of a dispute. Such a charge currently arises under section 10(7) of the Access to Justice Act 1999.

172. *Subsection (2)* describes the amounts of money to which the statutory charge relates. These are the amounts spent by the Lord Chancellor in securing the provision of the legal aid services and any other amounts payable by the individual by virtue of clauses 22 and 23. As under the Access to Justice Act 1999, regulations relating to the statutory charge can provide for circumstances in which the charge does not apply, provide for the charge to be in favour of the Lord Chancellor or the service provider and provide for the enforcement of the charge (*subsections (3) and (4)*).

173. *Subsection (5)* permits regulations made for the purpose of enforcing the statutory charge to require amounts of money awarded or payable to the legally-aided person to be paid to the Lord Chancellor or the service provider and to make provision about matters such as the timing and manner of payment, about how such monies are to be dealt with and about the enforcement of the requirement to pay.

**Clause 25: Costs in respect of civil legal services**

174. Clause 25 relates to costs in civil proceedings where a party is legally-aided and substantially reproduces provisions currently found in section 11 of the Access to Justice Act 1999.

175. *Subsection (1)* limits the costs that can be awarded against a person receiving civil legal aid to the amount (if any) that is reasonable given the financial resources of both parties and their conduct during the case.

176. *Subsection (3)* provides that this protection may be disapplied by regulations.

177. Subject to the restriction in subsection (1), regulations may be made under this clause about costs in proceedings where a person is in receipt of civil legal aid. Such regulations may, among other things, specify the principles that are to be applied in determining the amount of any costs awarded for or against a party receiving civil legal aid, limit the circumstances in which a costs order may be enforced against the person receiving civil legal aid and make provision about when a court can require the Lord Chancellor to pay any costs incurred by the opponent of the legally-aided party *(subsections (5) and (6)*).

***Providers of services etc***

**Clause 26: Choice of provider of services etc**

178. Clause 26 makes provision about an individual's choice of provider of criminal and civil legal aid

179. *Subsections (1) and (2)* provide that Lord Chancellor's duty under clause 1(1) does not include a duty to secure that legal aid is provided by the means selected by the individual. For example, in certain cases, the Lord Chancellor may arrange for some services to be provided only by telephone or by other electronic means.

180. *Subsection (3)* provides that the Lord Chancellor's duty under clause 1(1) does not include a duty to secure that legal aid is provided by a person selected by an individual, except as provided in *subsections (4) to (10)*. For example, in civil cases, as at present, the intention is that an individual must select a person with whom the Lord Chancellor has entered into a contract or other arrangement (for example, provision of services by telephone or by other electronic means) for the provision of those services.

181. In relation to representation for criminal proceedings, *subsection (4) and (5)* provide that an individual may select a legal representative of their own choice and that choice will be respected, subject to regulations made under *subsection (6)*. Those regulations may limit choice in the ways referred to in *subsection (6)*. For example, the regulations may limit the choice to a specified group of providers or may limit the number of legal representatives who can act for any individual at any one time. They may also restrict the right of the individual to appoint a new legal representative in place of one previously chosen.

182. Similar powers exist in section 15 of the Access to Justice Act 1999 in relation to a right to representation. Under that section provision has been made, for example, limiting an individual's choice to providers who hold a contract with the LSC to provide legal services and about the circumstances in which an individual may be represented by Queen's Counsel or by more than one junior advocate, and limitations have been placed on an individual's right to transfer a representation order to a new provider.

183. Clause 26 does not prevent regulations restricting an individual's choice to a person employed by the Lord Chancellor (unlike section 15(4) of the Access to Justice Act 1999).

**Clause 27: Position of providers of services**

184. Clause 27 makes provision similar to the provisions currently set out at section 22(1), (2) and (3) of the Access to Justice Act 1999.

185. *Subsection (1)* provides that, unless regulations state otherwise, the provision of legal aid to an individual does not affect the relationship between the individual and the

provider of the services, including any lawyer-client privilege.

186. *Subsection (2)* provides that providers of legal aid may not seek remuneration (or a "top up" payment) from their clients in addition to that provided under the legal aid scheme, unless the Lord Chancellor authorises them to do so.

187. *Subsection (3)* provides that regulations may provide that a provider is entitled to be paid for work done up to the time when a determination that a person qualifies for legal aid is withdrawn.

**Clause 28: Code of conduct**

188. Clause 28 makes provision about a code of conduct to be observed by certain types of persons when providing legal aid.

189. *Subsection (1)* provides that the Lord Chancellor must publish a code of conduct to be followed by civil servants and by employees of any body set up by the Lord Chancellor to provide legal aid, such as a body like the Public Defender Service that has been established by the LSC.

190. *Subsection (2)* provides that the code is to include the same range of duties currently listed at section 16(2) of the Access to Justice Act 1999, namely duties to avoid discrimination, duties to protect the interests of the individuals for whom services are provided, duties to the courts and tribunals, duties to avoid conflicts of interest, duties of confidentiality and duties to act in accordance with professional rules.

191. *Subsection (4)* provides that the persons to whom the code applies are not subject to the direction of the Lord Chancellor when they provide services. This is to ensure their independence in providing such services.

**Clause 29: Position of other parties, courts and tribunals**

192. Clause 29 makes provision similar to section 22(4), (5) and (6) of the Access to Justice Act 1999.

193. *Subsection (1)* provides that unless regulations provide otherwise, the fact that legal aid is provided to an individual does not affect the rights of any third party or the principles governing the exercise of a court's or tribunal's discretion.

194. *Subsections (2) and (3)* enable regulations to make provision about court or tribunal procedures in cases involving legal aid services.

***Supplementary***

**Clause 30 and Schedule 3: Legal aid for legal persons**

195. Clause 30 gives effect to Schedule 3.

**Schedule 3: Legal aid for legal persons**

196. Schedule 3 provides for the possibility that civil and criminal legal aid may be

made available to a legal person, that is a legal entity other than an individual, for example bodies corporate. All determinations in relation to legal aid for legal persons will be made by the Director.

197. *Paragraph 2* defines an exceptional case determination for the purposes of this Schedule. This is the same as an exceptional case determination under clause 9(3).

198. *Paragraph 3(1)* makes provision about when civil legal services are to be made available to a legal person. First, the Director must have made (and not have withdrawn) an exceptional case determination in relation to the person and the services. Second, the Director must have determined (and not withdrawn that determination) that the person qualifies for the services in accordance with Part 1 of the Bill and paragraph 3(2) requires the Director to make such a determination in accordance with the means testing provisions (clause 20) and the criteria in regulations made under clause 10(1)(b). It also requires a determination that a legal person qualifies for civil legal services to specify the type of service and the matters in relation to which the services are to be available. Paragraph 3(3) applies the powers in clause 11(2) to (6) to make provision about procedures for the making and withdrawal of determinations.

199. *Paragraph 4(1) and (2)* enables the Lord Chancellor to make regulations enabling prescribed advice and assistance for criminal proceedings to be made available to legal persons who are involved in investigations which may lead to criminal proceedings and who are before a court or other body in criminal proceedings. In order for such prescribed advice and assistance to be made available, prescribed conditions must be met, the Director must have made (and not withdrawn) an exceptional case determination in relation to the legal person and the proceedings, and the Director must have determined (and not withdrawn that determination) that the legal person qualifies for such advice and assistance in accordance with the regulations.

200. The effect of paragraph 4(3) is that, when making the regulations, the Lord Chancellor must have regard in particular to the interests of justice and the regulations must require the Director to make determinations having regard in particular to the interests of justice and may require the Director to do so in accordance with the means testing provisions (clause 20) and in accordance with criteria set out in the regulations. Paragraph 4(3) also applies provisions in clause 14(6) to (9) about procedures for the making and withdrawal of determinations.

201. *Paragraph 5* makes provision about representation for the purposes of criminal proceedings for legal persons. In order for such representation to be made available, the legal person must be a description of legal person specified in relation to those proceedings or the proceedings must involve resisting an appeal to the Crown Court in a private prosecution case. The conditions for representation for criminal proceedings being made available are: *first*, that the Director has made (and not withdrawn) an exceptional case determination, and paragraph 5(5) requires the Director to make an

exceptional case determination in accordance with the interests of justice; and *second*, that the Director has determined that the legal person qualifies for representation in accordance with Part 1 of the Bill, and paragraph 5(6) requires the Director to make that determination in accordance with the means testing provisions (clause 20) and in accordance with the interests of justice. Paragraph 5(12) provides that the Lord Chancellor may make regulations to prescribe the circumstances in which making representation available to a legal person for the purpose of criminal proceedings is to be taken as being in the interests of justice.

202. *Paragraph 5(3)* provides that where a legal person qualifies for representation, that representation will cover any preliminary or incidental proceedings and the effect of sub-paragraph (4) is that regulations made by the Lord Chancellor under clause 15(4) and (5) about whether proceedings are or are not to be regarded as preliminary or incidental apply in relation to legal persons unless those regulations provide otherwise.

203. *Paragraph 5(7)* applies the provisions in clause 17(2) to (7) about procedures for the making and withdrawal of determinations.

204. *Paragraph 5(8)* enables the Lord Chancellor to make regulations authorising the Director to make a provisional determination that a legal person qualifies for representation for the purposes of criminal proceedings in the circumstances described in sub-paragraph (8)(a) to (c). Paragraph 5(9) applies subsections (2) to (4) of clause 19 to regulations made under paragraph 5(8). Paragraph 5(10) requires the Director to make a provisional determination as to whether a legal person qualifies for representation for the purposes of criminal proceedings in accordance with the means testing provisions (clause 20) and the interests of justice.

205. *Paragraphs 6 and 7* ensure that the means testing provisions (clause 20) and provisions about contributions and costs (clauses 22, 23, 24 and 25) apply for the purposes of determinations about whether a legal person qualifies for legal aid. Paragraph 8 ensures that clause 26 (choice of provider of services etc), clause 27 (position of providers of services), clause 28 (code of conduct) and clause 32 (position of other parties, courts and tribunals) apply in relation to services are provided to a legal person under Part 1 of the Bill. Paragraph 9 ensures that clauses 33 (restriction on disclosure of other information), clause 34 (exceptions from restrictions under clause 33) and clause 28 (orders, regulations and directions) apply in the context of legal aid for legal persons as if references to an individual included a legal person.

**Clause 31: Foreign law**

206. Clause 31 concerns the availability of legal aid services in relation to foreign law. This clause reflects the current provision about legal aid in relation to foreign law at section 19 of the Access to Justice Act 1999.

207. *Subsection (1)* restricts the applicability of the civil legal services made available under the Bill to the law of England and Wales only, except where the Bill specifies

otherwise, where foreign law is relevant to proceedings in England and Wales, or where the Lord Chancellor specifies otherwise by order. *Subsection (2)* makes similar provision in relation to criminal legal aid.

208. *Subsection (3)* limits the Lord Chancellor's ability to make an order under *subsections (1) and (2).*

**Clause 32: Restriction on disclosure of information about financial resources**

209. Clause 32 provides for the protection of information obtained under the information gateway in clause 21. It makes provision similar to the provision in paragraphs 6 to 8 of Schedule 3 to the Access to Justice Act 1999.

210. *Subsections (1) and (2)* provide that a person who receives information under clause 21 or under this clause may only disclose or use that information if it is necessary or expedient to do so in connection with determining financial eligibility for legal aid.

211. *Subsection (3)* qualifies *subsection (2)* by providing for limited circumstances in which the information may be used for purposes other than assessing financial eligibility. Disclosure is permitted if it would be in accordance with an enactment or in accordance with a court order, if it is for the purposes of the investigation or prosecution of an offence or suspected offence or if it for the purposes of proceedings before a court, including instituting such proceedings. Disclosure is also permitted if the information has already been lawfully disclosed to the public.

212. *Subsection (4)* provides that disclosure or use of information contrary to this clause is a criminal offence and specifies the maximum penalties. The penalty for the offence will be, on conviction on indictment, imprisonment for a term not exceeding two years or a fine (or both) and, on summary conviction, imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both).

213. *Subsection (5)* provides a statutory defence to the criminal offence detailed in *subsection (4)* where the person charged with the offence reasonably believed that the disclosure or use was lawful.

**Clause 33: Restriction on disclosure of other information**

214. Clause 33 provides for the protection of information other than information to which clause 32 applies (see *subsection (7)*) which is given to the Lord Chancellor, the Director, a court, tribunal or any other person or body which has functions under Part 1 of this Bill.

215. *Subsection (1)* describes the information to which the provisions apply: information provided to the persons referred to in the paragraph above in connection with an individual applying for or in receipt of legal aid.

216. Subject to the exceptions in clause 34, *subsection (2)* prevents such information from being disclosed. *Subsection (3)* makes disclosure contrary to this clause a criminal

offence and sets out the maximum penalties for that offence. The penalty for the offence will be, on summary conviction, a fine not exceeding level 4 on the standard scale.

217. *Subsection (4)* provides a statutory defence for a person charged with the offence where they reasonably believed that the disclosure was lawful.

218. *Subsection (5)* requires the consent of the Director of Public Prosecutions before proceedings can be brought in relation to an alleged breach of this clause.

219. *Subsection (6)* provides that clause 33 does not apply to information provided to a provider of services by or on behalf of an individual for whom the services are, or would be, provided under Part 1 of the Bill.

**Clause 34: Exceptions from restrictions**

220. Clause 34 provides for exceptions to the bar on disclosure in subsection (2) of clause 33.

221. *Subsection (1)* provides for a general exception relating to the disclosure of information for the purpose of enabling or assisting the Lord Chancellor or the Secretary of State for Justice in carrying out their functions. It is not limited to functions created by statute. This subsection also provides for similar exceptions where the Director or a court, tribunal or other person is carrying out functions under Part 1 of the Bill, as well as in connection with any proceedings involving services delivered under Part 1.

222. *Subsection (2)* provides for an exception relating to disclosure of information where disclosure would be in accordance with the law of England and Wales, as well as when ordered by a court or for the purposes of court proceedings. This subsection also creates an exception relating to disclosure of information for the purposes of proceedings before a court, including instituting such proceedings, for the purpose of a criminal investigation and for the purpose of allowing a tribunal to properly exercise its disciplinary functions. This subsection also provides an exception where information has previously been lawfully disclosed to the public.

223. *Subsection (3)* provides two further exceptions to the restriction on disclosure. The first exception is where information is to be released in a form in which information pertaining to the individual cannot be identified. The second exception is where the information requested relates to any grant, loan or other payment made by the Lord Chancellor pursuant to functions under Part 1 of the Bill.

224. *Subsection (4)* provides an exception where an individual consents to the release of information pertaining to them. *Subsection (4)* also makes the same provision where information was provided by someone other than the individual to whom it relates and

the person providing the information consents to disclosure.

225. *Subsections (5)* and *(6)* ensure that disclosure of information covered by clause 34 under the Freedom of Information Act is not prevented by clause 34 after the restricted period of 100 years, provided disclosure is made by a person who is a public authority for the purposes of the Freedom of Information Act 2000 and the information is not held on behalf of another person.

**Clause 35: Misrepresentation**

226. Clause 35 provides criminal penalties for people who intentionally fail to comply with requirements to provide documents or information under Part 1 of the Bill, and for people who make a statement or representation which they know or believe to be false when providing documents and information in accordance with Part 1 of the Bill. The clause largely replicates equivalent provisions in section 21 of the Access to Justice Act 1999. A person found guilty of an offence under this clause is liable on summary conviction to a fine not exceeding level 4 on the standard scale, which is currently £2,500. Unlike the offence under section 21 of the Access to Justice Act 1999, the offence under this clause is not punishable by imprisonment.

227. This clause also enables the Lord Chancellor to take proceedings in the county courts to recover losses arising as a result of the failure of an individual to provide documents or information or as the result of a false statement or false representation as required under Part 1 of the Bill.

**Clause 36: Abolition of Legal Services Commission**

228. Clause 36 abolishes the LSC. The LSC was established under section 1(1) of the Access to Justice Act 1999. Following the transfer of legal aid functions to the Lord Chancellor under clause 1, it is intended that an Executive Agency will be created within the Ministry of Justice to administer legal aid.

229. *Subsection (3) and (4)* set out provision for the production of a report and statement of accounts for the final period up to the day before the LSC ceases to exist.

**Schedule 4: Transfer of employees and property etc of Legal Services Commission**

230. Schedule 4 provides for employees of the LSC to become civil servants and for the transfer of property, assets and liabilities held in the name of the LSC to the Lord Chancellor or to the Secretary of State.

231. LSC employees are currently public sector employees rather than civil servants. Paragraph 1 of Schedule 4 provides that, when the new arrangements for legal aid come into force, LSC employees become civil servants on their existing terms and conditions (save as to pensions and severance). It makes provision to ensure that the transfer does not break the continuity of their employment.

232. *Paragraph 4* enables the Lord Chancellor to make a scheme transferring the LSC's

rights and liabilities in respect of occupational pension schemes or compensation schemes to the Lord Chancellor or the Secretary of State.

233. *Paragraph 5* transfers interests in land held in the name of the LSC to the Secretary of State for Communities and Local Government who holds freeholds and leaseholds on behalf of other government departments. Charges on land are specifically excluded from this paragraph because those charges on property in connection with civil proceedings are to transfer to the Lord Chancellor pursuant to paragraph 6.

234. *Paragraph 6* transfers other property, rights, powers, duties and liabilities of the LSC to the Lord Chancellor. Therefore, for example, by operation of law, contracts (in the name of the LSC) are novated to the Lord Chancellor, including contracts made for the provision of legal aid services.

235. *Paragraph 10* allows the Lord Chancellor to make by statutory instrument, consequential, incidental, supplementary or transitional provision in connection with the transfers effected by or under Schedule 4.

**Clause 37 and Schedule 5: Consequential amendments**

236. Clause 37 gives effect to Schedule 5. Schedule 5 makes various amendments and repeals which are consequential on the changes to legal aid made by Part 1.

**Clause 38: Orders, regulations and directions**

237. *Subsections (1) to (3)* of clause 38 make further provision about the exercise of powers under Part 1 to make orders, regulations and directions. For example, they provide that such instruments may make different provision for different geographic areas and that they may make transitory provision. They may also make different provision for the purpose of proceedings before different courts and tribunals, for particular classes of individual or for individuals selected by reference to particular criteria or on a sampling basis. This provides flexibility and will enable provisions to be piloted.

**Clause 39: Interpretation**

238. Clause 39 provides definitions of terms used in Part 1.

**Part 2: Litigation funding and costs**

***Payments for legal services in civil cases***

**Clause 41: Conditional fee agreements: success fees**

239. A conditional fee agreement (CFA) is a private funding agreement between a lawyer and a client under which the lawyer agrees to represent the client on a 'no win, no fee' basis. Under the agreement, the lawyer does not generally receive a fee from the client if the case is lost[9]. However, if the case is won, the lawyers' costs (the 'base costs') are generally recoverable from the losing party. In these cases, the lawyer can charge

[9] A CFA can also be arranged on a 'no win, low fee' basis.

an uplift on these base costs, which is currently recoverable from the losing party. This uplift is known as the 'success fee'. The maximum success fee that may be charged under a CFA is prescribed by secondary legislation. In all cases, the current maximum uplift that may be charged is 100% of the base costs.

240. Clause 41 amends sections 58 and 58A of the Courts and Legal Services Act 1990, which currently make provision as regards the regulation of CFAs and the recoverability of success fees. The effect of the amendments is that a success fee under a CFA will no longer be recovered from a losing party in any proceedings. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will now be subject to further regulation.

241. *Subsection (2)* inserts new subsections (4A) and (4B) into section 58. New subsection (4A) provides that CFAs which provide for a success fee and relate to proceedings prescribed by the Lord Chancellor must comply with certain additional conditions in order to be enforceable. New subsection (4B) sets out those conditions. They require the CFA to cap the success fee at a percentage of certain damages awarded to the client if they win. The cap and the kinds of damages to which it applies are to be prescribed by the Lord Chancellor. These provisions will be of particular importance in personal injury claims, for example, where it is proposed to exclude damages for future care and loss from the calculation of any success fee.

242. *Subsection (3)* amends subsection (5) of section 58A, the effect of which is to require the Lord Chancellor to consult with designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate before making an order under new subsections (4A) and (4B).

243. By virtue of *subsection (5)*, orders made under new subsections (4A) and (4B) will be subject to the affirmative resolution procedure.

244. *Subsection (4)* inserts a new subsection (6) into section 58A, the effect of which is to prevent the recoverability of a success fee from a losing party under a court's costs order.

**Clause 42: Damages-based agreements**

245. Damages-based agreements (DBAs) are another type of 'no win, no fee' agreement under which a lawyer can recover a percentage of the client's damages if the case is won, but will receive nothing if the case is lost. Currently, solicitors and barristers are not permitted to act under DBAs in civil litigation, but solicitors are permitted to act under DBAs in non-contentious business, including cases before employment tribunals.

246. Clause 42 amends section 58AA of the Courts and Legal Services Act 1990 (inserted by section 154 of the Coroners and Justice Act 2009), which currently provides that DBAs are enforceable only when they relate to employment matters. The effect of the amendments is to enable the use of DBAs in most civil litigation by persons providing

advocacy services, litigation services or claims management services.

247. *Subsections (2) and (3)* omit references to employment matters, the effect of which is that a DBA need not relate to an employment matter in order to be enforceable.

248. *Subsection (5)* inserts new paragraph (aa) into subsection (4) of section 58AA, to provide that a DBA may not relate to proceedings which may not be the subject of an enforceable CFA under section 58A of the 1990 Act (essentially criminal and family proceedings) or to proceedings of a description prescribed by the Lord Chancellor.

249. Section 58AA(4) also sets out other conditions that must be met for a DBA to be enforceable. The amendments made by *subsections (6) and (7)* of this clause make clear that the Lord Chancellor may, but need not, prescribe the information which a legal representative must provide to a claimant prior to entering a DBA and the maximum amount which may be paid under the DBA from the claimant's damages.

250. *Subsection (8)* amends section 58AA to provide that rules of court may be made in respect of the assessment of costs in proceedings funded under DBAs. For the avoidance of doubt, *subsection (9)* inserts a definition of "proceedings" into section 58AA, which includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated. Any regulations made under section 58AA are subject to the affirmative resolution procedure.

251. *Subsection (10)* further amends section 58AA to provide that, except where they relate to employment matters, non-contentious business agreements between solicitors and clients to which section 57 of the Solicitors Act 1974 applies will not be unenforceable by reason of the provisions of section 58AA.

**Clause 43: Recovery of insurance premiums by way of costs**

252. After the Event (ATE) insurance can be taken out by parties in a CFA funded case to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose. Under the current arrangements, ATE insurance premiums are recoverable from the losing party. Currently, the recovery of such insurance premiums by way of costs is provided for by section 29 of the Access to Justice Act 1999.

253. Clause 43 repeals section 29 and makes new provision relating to the recoverability of insurance premiums from a losing party. The effect of the new provision is to provide that the cost of any insurance policy taken out by a party to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose cannot be recovered from a losing party except in certain limited circumstances.

254. *Subsection (1)* inserts a new section 58C into the Courts and Legal Services Act 1990. The effect of section 58C is to limit the recoverability of insurance premiums to certain clinical negligence proceedings and only allow recovery of the premium to the extent that it relates to the costs of an expert report or reports (section 58C(1) and (2)).

This exception reflects concerns that expert reports in clinical negligence cases can often be very expensive. New section 58C(2) and (3) enables the Lord Chancellor to make regulations to prescribe the circumstances in which the premium would be recoverable and the maximum amount of the premium that may be recovered. The maximum amount may, in particular, be prescribed by specifying a percentage of the relevant part of the premium or an amount calculated in a prescribed manner (section 58C(4)).

**Clause 44: Recovery where body undertakes to meet costs liabilities**

255. Certain bodies, such as trade unions and other membership organisations, often provide legal services to their members as a benefit of membership. Section 30 of the Access to Justice Act 1999 allows bodies that are approved by the Lord Chancellor to recover from a losing party the cost of insuring themselves against the risk of paying costs to another party in the event of losing a claim. The effect of clause 44 is to prevent the recovery of these insurance premiums from a losing party.

256. *Subsection (1)* repeals section 30 of the 1999 Act. Although similar in effect to clause 43, clause 44 does not provide for any exceptions to non-recoverability, since the circumstances which require specific provisions relating to expert reports in clinical

**Clause 45: Divorce etc proceedings: orders for payment in respect of legal services**

257. Part II of the Matrimonial Causes Act 1973 ("the 1973 Act") makes provision (mirrored for civil partnerships by Schedule 5 to the Civil Partnership Act 2004 ("the 2004 Act")) for the court's powers to make orders "for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation". The orders include orders that one party to the marriage makes periodical payments to the other or for a child of the family; or that one party pays a lump sum to the other or for a child of the family. It is not possible to make an *interim* order for a lump sum, or periodical payments, by one party to the marriage to the other. Section 22, however, makes provision for *maintenance pending suit*, where the court may at any time in the proceedings make an order for one party to make to the other "such periodical payments for his or her maintenance … as the court thinks reasonable", and case law has developed in which the court has included an element to enable that other party to fund that party's costs of pursuing the proceedings where he or she has insufficient immediately available resources to do so.[10]

258. Clause 45 amends the 1973 Act to confer a more general power, not limited to maintenance pending suit, for a court in divorce, nullity of marriage or judicial separation proceedings to order payment by one party to the other for the purpose of securing legal services.

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[10] The leading case, which gives the history of the development of the case law in this respect and restates the principles governing the making of such orders, is the Court of Appeal case of *Currey v Currey* [2006] EWCA Civ 1338

259. *Subsection (1)* amends section 22 of the 1973 Act to provide that the court cannot use its existing powers to use maintenance pending suit to cover payment for legal services, so that such payment will be covered by the new power alone.

260. *Subsection (2)* inserts into the 1973 Act a new section 22ZA, which sets out the court's power and the conditions for its exercise as well as the terms on which any order may be made. *Subsections (1) and (2)* of the new section provide for the scope of the power and its purpose: the power may be exercised in proceedings for divorce, nullity of marriage or judicial separation (including ancillary relief proceedings), and is a power to make an order requiring one party to pay to the other (referred to as the applicant) an amount to enable the other to obtain legal services for the purposes of the proceedings.

261. *Subsection (3)* of the new section contains the test for making an order, which requires the court to be satisfied that without this money the applicant would not otherwise reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of them. This, by virtue of *subsection (4)* of the new section, includes being satisfied that the applicant could not obtain a loan or secure legal services with the promise of payment on conclusion of the proceedings and division of the assets.

262. *Subsection (5)* of the new section provides for flexibility in making an order. The court does not have to assess the likely need for legal services for the entire proceedings and make an order for a payment to cover that (although that is possible), but may order payment to cover specified services, services in a specified period or for a specified part of the proceedings, or a combination ("specified" being explained in *subsection (11)* of the new section as meaning specified by the court). Coupled with the ability to make more than one order, this enables the court, for example, to make an order for payment for services limited to addressing a specific issue or issues in the proceedings at an initial stage and to review the position at the conclusion of that stage.

263. *Subsections (6) to (8)* of the new section provide for additional flexibility, enabling the court to order payment to be made in instalments or for it (or any part of it) to be deferred, and to vary an order if there has been a material change of circumstances. *Subsection (9)* of the new section provides for the paying party to have credit for a payment made pursuant to an order under the section in that the amount paid will be set off, in the event of an order for costs as between the parties, against any costs which the applicant might be able to recover.

264. *Subsection (10)* of the new section defines "legal services" in a broad and flexible way which will cover disbursements as well as pure legal advice, so that, for example, if the court were satisfied that an initial report is necessary, it could order payment of an appropriate amount to cover the cost of that report as part of the legal services.

**Clause 46: Divorce etc proceedings: matters to be considered by court making legal services order**

265. Clause 46 inserts into the 1973 Act a new section 22ZB, which provides for the matters the court must consider when deciding whether to make (or vary) an order under the new section 22ZA and the terms of any order so made or varied.

266. *Subsection (1)* of the new section 22ZB lists the matters to which the court must have regard. These include the overall financial position of both parties (as to which *subsection (2)* of the new section makes supplementary provision about the meaning of "earning capacity" of a party), what the main proceedings are about, whether one party already has legal representation, the behaviour of the applicant in the proceedings and the extent to which the party who is being asked to pay is reasonably able to do so (as to which *subsection (3)* of the new section requires the court to have regard in particular to whether the order is likely to cause undue hardship to, or prevent obtaining of legal services on that party's own account by, the paying party).

267. *Subsection (4)* of the new section provides for the Lord Chancellor to have power to amend the list of factors in *subsection (1)*, and *subsections (5) and (6)* require such amendment to be by way of statutory instrument subject to affirmative resolution procedure. *Subsection (7)* of the new section provides for the term "legal services" in this new section to have the same meaning as in the new section 22ZA.

**Clause 47: Divorce etc proceedings: orders for sale of property**

268. Clause 47 amends section 24A of the Matrimonial Causes Act 1973 so that the court's power to order the sale of property in order to give effect to certain types of order extends also to the new type of order under the new section 22ZA. 'Property' could be assets such as a holiday home, shares or other illiquid assets.

**Clause 48: Dissolution etc proceedings: orders for payment in respect of legal services**
**Clause 49: Dissolution etc proceedings: matters to be considered by court making legal services order**
**Clause 50: Dissolution etc proceedings: orders for sale of property**

269. Clauses 48 to 50 make provision in respect of civil partnership proceedings which mirrors that in clauses 45 to 47.

***Offers to settle***
**Clause 51: Payment of additional amount to successful claimant**

270. The costs sanctions against a defendant for failing to accept a claimant's offer to settle generally amount to considerably less than the sanctions against a claimant for failing to beat a defendant's offer to settle. Consequently, there is less incentive for a defendant to accept a reasonable offer from the claimant than for a claimant to accept a reasonable offer by the defendant.

271. Clause 51 enables rules of court to be made to permit a court to order an additional amount to be paid by defendants to claimants who do not accept a claimant's offer to

settle where the court gives judgement for the claimant that is at least as advantageous as an offer the claimant made to settle the claim. It also confers power by order to provide that rules of court may provide that in non-monetary claims a defendant may be required to pay an amount to a claimant where the court gives judgment in favour of the claimant which is at least as advantageous as an offer the claimant made to settle the claim. These provisions will be in addition to the current sanctions that the court may order and which are available under Part 36 of the Civil Procedure Rules (CPR) (namely the payment of interest on damages, interest on costs and the payment of costs on an indemnity rather than a standard basis).

272. *Subsection (1)* makes provision for rules of court to be made in respect of monetary claims so that courts may order a defendant to pay an additional sum to a claimant where the court awards the claimant a benefit the value of which is at least as advantageous as an offer the claimant made to settle the claim, which the claimant has made in accordance with Part 36 CPR. *Subsection (2)* provides that rules made under *subsection (1)* may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle.

273. The effect of *subsection (3)* is to enable the Lord Chancellor to prescribe, as a percentage of the value of the benefit awarded to the claimant, the maximum additional sum that the court may order. The Lord Chancellor may prescribe different percentage values for different values of claim (by virtue of *subsection (10)*).

274. *Subsection (4)* enables the Lord Chancellor to provide, by order, that rules of court may be made to enable a court to make an order in non-monetary claims (or mixed non-monetary and monetary claims) requiring a defendant to pay an amount to a claimant where the court gives judgment in favour of the claimant which is at least as advantageous as an offer the claimant made to settle the claim.

275. *Subsection (5)* provides that in claims to which *subsection (4)* applies, an order made by the Lord Chancellor must provide for the amount payable to be calculated in one or more of three specified ways, namely by reference to costs ordered to be paid to the claimant, or any amount of money that is awarded to the claimant in the proceedings, or the value of any non-monetary benefit awarded to the claimant.

276. *Subsection (6)* additionally requires that any order made under *subsection (4)* must provide that rules of court made under the order may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle, and may provide that such rules may make provision as to the calculation of the value of any non-monetary benefit awarded to a claimant.

277. *Subsection (7)* provides that conditions prescribed by the Lord Chancellor which must be satisfied before an additional amount can be ordered to be paid may, in particular, relate to the nature of the claim, the amount of money awarded to the claimant and the value of an The effect of *subsections (8) and (9)* is that any order made by the Lord

Chancellor under this clause is subject to the negative resolution procedure.

278. *Subsection (10)* provides that rules of court made under clause 51 may make different provision in relation to different cases.

279. *Subsection (11)* defines, amongst other things, "civil proceedings" for the purposes of this clause, as proceedings to which rules of court made under the Civil Procedure Act 1997 apply.

***Costs in criminal cases***

**Clause 52 and Schedules 6 and 7: Costs in criminal cases**

280. *Subsection (1)* gives effect to Schedule 6, which amends the Prosecution of Offences Act 1985 (POA 1985) by limiting the costs, including legal costs (that is, lawyers' fees, charges and disbursements, including expert witness costs) that may be awarded as part of a "defendant's costs order" (DCO). Schedule 6 also amends the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003 by limiting the payment of legal costs in certain proceedings.

281. *Subsection (2)* gives effect to Schedule 7, which amends the Court Martial Appeals Act 1968 by making changes to the costs that may be awarded to successful appellants and others in the Court Martial Appeal Court and on appeal from that Court.

**Schedule 6: Costs in criminal cases**

282. Section 16 of the POA 1985 enables courts in England and Wales to order the payment of amounts in respect of costs to be paid out of central funds (that is, out of money provided by Parliament) in certain circumstances. Section 16(6) provides that the amount awarded is to be an amount reasonably sufficient to compensate the person concerned for costs properly incurred. Paragraph 2 of Schedule 6 inserts new subsections (6A) to (6D) into section 16 of the POA 1985. New subsection (6A) provides that, where the court considers it appropriate, it may reduce the amount awarded to the accused; for example, the court may do so because he or she has been convicted of some offences but acquitted of others. New subsections (6C) and (6D) clarify the existing procedure by which the court makes a costs order in favour of an acquitted defendant or successful appellant. New subsection (6B) provides that orders made by the court under subsections (6) and (6A) have effect subject to new section 16A and regulations made by the Lord Chancellor under new section 20(1A)(d). The effect of section 16A is to limit the circumstances in which a defendant's costs order can include amounts in respect of legal costs. Regulations under section 20(1A)(d) may have the effect that the amount awarded is an amount that is less than an amount which the court considers is reasonably sufficient to compensate the person for the costs incurred.

283. Paragraph 3 of Schedule 6 inserts a new section 16Ain the POA 1985. New section 16A(1) provides that a DCO may not include an amount in respect of legal costs, subject to the following provisions of that section. Section 16A(2) and (3) provide that

such an amount can be awarded if the accused is an individual, as opposed to a company or other body, and the order is either made (a) in the magistrates' court, (b) on appeal to the Crown Court against a magistrates' court conviction or sentence, or (c) in the Court of Appeal in limited circumstances relating to a defendant who has been found not guilty by reason of insanity, or has been found unfit to stand trial, or having been found unfit to stand trial, has been found to have done the act or made the omission alleged against him.

284. New section 16A(4) provides that a DCO made by the High Court or Court of Appeal can include an amount in respect of legal costs in relation to the costs of an individual defendant in proceedings in the court below, where those proceedings were either in a magistrates' court or were proceedings on appeal to the Crown Court against a magistrates' court conviction or sentence (as those courts would have been able to award legal costs in those proceedings).

285. Section 16A(5) provides that a DCO can include an amount in respect of legal costs incurred in proceedings in the Supreme Court.

286. Section 16A(6) provides that the Lord Chancellor may make regulations that alter the availability of legal costs by adding, modifying or removing an exception to the availability of legal costs. The Lord Chancellor's regulations may provide for an exception to arise where a determination has been made by a person specified in the regulations. This would allow the Lord Chancellor to prescribe that legal costs are not to be available in respect of cases that do not pass the interests of justice test.

287. Section 16A(7) provides that regulations under subsection (6) may not remove or limit the Supreme Court's power to award legal costs incurred in proceedings before it.

288. New section 16A(8) provides that where a court makes a DCO that includes legal costs, the order must contain a statement to this effect.

289. New section 16A(9) provides that amounts awarded by a court in respect of legal costs, other than legal costs incurred in proceedings before the Supreme Court, may not exceed an amount specified in regulations by the Lord Chancellor.

290. New section 16A(10) explains what is meant by "legal costs".

291. *Paragraph 4* of Schedule 6 inserts new subsections (2A), (2B) and (2C) into section 17 of the POA 1985. These subsections are the same as new subsections (6A), (6C) and (6D) of section 16 discussed in paragraph 283 above and apply in respect of private prosecutors. They clarify the procedure to be followed where a court considers that a private prosecutor should recover a sum in respect of his or her costs.

292. *Paragraph 5* of Schedule 6 inserts a new subsection (3ZA) into section 19 of the POA 1985. Section 19(3) provides that the Lord Chancellor may make regulations in

respect of the costs of witnesses, and other persons attending court, such as an interpreter, or a person appointed to put the case for the defence where the defendant is unfit to be tried, or is prevented from cross-examining a witness in person. New subsection (3ZA) provides that the requirement that regulations made under section 19(3) make provision for the payment of an amount that the court considers reasonably necessary to compensate the person concerned is subject to regulations under section 20(1A)(d).

293. *Paragraph 5* also inserts new subsections (4A), (4B) and (4C) into section 19 of the POA 1985. They provide that an order made in favour of an appellant in the Court of Appeal who is not in custody may not require the payment of an amount in respect of legal costs unless regulations provide otherwise. Any such order is subject to regulations made by the Lord Chancellor under section 20(1A)(d), which may have the effect that the amount awarded is an amount that is less than an amount which the court considers is reasonably sufficient to compensate the person for the costs incurred.

294. *Paragraph 6* of Schedule 6 inserts a new subsection (1A) into section 20 of the POA 1985. New subsection (1A) provides that the Lord Chancellor may make regulations in respect of amounts that may be paid in pursuance of a costs order. Subsection 20(1A)(a) provides that such regulations can specify rates or scales or make other provision as to the calculation of the amounts to be paid. It is intended that regulations will provide for the payment of amounts in respect of legal costs that are broadly equivalent to legal aid rates.

295. New subsection (1A)(b) provides that regulations may make provision as to the circumstances in which amounts can be paid or ordered to be paid. New subsection 20(1A)(c) provides that regulations may provide that the amounts required to be paid by a costs order are to be calculated having regard to regulations under paragraphs (a) and (b). This is intended to enable courts to summarily assess the amount to be awarded, using the amounts set out in the regulations as guidance. New subsection (1A)(d) provides that regulations may require the amount of such orders to be fixed in accordance with such regulations. This is likely to be relevant when the court, instead of summarily assessing the amount of the order, directs that the sum be assessed by a determining officer. The amount that results from the application of the regulations does not need to be reasonably sufficient or necessary to compensate the recipient, except in respect of costs incurred in proceedings in the Supreme Court. New subsection (1A)(e) provides for the regulations to make provision providing for appeals against the amounts determined to be paid.

296. *Paragraph 8* of Schedule 6 amends section 29 of the POA 1985 to make the powers to make regulations under sections 16A(6) or 19(4B)) subject to the affirmative resolution procedure. Those powers can be used to alter the circumstances in which amounts in respect of legal costs may be awarded by a court.

297. *Paragraph 9* of Schedule 6 amends section 36 of the Criminal Justice Act 1972,

which relates to references by the Attorney General on a point of law following acquittal on indictment. It provides that the court's power to order the payment of costs out of central funds is subject to regulations made under section 20(1A)(d) of the POA 1985 (which is applied for the purposes of this section). It also provides that orders may not be made for the payment out of central funds of amounts in respect of legal costs incurred in proceedings on the reference in the Court of Appeal. Clause 13(f) of the Bill provides that proceedings on a point of law following acquittal on indictment are "criminal proceedings" for the purposes of legal aid.

298. *Paragraph 11* of Schedule 6 amends Schedule 3 to the Criminal Justice Act 1988, which relates to references by the Attorney General to the Court of Appeal or Supreme Court in relation to a sentence of the Crown Court that appears to be unduly lenient. It provides that, in England and Wales, the court's power to order the payment of costs out of central funds is subject to regulations made under section 20(1A)(d) of the POA 1985 (which is applied for the purposes of this section). It also provides that orders may not be made for the payment out of central funds of amounts in respect of legal costs incurred in proceedings in the Court of Appeal. Clause 13(b) of the Bill provides that proceedings for dealing with an individual convicted of an offence, which includes references under the 1988 Act, are "criminal proceedings" for the purposes of legal aid. Paragraph 11 1also contains consequential provisions to preserve the existing arrangements in relation to costs for Northern Ireland.

299. *Paragraph 13* amends section 61 of the Extradition Act 2003 (costs where discharge ordered) by inserting new subsections (5A) and (5B). New subsection (5A) provides that, in England and Wales, an order for costs is to be made in accordance with new sections 62A and 62B. New subsection (5B) provides that an order for costs in Scotland and Northern Ireland under subsection (5) is to be determined in accordance with subsections (6) to (9) so that the existing arrangements are preserved for those jurisdictions.

300. *Paragraph 14* omits subsections (1) and (2) of section 62 of the Extradition Act 2003. Subsection (1) and (2) provide that, in respect of England and Wales, subsections (1) and (3) of section 20 of the POA 1985 apply in relation to section 61 of the Extradition Act 2003 as they apply to Part 2 of the POA 1985.

301. *Paragraph 15* inserts new sections 62A and 62B into the Extradition Act 2003. New section 62A(1) to (5) makes provision equivalent to sections 16(6) to 16(6D) of the POA 1985 (i.e. provision as to the amount to be awarded pursuant to an order for costs and the calculation of that amount). New subsection (6) of section 62A provides that regulations made under section 20(1A) to (1C) and (3) of the POA 1985 (regulations as to amounts ordered to be paid out of central funds) apply for the purposes of orders under section 61 as they apply for the purposes of orders under section 16 of the POA 1985. New section 62B provides that, in England and Wales, an order under section 61(5) may not include an amount in respect of legal costs unless those legal costs were incurred in the magistrates' court or the Supreme Court. The Lord Chancellor may, by regulations, make provision about exceptions from the

prohibition against the award of legal costs, but such regulations cannot affect the Supreme Court's power to award an amount in respect of legal costs incurred in proceedings before it.

302. *Paragraph 16* makes amendments of section 134 of the Extradition Act 2003 (costs where discharge ordered) equivalent to the amendments of section 61 of that Act.

303. *Paragraphs 20 to 22* provide that the amendments to the POA 1985, the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003 do not affect a person's entitlement to costs in respect of proceedings and references commenced prior to commencement of the relevant provisions.

**Schedule 7: Costs in criminal cases: service courts**

304. Schedule 7 makes similar provisions in relation to the legal costs of an appellant in the Court Martial Appeal Court as to civilian courts in Schedule 6, and also removes the restriction on successful appellants against sentence receiving costs.

**Part 3: Sentencing and punishment of offenders**

**Chapter 1: Sentencing**

***General***

**Clause 53: Court's duty to consider compensation order**

305. Clause 53 amends section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 and strengthens the obligation on the court to consider ordering a person convicted of an offence to pay compensation.

306. The clause inserts a new subsection (2A) in section 130, which places the court under an express duty to consider making a compensation order in any case where it is empowered to do so under this section. Compensation may be ordered for any loss or damage, personal injury or bereavement, or to make payments for funeral.

307. The clause retains the obligation on the court to give reasons if it does not make a compensation order, in a case where it is empowered to under this section.

**Clause 54: Duty to give reasons for and to explain effect of sentence**

308. Clause 54 replaces the existing section 174 of the 2003 Act with a new version of that section retaining a general duty to explain a sentence and reducing the specific requirements on the court.

309. The substituted version of section 174 retains, in subsection (2) the general duty on a court to explain in open court and in ordinary language the court's reasons for deciding on a sentence. The substituted section 174 also retains the general duty, in subsection (3) to explain to an offender the effect of the sentence and the implications of the offender not complying with the sentence.

310. The substituted section 174 goes on to set out, in subsections (6) to (8), a revised and

reduced list of the particular duties on courts to explain aspects of a sentence. These duties include, in *subsection (6)*, identifying relevant sentencing guidelines and explaining how they were applied or why they were not applied. In subsection (7) there is a duty to explain the impact on the sentence of a reduction for a guilty plea. In subsection (8) a court must explain, in giving a juvenile a discretionary custodial sentence, why a non-custodial sentence could not be justified, and in making a youth rehabilitation order with intensive supervision and surveillance or with fostering, why the order is appropriate

311. The substituted section 174 removes specific duties to explain the court's consideration of the thresholds for imposing a custodial sentence or community order. The revised section 174 also removes the particular exception from the general duty to explain a sentence where the sentence is fixed by law (mandatory minimum sentences). These considerations are now covered by the general duty on courts contained in subsections (2) and (3) of the substituted section 174.

***Community orders***

**Clause 55: Duration of community order**

312. Clause 55 makes provision about when a community order comes to an end.

313. Currently a community order must specify a date by which all the requirements in the order must have been complied with. This date may not be more than three years after the date of the order. However, there is no express provision about when the order itself comes to an end.

314. *Subsections (1) and (2)* amend section 177(5) of the 2003 Act and insert new subsections (5A) and (5B). These amendments provide that a community order comes to an end on the date specified under section 177(5). (This is subject to specific provision in relation to an unpaid work requirement, where the order continues in force until the requirement is complied with.) Where an order imposes two or more requirements, a court may specify end dates for each of those requirements, and where it does so, the last of those end dates must be the same as the date specified under section 177(5) (that is, the date at which the order comes to an end).

315. *Subsections (3) and (4)* allow magistrates' courts and the Crown Court respectively to extend the duration of an order by up to 6 months where the offender has breached a requirement in order.

316. *Subsection (5)* allows magistrates' courts and the Crown Court to extend the duration of an order otherwise than for breach of the order.

**Clause 56: Breach of community order**

317. Clause 56 amends Schedule 8 to the 2003 Act, which makes provision about breach of a requirement imposed as part of a community order and a court's powers in relation

to such a breach.

318. Schedule 8 already provides a court with the option of dealing with breach of an order by either varying the order to make its requirements more onerous (for example, by extending the duration of a requirement or adding a new one), or revoking the order and re-sentencing the offender as if he had just been convicted. There is currently no option to take no action.

319. Schedule 8 provides that in dealing with an offender for breach the court must take into account the extent to which he has already complied with the order. If the offender has wilfully and persistently failed to comply with a community order the court can re-sentence the offender to custody even if the original offence was not serious enough to justify a custodial sentence.

320. The clause gives a court the option of taking no action in relation to a breach. It also gives a court a new power to fine an offender in relation to a breach (and in that case the order will continue in force).

321. *Subsection (2)* amends paragraph 9(1) of Schedule 8 in two ways: it provides a magistrates' court with the option of taking no action; and it provides them with a new power to impose a fine on the offender of not more than £2,500 in relation to the breach.

322. *Subsection (4)* makes substantially the same provision as subsection (2), but in relation to the Crown Court

323. *Subsection (5*) inserts a new provision giving the Secretary of State a power by order (subject to the negative Parliamentary procedure) to amend the maximum amount of a fine which may be imposed by the magistrates' court or Crown Court in relation to a breach of a community order. The power may only be exercised if it appears to the Secretary of State that there has been a change in the value of money. The power replicates the power of the courts in relation to breach of a youth rehabilitation order (see paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008).

***Suspended sentence orders***

**Clause 57 and Schedule 8: Changes to powers to make suspended sentence order**

324. Clause 57 amends provisions relating to suspended sentences. Currently a court cannot suspend prison sentences that are longer than 12 months. The courts are also currently required to attach at least one "community requirement" to a suspended sentence even if they consider that no community requirement is necessary in the circumstances. (Community requirements are available to address issues of offender behaviour through treatment programmes such as alcohol or drug addiction and poor cognitive skills.)

325. *Subsection (1)* amends section 189 of the 2003 Act to enable courts to suspend longer sentences of imprisonment namely those between 14 days and two years. The

amended clause also provides the court with discretion as to whether or not to impose community requirements. The clause retains the current position whereby the sentence of imprisonment will not take effect unless the offender fails to comply with a community requirement or is convicted of a further offence during the period of suspension.

326. *Subsection (2)* provides that, where a court imposes consecutive sentences, the power to make a suspended sentence order is limited to cases where the sentence does not exceed two years in total.

327. *Subsections (3) and (4)* clarify that the provisions relating to the length of supervision periods (the period during which the offender is subject to one or more community requirements) apply only to those orders with community requirements.

328. *Subsection (6)* gives effect to Schedule 8, which makes consequential and transitional provision (see below).

329. *Subsection (7)* provides that the new provisions apply to offences committed before, and after, the clause comes into force where the offender is sentenced after the clause comes into force.

**Schedule 8: Changes to powers to make suspended sentence orders: consequential and transitory provision**

330. *Paragraphs 1 to 12* of Schedule 8 make various amendments which are consequential on the changes to powers to make suspended sentence orders introduced by clause 57, in particular to ensure requirements that are only appropriate for suspended sentences with community requirements do not apply where they would be inappropriate or unnecessary for suspended sentence without community requirements.

331. *Paragraph 13* of Schedule 8 contains a transitory provision to apply the new provisions to detention in young offender institutions, since pending the bringing into force of section 61 of the Criminal Justice and Court Services Act 2000 (which will abolish a sentence of detention in a young offender institution), such a sentence is still possible.

**Clause 58: Fine for breach of suspended sentence order**

332. At present the court has no power to impose a fine for breach of a suspended sentence order. Clause 58 inserts a new provision into paragraph 8 of Schedule 12 to the 2003 Act. This will enable the court to impose a fine of up to £2,500 for breach of a suspended sentence order where it decides not to give effect to the custodial sentence.

333. A suspended sentence order is breached where an offender fails to comply with any community requirement or is convicted of another offence during the period for which the sentence is suspended. In determining the level of the fine the court must take account of the offender's means or, in the absence of such information, make such determination as it sees fit. Any fine is enforced as it would be had it been imposed

on conviction

334. *Subsection (3*) inserts a new provision giving the Secretary of State a power by order (subject to the negative Parliamentary procedure) to amend the maximum amount of a fine which may be imposed by the magistrates' court or Crown Court in relation to a breach of a suspended sentence order. The power may only be exercised if it appears to the Secretary of State that there has been a change in the value of money. The power replicates the power of the courts in relation to breach of a youth rehabilitation order (see paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008). It also replicates a power conferred by clause 56(5) in the Bill in relation to a fine for breach of a community order.

***Requirements under community orders and suspended sentence orders***

**Clause 59: Programme requirement**

335. Clause 59 amends section 202 of the 2003 Act which makes provision in relation to "programme requirements". These may be imposed as part of a community order or a suspended sentence order with a view to addressing particular aspects of offender behaviour such as treatment of alcohol or drug addiction and poor cognitive skills.

336. *Subsection (2)* amends section 202(1) of the 2003 Act by reducing the number of matters the court must specify when imposing a programme requirement. It removes the requirement for a court to specify (a) the particular accredited programme in which the offender must participate, and (b) the place at which the offender must participate in an accredited programme. It retains the requirement for a court to specify the number of days on which the offender must take part in an accredited programme. By the amendments to section 202(6) of the 2003 Act, it will be for the responsible officer to determine those matters.

337. *Subsection (3)* repeals section 202(4) and (5) of the 2003 Act, which specify a number of conditions that have to be met before a court may impose a programme requirement. These conditions currently require a court to include only certain accredited programmes, and prevent the court from including a programme requirement if compliance with that requirement would involve the co-operation of someone other than the offender and the responsible officer, unless that person has consented. The effect of *subsection (3)* is that those conditions will no longer apply.

**Clause 60: Curfew requirement**

338. Clause 60 amends section 204 of the 2003 Act, which makes provision in relation to curfew requirements.

339. *Subsection (2)* amends section 204(2) by increasing the maximum period in any day for which the court may impose a curfew requirement from twelve to sixteen hours.

340. *Subsection (3)* amends section 204(3) by increasing the maximum period for which a curfew requirement may be imposed from six to twelve months from the date on

which the community order is made.

341. It remains the case that, before imposing a curfew requirement, the court must obtain and consider the effect that the curfew might have on other people living at the curfew address. Compliance with a curfew requirement is normally monitored electronically by the offender wearing a 'tag'.

**Clause 61: Foreign travel prohibition requirement**

342. Clause 61 amends section 177 of the 2003 Act to enable a court to impose a prohibition on foreign travel as a requirement in a community order or suspended sentence order. The effect of the new requirement is to prohibit travel to a country or countries outside the British Islands (the United Kingdom, the Channel Islands and the Isle of Man).

343. Currently courts can already impose a number of requirements that restrict offenders' movements in some way. These include curfews, residence requirements, and exclusion requirements. However, there is no requirement which gives courts an express power to prohibit an offender from travelling outside the British Islands.

**Clause 62: Mental health treatment requirement**

344. Clause 62 amends section 207 of the 2003 Act which makes provision about mental health treatment requirements in community orders or suspended sentence orders.

345. Currently, a court cannot make a mental health treatment requirement unless it is satisfied on the evidence of a registered medical practitioner approved for the purposes of section 12 of the Mental Health Act 1983 that the mental condition of the offender requires treatment and may be susceptible to it, and other disposals under the Mental Health Act 1983 are not warranted.

346. Clause 62 removes the condition that a court can only impose a mental health treatment requirement on the evidence of a registered mental health practitioner approved for the purposes of section 12. It remains the case that the court may not include a mental health treatment requirement unless the offender has expressed willingness to comply with it.

**Clause 63: Drug rehabilitation requirement**

347. Clause 63 amends section 209 of the 2003 Act, which makes provision in relation to drug rehabilitation requirements.

348. It removes the requirement that the treatment and testing period on a drug rehabilitation requirement must be at least six months. The effect of this is that there will be no minimum treatment and testing period. The change provides the court with greater discretion in determining the appropriate length of the requirement.

**Clause 64: Alcohol treatment requirement**

349. Clause 64 amends section 212 of the 2003 Act, which makes provision in relation to

alcohol treatment requirements.

350. It removes the requirement that the period of an alcohol treatment requirement must be at least six months. The effect of this is that there will be no minimum period. The change provides the court with greater discretion in determining the appropriate length of the requirement.

***Youth sentences***

**Clause 65: Referral orders for young offenders**

351. Clause 65 amends sections 16 and 17 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000), which set out the circumstances in which the court has the power to give a referral order to an offender under the age of 18.

352. A referral order refers the offender to a youth offender panel and requires the offender to attend meetings of the panel and enter into a contract with the panel to undertake rehabilitative activities for a period of between 3 and 12 months.

353. Sections 16(2) and 17(1) of the PCC(S)A 2000 impose a duty on a youth court or magistrates' court either to make a referral order or to discharge offenders absolutely where they have pleaded guilty to their first offence (or where they are before the court for more than one offence, at least one of these offences) unless certain exceptions apply. Those exceptions are: if the offence (or at least one of the offences) that the offender is being sentenced for is fixed by law (section 16(1)(a)) or the court proposes to impose a custodial sentence or a hospital order in respect of the offence (or where the offender is before the court for more than one offence, at least one of these offences). Where the exceptions apply the duty does not apply.

354. Typically, these exceptions apply only in a very few cases so the powers of the court when sentencing a first time offender who has pleaded guilty are very limited. The court can never impose a community sentence on an offender where section 16 of the PCC(S)A 2000 applies.

355. Sections 16(3) and 17(2) to (2C) of the PCC(S)A 2000 provide a discretionary power for a youth or magistrates' court either to make a referral order or absolutely discharge offenders where they have pleaded guilty to the offence (or where they are before the court for more than one offence, at least one of these offences), even if it is not their first offence. But the court may only do so in circumstances where the offender has not previously received a referral order (section 17(2B)) or has received a referral order on one occasion but is recommended as suitable for another by an 'appropriate officer' (usually an officer of the local youth offending team) (section 17(2C)).

356. *Subsection (1)* amends section 16(1)(c) of the PCC(S)A 2000 to provide for circumstances in which the court is proposing to discharge the offender conditionally as well as those in which it proposes to discharge the offender absolutely.

357. The purpose and effect of this is to widen the powers of a youth or magistrates' court to deal with offenders where they have pleaded guilty to their first offence (or where they are before the court for more than one offence, at least one of these offences). As a result of this amendment, where the exceptions in 16(1)(a) and (b) do not apply, the court will no longer have to choose between making a referral order or absolutely discharging the offender: it will now be able to choose to conditionally discharge the offender instead.

358. *Subsection (2)* amends section 17 PCC(S)A 2000. It removes the existing conditions set out in section 17(2A) to (2C) and amends section 17(2) in order to widen the powers of a youth or magistrates' court to deal with an offender where they have pleaded guilty to an offence (or where they are before the court for more than one offence, at least one of these offences), even if it is not their first offence. As a result of the amendment, the court is no longer prevented from offering referral orders to offenders who meet this condition but who have previously received referral orders in the past. There is no limit to the number of referral orders that a repeat offender can receive. The offender does not need to be recommended as suitable for a second or subsequent referral order by an appropriate officer.

**Clause 66: Breach of detention and training order**

359. A detention and training order (DTO) is a custodial sentence for young offenders aged between 12 and 17 created by sections 100 to 107 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000). In broad terms, the offender spends the first half of the specified period in custody (detention and training) and the second half in the community subject to various requirements and under the supervision of the youth offending team.

360. *Subsections (2)* to (7) amend section 104 of the PCC(S)A 2000 to extend the powers of the court to punish an offender who has breached their DTO by failing to comply with the supervision requirements imposed on them

361. *Subsection (2)* retains the power of the court to impose a period of detention in punishment for the breach. It also creates a new power for the court to impose an additional period of supervision.

362. *Subsection (3)* inserts new subsections (3A) to (3D), which make further provision about the periods of supervision or detention, into section 104:

- new subsection (3A) sets the maximum period for which the court may impose supervision or detention as a punishment for breach. This is to be the shorter of 3 months or the period beginning with the date of the failure to comply with the requirement and the last day of the term of the DTO.

- new subsection (3B) stipulates how that period is to be determined if the failure to comply with a requirement took place over two or more days.

- new subsection (3C) is especially important as it provides that the court may impose a period of supervision or detention for breach even after the term of the DTO has finished. This means that those subject to a DTO will not be able to avoid being given a further period of detention or supervision by delaying their breach hearings until after the term of their DTO expires as has happened following the case of *H v Doncaster Youth Court, Doncaster Youth Offending Service*[11] where the court had held that a further period of detention could only be imposed from the date on which the court made a finding that the offender had failed to comply with supervision requirements, rather than from the actual failure to comply, and only up to the end of the original DTO period.

- new subsection (3D) provides that where the court imposes a period of detention or supervision for breach, it takes immediate effect and can overlap with a period of supervision under the DTO.

363. *Subsection* (4) inserts new section 104(4A) into the PCC(S)A 2000. This provides that where an offender is over 18 when a court orders a further period of detention in respect of a breach of a DTO, the offender will be sent to prison. This subsection needs to be read with clause 66(8) of the Bill which provides that an offender aged between 18 and 21 will not be sent to prison under section 104(4A) until such time as section 61 of the Criminal Justice and Court Services Act 2000 is commenced (and the sentence of detention in a young offenders institution is abolished). Until that time 18 to 21 year olds will be sent to youth detention accommodation, which includes young offender institutions (see section 107 of the PCC(S)A 2000).

364. *Subsection (6)* extends the right of appeal to the Crown Court that currently exists where an offender is given a further period of detention for breach of a DTO to the new power to impose an additional period of supervision.

365. *Subsection (7)* inserts new sections 104A and 104B into the PCC(S)A 2000. New section 104A applies certain provision in the PCC(S)A 2000 relating to DTOs to orders under section 104(3)(aa) that an offender serve a further period of supervision, with the necessary modifications:

- section 104A(1) and (2) applies section 103 (which provides for how a period of supervision under a DTO operates);

- section 104A(3) to (5) applies section 104 (which deals with breach of DTO supervision requirements) and section 105 (which makes provision for when an offender commits an offence when subject to supervision).

366. In broad terms, the further period of supervision works in a similar way to the period of supervision under a DTO. In particular, requirements can be imposed on the

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offender under section 103 of the PCC(S)A 2000, as applied, and enforced under section 104 of that, again as applied. And, if the offender commits an imprisonable offence while subject to a further period of supervision, then the offender can be detained in youth detention accommodation under section 105, as applied.

367. The fact that a court can deal with an offender who breaches requirements imposed in respect of a further period of supervision in the same way that it can deal with someone who has breached the supervision requirements of a DTO, means that there could be a series of orders under section 104(3)(aa). If an offender breaches a DTO and is given a further of supervision which the offender then also breaches, the court can once again respond by imposing further supervision (or detention or a fine). And if requirements attached to that further period of supervision are also then breached, another period of supervision could be ordered in respect that breach and so on. This continues to be the case until the offender completes the order of the court without breaching it.

368. New section 104B provides for the interaction between the new power to impose periods of detention beyond the end of the original DTO and other sentences. Subsections (1) to (4) provide for the interaction between a period of further detention and a DTO. New subsection 104B(5) provides a power for the Secretary of State to make regulations to provide for the interaction between a period of detention imposed for breach and custodial sentences other than a DTO.

369. A further period of detention can be imposed for breach after the term of the DTO has ended. It can also be imposed in respect of the breach of a requirement attached to a period of further supervision under section 104(3)(aa), which may itself have been imposed after the end of the DTO. It is therefore possible for a period of detention to be imposed under section 104(3)(a) after the offender has turned 18 or even 21. For this reason it is necessary to set out for the courts how the breach period will interact with adult sentences.

370. S*ubsection (9)* applies the provision made by the clause to any breach of a DTO that occurs after commencement.

**Clause 67: Youth rehabilitation order: curfew requirement**

371. Clause 67 mirrors the amendments to the curfew requirement for community orders in clause 60 of the Bill by increasing the maximum number of hours in a day for which a curfew can be imposed from twelve to sixteen hours a day and the length of time from six to twelve months.

**Clause 68: Youth rehabilitation order: mental health treatment requirement**

372. A youth rehabilitation order is a community sentence provided for by the Criminal Justice and Immigration Act 2008 (the 2008 Act). As part of the sentence a court may impose one or more of 18 different requirements that the offender must comply with for a period of up to three years. The requirements can include curfew, supervision and mental health treatment requirements. These requirements are similar to

programme requirements that can be attached to community orders for adults.

373. Clause 68 amends paragraph 20 of Schedule 1 to the 2008 Act to make provision for mental health treatment requirements in youth rehabilitation orders and mirror the amendments to mental health treatment requirements in clause 62 for adults by removing the requirement for evidence from a medical practitioner approved for the purposes of section 12 of the Mental Health Act 1983. It remains the case that the court can not include a mental treatment requirement unless the youth has expressed a willingness to comply with it.

**Clause 69: Youth rehabilitation order: duration**

374. This clause amends the current provisions in Schedules 1 and 2 to the Criminal Justice and Immigration Act 2008 (the 2008 Act) which set out the duration of youth rehabilitation orders. Under the current provisions where an order has multiple requirements which may themselves be time limited it can be unclear when the order is completed. In some cases this can result in the requirements being completed before the end date of the order requiring the case to be returned to court to revoke the order.

375. *Subsection (1)* amends Schedule 1 to the 2008 Act to enable the court to specify different completion dates for different requirements attached to an order and for the end date of the order to be the same as the last completion date for a requirement.

376. *Subsection (2)* inserts new sub-paragraphs (6A) to (6D) in paragraph 6 of Schedule 2 to allow a magistrates' court to extend the end date of an order by up to 6 months where a further requirement is imposed but only on one occasion. If the order is extended under these provisions then it may extend beyond the three year maximum length set out in Schedule 1.

377. *Subsection (3)* inserts new paragraphs 6A to 6D in paragraph 8 of Schedule 2 which makes the same amendments to the powers in the Crown Court as subsection 2 does to the powers of the magistrates' court.

378. *Subsection (5)* inserts a new paragraph 16A in Schedule 2 relating to the exercise of powers of the magistrates' court or Crown court when dealing with breach of a youth rehabilitation order to cancel or replace requirements in the order. Sub-paragraph (1) of new paragraph 16A allows a court to amend the end date of an order where either the offender or responsible officer requests this. Further provisions limit the extension of the end date to a maximum period of 6 months beyond the end date of the original order and allow the overall length of the order to extend beyond the maximum of three years where the order is so extended. This power to extend is limited to one occasion only. Sub-paragraph (6) provides that the court amending the length of the order must be a youth court where the offender is aged under 18 at the time the application to extend is made or an adult magistrates' court where the offender has reached the age of 18.

**Clause 70: Youth rehabilitation order: fine for breach**

379. Clause 70 provides for the fine available to a court to deal with breach of a youth rehabilitation order under Schedule 2 to the 2008 Act to be increased to a maximum amount of £2,500. Currently the maximum fine in both the magistrates' courts and the Crown Court is £250 if the offender is aged under 14, or £1,000 in any other case.

***Repeal of uncommenced provisions***

**Clause 71: Magistrates' courts' powers to impose imprisonment**

380. Clause 71(1) and (2)(a) to (g) repeal the sections of the 2003 Act which would have increased magistrates' courts' sentencing powers from six months to 12 months or 51 weeks. These provisions have never been commenced.

381. Clause 71 (2)(h) to (l), (3) and (4) make those repeals which are directly consequential on the repeal of the uncommenced sections of the 2003 Act.

**Clause 72 and Schedule 9: Custody plus orders and intermittent custody: repeal**

382. Clause 72(1) repeals those sections of the 2003 Act which would have introduced custody plus and intermittent custody orders for sentences of less than 12 months (sections 181 to 188). Those provisions have never been commenced. Sentences of less than 12 months are now to be brought within Chapter 6 of Part 12 of the 2003 Act: see clause 93. Schedule 9 makes amendments which are consequential on the repeal of sections 181 to 188.

**Chapter 2: Bail etc**

**Clause 73 and Schedule 10: Amendment of bail enactments**

383. Clause 73 gives effect to Schedule 10 which amends the Bail Act 1976 (the 1976 Act) and other legislation concerning bail.

384. The 1976 Act creates a general presumption in favour of bail, both before and after an offender is convicted. This general presumption is subject to certain exceptions which are set out in Schedule 1 to the Act: for example, if the defendant has previously failed to surrender to bail and the court believes that if released he would fail to do so again. Schedule 1 contains a number of Parts which set out the different exceptions that apply depending on whether the person has been accused or convicted of an indictable or summary offence that may or may not be punishable with imprisonment.

**Schedule 10: Amendment of enactments relating to bail**

385. Schedule 10 amends the 1976 Act so that certain of the exceptions to the presumption that bail should be granted to a defendant will not apply where there is no real prospect that the defendant will be sentenced to a custodial sentence ("the no real prospect test"). This new test (which increases the availability of bail) is limited to non-extradition proceedings and to adult defendants who have not been convicted.

386. Those aged under 18 will continue to be subject to the existing exceptions in Schedule

1 to the 1976 Act restricting the grant of bail. This is to ensure that those offenders aged under 18 who would otherwise be granted bail under the new test can continue to be given "looked after" status by the local authority (see Chapter 3 of Part 3 of the Bill). This means that the young person is assessed by the local authority and receives appropriate assistance and supervision.

387. Although the new restriction on the exceptions to bail does not apply to under-18s by virtue of this Schedule, a similar restriction on remand to secure accommodation is imposed by the youth remand provisions in Chapter 3 of Part 3 of the Bill.

388. *Paragraph 5* amends section 7 of the 1976 Act which applies to a person has been released on bail and fails to surrender to custody. In such circumstances the power to remand the person in custody will be subject to the new test, i.e. that there is no real prospect that the person will be sentenced to a custodial sentence if convicted of the offence. This new test is limited to non-extradition proceedings and to adult defendants who have not been convicted.

389. *Paragraphs 10 and 22* amend Parts 1 and 1A of Schedule 1 to the 1976 Act. These Parts deal with those cases in which the person is accused or convicted of an indictable or a summary offence and which is punishable with imprisonment. The effect of the amendments are that certain exceptions to the right to bail do not apply where the matter relates to non extradition proceedings and to adult defendants who have not been convicted.

390. *Paragraph 12* amends Part 1 of Schedule 1 to the 1976 Act by inserting a new exception to the right to bail which is not subject to the new 'no real prospect test'. This new exception to bail relates to a person who, if released on bail, might commit an offence by engaging in conduct involving domestic violence.

391. *Paragraphs 23 to 26* amend Part 2 of Schedule 1 to the 1976 Act, which deals with cases in which a person is accused or convicted of a non-imprisonable offence. The effect of the amendments is to make certain existing exceptions to the right to bail applicable only where the defendant is under the age of 18 or has been convicted of the offence. This has the same effect as the "no real prospect" test in Parts 1 and 1A of Schedule 1 which disapplies certain exceptions to the right to bail.

**Chapter 3: Remands of children otherwise than on bail**

***Remands***

**Clause 74: Remands of children otherwise than on bail**

392. Clause 74 is concerned with a child who has not been granted bail and who either (a) has been charged with or convicted of an offence and is awaiting trial or sentence or (b) is the subject of extradition proceedings.

393. *Subsection (3)* provides that the court must remand that child to local authority accommodation unless one of the sets of conditions set out in Clauses 81-84 is met. (Clauses 81 and 82 provide two sets of conditions one set of which must be met for a

child charged with or convicted of a criminal offence and clauses 83 and 84 provide equivalent alternate sets of conditions for children concerned in extradition proceedings).

394. *Subsection (5)* defines a child as a person under the age of 18. This has the effect of applying these provisions to all under 18s who are before the court in the above circumstances. Currently, 17 year olds are remanded to prison either under section 27 of the Criminal Justice Act 1948 in the case of those charged with or convicted of an offence or the Extradition Act 2003 for those involved in extradition proceedings.

**Clause 75: Remands to local authority accommodation**

395. Clause 75 sets out the practical effect of and arrangements for a remand to local authority accommodation.

396. *Subsection (4)* provides that a local authority designated by the court must receive the child and provide or arrange suitable accommodation for them. The powers and duties of a local authority to place a child that is remanded under this section are set out in section 22C of the Children Act 1989.

397. *Subsection (5)* provides that a child remanded to local authority accommodation may be lawfully detained by any person acting on behalf of the authority. This allows a representative of a local authority to require a child to reside in the accommodation that the local authority has placed them in pursuant to section 22C. If the child leaves the accommodation without the permission of the local authority (or a representative of that authority) they can be arrested under section 32 of the Children and Young Persons Act 1969 and returned to the accommodation in which they were placed or some other accommodation specified by the local authority.

**Clause 76: Conditions etc on remands to local authority accommodation**

398. Clause 76 provides that a court may impose conditions on a child who it has remanded to local authority accommodation. These conditions are the same as the court may apply to a child who is remanded on bail pursuant to section 3 of the Bail Act 1976. Clause 76 also provides that the court may impose requirements on the designated local authority to secure compliance with any of the conditions imposed on the child.

399. *Subsection (2)* additionally allows the court to order that compliance with any requirements imposed under subsection (1) be secured by means of electronic monitoring. In the case of children who are charged with or convicted of an offence the conditions imposed in clause 77 must be met. These are same as those which apply to electronic monitoring imposed pursuant to section 3A Bail Act 1976. In the case of children concerned in extradition proceedings, the conditions in clause 78 must be met.

**Clause 77: Requirements for electronic monitoring**

400. Clause 77 applies in cases other than extradition cases and sets out five requirements

that must be satisfied before a court may impose electronic monitoring on a child remanded to local authority care pursuant to clause 74.

**Clause 78: Requirements for electronic monitoring: extradition cases**

401. Clause 78 provides for a modified version of the five requirements in clause 77 in respect of children concerned in extradition proceedings. The effect of the requirements is the broadly the same as for clause 77 but the drafting reflects the fact that the child is subject to extradition proceedings.

**Clause 79: Further provisions about electronic monitoring**

402. Clause 79 provides that when imposing a condition of electronic monitoring the court must make a person responsible for the monitoring and that they must be of a description specified by the Secretary of State.

403. *Subsection* (2) confers a power on the Secretary of State to prescribe by order the description of persons who may be responsible for electronic monitoring, and subsection (3) confers a power to make rules regulating electric monitoring in general and the functions of the person responsible for carrying out the monitoring in particular. Both the order and the rules must be made by statutory instrument and the rules are subject to the negative resolution procedure in Parliament.

**Clause 80: Liability to arrest for breaking conditions of remand**

404. Clause 80 confers a power for a constable to arrest without a warrant a child who the constable has reasonable grounds for suspecting has breached any of the conditions imposed under clause 76. It also imposes a duty on the constable to bring the child before a court as soon as reasonably practicable and in any event within 24 hours.

405. If the court determines that the child has broken any of the conditions imposed under the original remand it can remand the child on new conditions or, if it thinks the test for remand to youth detention accommodation is met, remand the child to youth detention accommodation. If it is not satisfied that the conditions have been breached then the child must be remanded to local authority accommodation, again subject to the same conditions as those originally imposed.

***Remands to youth detention accommodation***

406. A child can be only be remanded to youth detention accommodation under the provisions of this chapter if at least one of four sets of conditions out in clauses 81, 82, 83 or 84 is met.

**Clause 81: First set of conditions for a remand to youth detention accommodation**

407. Clause 81 applies to a child charged with or convicted of an offence and describes the first set of conditions that if met would allow the court to remand the child to youth detention accommodation. This set of conditions includes a requirement relating to the seriousness of the offence which must be either a violent or sexual offence or one that is punishable if committed by an adult with a sentence of imprisonment of

fourteen years or more.

**Clause 82: Second set of conditions for a remand to youth detention accommodation**

408. Clause 82 defines an alternative set of conditions that would enable the court to remand a child charged or convicted of an offence to youth detention accommodation. This set of conditions includes a requirement concerning the behaviour of the offender while on remand. In particular it is a requirement that (a) the child has a recent history of absconding while remanded to local authority or youth detention accommodation and (b) the offence for which the child is to be remanded on this occasion is alleged to be or has been found to have been committed while on remand to such accommodation. Alternatively it is a requirement that the child has a recent history of committing imprisonable offences while on remand (on bail or in custody). The offence in respect of which the offender is charged or convicted must be an imprisonable offence in any event.

**Clause 83: First set of conditions for a remand to youth detention accommodation: extradition cases**

409. Clause 83 sets out in an equivalent set of conditions to those in Clause 81, this time for a child in an extradition case.

**Clause 84: Second set of conditions for a: extradition cases**

410. Clause 84 sets out an equivalent set of conditions to those in Clause 82, this time for a child in an extradition case.

**Clause 85: Remands to youth detention accommodation**

411. This clause contains general provisions regarding arrangements when a child is remanded to youth detention accommodation.

412. It provides that the Secretary of State may direct that the child be placed in one of the kinds of accommodation in subsection (2) namely a secure children's home, a secure training centre or a young offender's institution, and that the Secretary of State must consult the local authority designated by the court before directing where the child must be placed.

413. *Subsections (4) and (5)* make specific provision regarding the giving of reasons and, in the case of the magistrates' court, the recording of reasons for the remand.

**Clause 86: Arrangements for remands**

414. Clause 86 gives the Secretary of State the power to make arrangements for accommodation in a secure children's home for those children who are subject to a remand to youth detention accommodation. Existing legislation enables the Secretary of State to make arrangements for remands to secure training centres and young offender institutions.

415. *Subsection (2)* gives the Secretary of State the power to make regulations (subject to

the negative resolution procedure in Parliament) enabling the Secretary of State or a provider of youth detention accommodation to recover the costs of youth detention accommodation from designated local authorities. It also gives the power to recover associated costs, such as those for providing transport for the child from the court to the chosen form of accommodation.

***Supplementary***

**Clause 87: Looked after child status**

416. Clause 87(1) provides that any child remanded to youth detention accommodation is to be treated as looked after by the designated authority.

417. *Subsection (2)* gives the Secretary of State the power to apply with modifications or not apply, any legislation (including an Act or Measure of the National Assembly of Wales) to a child who is treated as looked after by virtue of being remanded under this Chapter. Any regulations made under this section may make different provision for different cases and may include supplementary, incidental, transitional, transitory or saving provision. Regulations must be made by statutory instrument subject to negative resolution in Parliament.

**Clause 88 and Schedule 11: Minor and consequential amendments**

418. Clause 88 gives effect to Schedule 11 which makes various amendments and repeals which are consequential on the new scheme for remands of children otherwise than on bail introduced by Chapter 3 of Part 3.

419. In general these are very straightforward and involve replacing references to sections of the Children and Young Persons Act 1969 or repealing legislation that created powers and duties associated with remand under that Act. Of note however are:

- *Paragraphs 1 to 3* which amend the Criminal Justice Act 1948. This previously required 17 year olds to be remanded to prison. Under the Bill they will be remanded to local authority accommodation or youth detention accommodation.

- *Paragraph 9* which amends section 32 of the Children and Young Persons Act 1969. It has the effect of providing that where a child is remanded to local authority accommodation and they abscond, if found they will be escorted back to local authority accommodation and the cost will be met by that local authority. Where the child is remanded in youth detention accommodation they will be escorted back to youth detention accommodation at the cost of the Secretary of State.

- *Paragraph 12* which inserts a reference to this Bill into the Local Authority Social Services Act 1970. The effect of this is to include the functions carried out by local authorities in relation to children remanded to local authority accommodation under the Bill in the definition of social services functions for the purposes of the Local Authority Social Services Act 1970. This, in turn, brings children who are remanded to local authority accommodation under the Bill into

the definition of a 'looked after child' set out in section 22 Children Act 1989. In this way a child who is remanded to local authority accommodation under the Bill becomes a "looked after child" within the meaning of the Children Act 1989.

**Clause 89: Interpretation of Chapter 3**

420. Clause 89 provides definitions of terms used in Chapter 3.

**Chapter 4: Release on licence etc**

***Calculation of days to be served***

**Clause 90: Crediting of periods of remand in custody**

421. Clause 90 replaces section 240 of the 2003 Act with a new section 240ZA, dealing with the crediting of time spent on remand in custody against any subsequent sentence of imprisonment or detention. Under section 240 the court directs the amount of remand time to be counted towards a prisoner's sentence. The insertion of section 240ZA provides for such time, instead, to be calculated and applied administratively. All time that meets the criteria of the provision will be counted to reduce a subsequent sentence. There is no longer discretion to disapply any such time.

422. *Subsection (4)* of new section 240ZA prevents time spent on remand from counting if the prisoner is also serving another sentence or is otherwise detained in connection with another matter (subsection (10) lists the types of detention which count for this purpose).

423. *Subsection (5)* of new section 240ZA prevents the same remand time counting several times against two or more sentences (whether or not they are served consecutively or concurrently).

424. *Subsection (6)* of new section 240ZA prevents remand time shortening any recall under section 255B where the maximum length of the recall is 28 days. (The possibility of a 28 day fixed recall period was introduced by the Criminal Justice and Immigration Act 2008 ("the 2008 Act") which provides that lower risk prisoners who are suitable for such a recall must be released automatically at the end of that period.)

425. *Subsection (9)* of new section 240ZA makes it clear that consecutive and concurrent sentences, where a prisoner has not been released between serving such sentences, are counted as one sentence for the purposes of deducting remand time. Together with subsection (5) of new section 240ZA, this prevents the same remand time counting several times against the overall sentence envelope created by the consecutive or concurrent sentences.

**Clause 91: Crediting of periods of remand on bail**

426. Clause 91 amends section 240A of the 2003 Act which gives the court power to direct that time spent remanded on bail subject to electronic monitoring ("tagged bail") counts towards any subsequent sentence imposed, provided that that sentence is imposed for the same offence for which the defendant was remanded or a related

offence. Two days successfully completed on tagged bail count as one day of the sentence. The new provisions set out how the time to be credited has to be calculated.

427. *Subsection (3)* inserts new subsections (3) to (3B) into section 240A. These set out the stages of the calculation. Under Step 1 the first day is counted even if the electronic monitor is not put in place until late that day. However, the last day is not counted if the offender spends the last part of that day in custody: that day will count towards the sentence served.

428. Step 2 prevents credit for tagged bail counting towards a subsequent sentence where during such time on bail the offender was also released on home detention curfew ("HDC") or temporarily released from prison in relation to another sentence.

429. Under Step 3 days where the offender breached the conditions of the release on bail are not to be counted.

430. Step 4 provides that each day spent on tagged bail effectively counts as half a day against the sentence. If such a calculation results in a number of days that include a half day, that half day can be counted as a whole day under Step 5.

431. New subsection (3A) prevents the same remand time counting several times against two or more sentences (whether or not they are to be served consecutively or concurrently).

432. New subsection (3B) prevents remand time shortening any recall under section 255B where the maximum length of the recall is 28 days (that is, where a prisoner receives the type of 'fixed term recall' introduced by the 2008 Act which provides for automatic release at the end of that 28 day period).

**Clause 92: Amendments consequential on sections 90 and 91**

433. Clause 92 makes amendments consequential on clauses 9090 and 9191, mainly amending the references to the repealed section 240 of the 2003 Act so as refer to section 240ZA instead.

434. *Subsection (8)* amends section 243 of the 2003 Act in relation to persons extradited to the United Kingdom. For those persons who qualify under section 243 of the 2003 Act, the changes provide for all days remanded in custody in another jurisdiction while awaiting extradition to the United Kingdom to be counted against a subsequent sentence imposed.

***Release***

**Clause 93 and Schedule 12: Prisoners serving less than 12 months**

435. Clause 93 provides for prisoners serving sentences of less than 12 months to be released unconditionally at the half way point. It does so by inserting a new section 243A. This replicates the corresponding provision in the Criminal Justice Act 1991. In effect, it replaces the provisions for release of those serving sentences of less than

12 months (section 181: custody plus) originally provided for in the 2003 Act.

436. Clause 93 introduces Schedule 12 which provides for the consequential amendments in relation to the new section 243A of the 2003 Act to ensure that the new provision works with the existing release and recall scheme in Chapter C 6 of Part 12 of the 2003 Act.

437. *Paragraph 10* of the Schedule provides that consecutive sentences which add up to 12 months or more are to be treated as a single sentence of 12 months or more. This means that where a sentence of less than 12 months is served consecutively with another sentence and either (i) the other sentence is 12 months or more, or (ii) the two sentences add up to 12 months or more, then release for the sentence of less than 12 months would be on licence for the remainder of the sentence. However, where consecutive sentences add up to less than 12 months, release will be unconditional.

438. Sentences of less than 12 months were previously all dealt with under the Criminal Justice Act 1991 (by virtue of transitional provisions, this remained the case even after the 2003 Act was brought into force). Paragraph 13 of the Schedule removes those transitional provisions, so that from the commencement of Chapter 4 such sentences are dealt with under the 2003 Act.

**Clause 94: Restrictions on early release subject to curfew**

439. Clause 94 amends section 246 of the 2003 Act which provides for early release on home detention curfew ("HDC"), which includes electronic monitoring. The amendments exclude a number of categories of prisoner from the HDC scheme. They will prevent anyone serving a sentence of four years or more from being eligible for the scheme. They also make ineligible those previously released and recalled under the scheme for breach of licence conditions (during a previous or current sentence). Also excluded will be those previously returned to prison under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 for committing a further offence before the expiry of a previous sentence. These changes bring the 2003 Act scheme in line with the scheme under the Criminal Justice Act 1991, so that the statutory provisions for HDC will be the same for all prisoners.

440. *Subsection (5)* inserts a new subsection (4ZA) into section 246 of the 2003 Act. This deals with concurrent and consecutive sentences for the purpose of determining whether an offender is serving a term of 4 years or more.

***Further release after recall***

**Clause 95: Cancellation of revocation of licence**

441. Clause 95 amends section 254 of the 2003 Act to provide that when prisoners have been recalled erroneously (for example, as a result of incorrect information about the breach), a licence revocation may be cancelled. This will apply even after the Parole Board have considered the recall and made a decision on release.

**Clause 96: Further release after recall**

442. Clause 96 replaces section 255A to 255D of the 2003 Act, which provide for the release of prisoners after recall, with new sections 255A to 255C. There are two different recall schemes under these provisions. Under section 255B prisoners, if not released executively or by the Parole Board within 28 days, are released at the completion of 28 days detention. Under section 255C prisoners are subject to detention to the end of their sentence unless released executively or by the Parole Board. Section 255A identifies which scheme will apply to a prisoner and sets out the criteria for suitability for automatic release. Recalled prisoners serving extended sentences and those not suitable for automatic release will be dealt with under section 255C.

443. The changes made by the substituted provisions are as follows:

- The combination of the previous section 255C and 255D allows for the executive release of recalled extended sentence prisoners.

- The re-writing of section 255B removes previous restrictions on automatic release for certain categories of prisoner so that such prisoners may be considered for automatic release if they are assessed as sufficiently low risk and suitable.

- New sections 255B(6) and (7) and 255C(6) and (7) prevent prisoners recalled during their HDC period from being re-released prior to their automatic release date unless satisfactory arrangements for further HDC electronic monitoring can be put in place. These are prisoners who have been released on HDC under section 246 and recalled under section 254.

- New section 255B(8) and (9) allows for the Secretary of State, on receipt of new information, to alter the basis of the recall, so that an offender originally intended for automatic release will be dealt with under the standard release provision (section 255C).

444. The amendment to section 244(1) of the 2003 Act by *subsection (2)* of clause 96 makes it clear that for those serving a sentence of 12 months or more a recall under section 254 can override the automatic release date at the half-way point of the sentence. This means where the 28-day automatic recall period ends after the duty to release at the half-way point under section 244, the full 28 days can be served before release. Similarly, the duty to release at the half-way point will not apply if the Parole Board has not directed release under section 255C.

***Other provisions about release***

**Clause 97: Supervision of young offenders after release**

445. Clause 97 amends the 2003 Act to include a provision – section 256B – for the supervision of young adult prisoners released from a sentence of Detention in a Young Offenders' Institution (DYOI) – available for 18 to 20 year olds. This will

ensure that prisoners released from a DYOI sentence of less than 12 months will receive 3 months' supervision. This provision recasts a similar provision in section 65 of the Criminal Justice Act 1991, which was repealed by the 2003 Act. Such supervision can include specific requirements relating to drug testing and electronic monitoring.

446. It also inserts a new section 256C into the 2003 Act to provide for what is to happen if the offender breaches the terms of the supervision. It gives the court powers to summons the offender, issue a warrant of arrest and impose a penalty for the breach.

**Clause 98: Miscellaneous amendments relating to release and recall**

447. Clause 98 makes amendments to the 2003 Act.

448. *Subsection (2)* removes the duty of the Secretary of State to consult the Parole Board before releasing extended sentence prisoners on compassionate grounds. This brings such release of extended sentence prisoners into line with that of all other determinate sentence prisoners.

449. *Subsection (3) to (5)* amend sections 260 to 261 of the 2003 Act; these amendments are consequential on the fact that extended sentence prisoners can be removed from prison in order to be removed from the United Kingdom.

**Clause 99: Repeal of uncommenced provisions**

450. Clause 99 removes various provisions which have not been commenced. Some of these are provisions of the 2003 Act. Some of them are amendments of that Act or Part 2 of the Criminal Justice Act 1991 (which also relates to release and recall).

***Life sentence prisoners***

**Clause 100: Removal of prisoners from the United Kingdom**

451. Clause 100 inserts two new sections into the Crime (Sentences) Act 1997 to provide a power for the Secretary of State to remove from the UK foreign national prisoners who are serving indeterminate sentences once they have served the minimum term ("tariff") set by the court. The Secretary of State may remove such a prisoner whether or not the Parole Board has directed the prisoner's release. Provision is also made for prisoners who are removed under this power and subsequently return to the UK to be detained in pursuance of their sentence.

452. New section 32A sets out the criteria for removal and the powers of the Secretary of State to remove a prisoner. This provision applies to those who are removed from prison (whether before initial release or after recall at any time). Subsection (4) allows for release by the Parole Board or compassionate release to apply to the prisoner up until the actual removal from the UK. Subsection (5) imports the definition for a person liable to removal from section 259 of the 2003 Act as it applies for determinate sentence prisoners.

453. New section 32B applies where, after removal, the offender returns. If not initially

released by the Parole Board before removal then the offender will be treated as if he had not previously been released. If the Parole Board directed release prior to the removal then the offender will be treated as if recalled for breach of licence. Where the sentence is a life sentence, this will apply at any time until death. Where the sentence is an indeterminate sentence for public protection, then it will apply at any time until the licence ceases to have effect under section 31A.

***Application and transitional provision***

**Clause 101: Application and transitional etc provision**

454. Clause 101 gives effect to Schedule 13 (see below).

**Schedule 13: Application of sections 90 to 100 and transitional and transitory provision**

455. Schedule 13 contains provision for the application and commencement of the release and recall clauses. This provision sets out whether the commencement of the clause affects those being sentenced, those recalled or those yet to be initially released after sentence.

456. *Paragraph 4* of Schedule 13 makes it clear that the changes to eligibility for early release on HDC will not affect those who are already released on the scheme prior to the commencement of the changes to section 246 of the 2003 Act.

***Restatement of earlier enactments and transitional provisions***

**Clause 102: Power to restate earlier enactments and existing transitional provisions**

457. Clause 102 contains an order-making power which provides for the savings of the 1991 Act, and of the Criminal Justice Act 1967, and associated transitional and saving provision, to be transposed and restated in the 2003 Act. This will enable all releases to be governed by the 2003 Act. The provision operates by expanding the commencement provision in the 2003 Act (the power conferred by section 336 of that Act) to allow for restatement and amendment of provisions which are to be repealed in full under that Act. The affirmative Parliamentary procedure will apply to exercise of the power.

**Chapter 5: Prisoners etc**

**Clause 103: Employment in prisons: deductions etc from payments to prisoners**

458. Clause 103 makes amendments to the Prison Act 1952 ("the 1952 Act") in respect of the employment and payment of prisoners and persons required to be detained in remand centres, secure training centres and young offender institutions. It makes particular provision in respect of reductions in, deductions from and levies on the earnings of prisoners and persons in young offender institutions who are aged 18 or over.

459. *Subsection (1)* removes 'employment' from the existing rule-making power in section 47 of the 1952 Act. Rules about employment of prisoners and persons in young

offender institutions who are aged 18 or over are to be made under the power in new section 47A inserted by *subsection (4)*

460. *Subsection (2)* amends section 47 of the 1952 Act by inserting new subsection (1A) so that the Secretary of State may continue to make rules about the employment of persons required to be detained in remand centres, in secure training centres and (where they are aged 17 years or younger (see subsection (9)(a))) young offender institutions.

461. *Subsection (4)* inserts a new section 47A into the 1952 Act. This confers a number of new powers on the Secretary to State make prison rules (to which the negative Parliamentary procedure will apply):

- about the employment of prisoners and the making of payments to prisoners in respect of work or other activities undertaken by them (or in respect of their unemployment);
- about the making, by the governor, of reductions in such payments to a prisoner.
- about the ways in which a governor may use the amounts generated by way of reductions – which can be for the benefit of victims or communities, for the purposes of the rehabilitation of offenders, or for other purposes prescribed in rules.
- enabling amounts generated by way of reductions for making payments into an account of a kind to be prescribed. (It is envisaged that such accounts will be for the benefit of the prisoner. The accounts are to be of a kind prescribed in rules, and the rules may also make provision for making payments out of the account to the prisoner before or after the prisoner's release on fulfilment by the prisoner of conditions which are prescribed in rules.);
- to allow for payments of amounts generated by way of reductions to be made after the deduction of amounts of a prescribed description. This is to enable running and administration costs to be taken into account;
- to allow for the making deductions from, or imposing levies on, payments to a prisoner for work, other activities, or in respect of unemployment, where those payments are not made by or on behalf of the governor. It is envisaged that this power will apply in respect of a prisoner's earnings etc. from a range of sources other than the governor;
- to provide for either the governor or the Secretary of State to make deductions or impose levies but that, where the governor does so, the governor must pay amounts generated to the Secretary of State.

462. *Subsections (6) and (7)* of clause 103 amend the Prisoners' Earnings Act 1996 to remove its application in England and Wales. It remains applicable in Scotland.

463. *Subsection (10)* gives the Secretary of State a power to make payments in connection with measures that appear to him to be intended to rehabilitate offenders, prevent re-offending or limit the impact of crime.

464. *Subsection (11)* provides that making such payments, the Secretary of State must have regard to the amounts generated from reductions, deductions and levies made or imposed by virtue of rules under new section 47A.

**Clause 104: Transfer of prisoners: prosecution of other offences**

465. Clause 104 inserts new section 3A into the Repatriation of Prisoners Act 1984. New section 3A will provide prisoners transferred to England, Wales or Northern Ireland, in accordance with international prisoner transfer arrangements, with statutory protection from prosecution in relation to offences committed prior to transfer taking place, except in specified circumstances.

466. *Subsection (3)* of new section 3A sets out the circumstances in which prisoners transferred to England, Wales or Northern Ireland pursuant to international prisoner transfer arrangements may be prosecuted for offences committed prior to transfer taking place.

**Clause 105: Transit of prisoners**

467. Clause 105 inserts new sections 6A, 6B and 6C into the Repatriation of Prisoners Act 1984. These new sections will enable countries with which the UK has prisoner transfer arrangements to transfer, via an airport or port in England, Wales or Northern Ireland, a prisoner serving a sentence of imprisonment to or from a third country, for the purpose of the serving that sentence.

468. New sections 6A and 6B provide the relevant Minister responsible for executing the transit with the power to hold a prisoner who is in transit through England, Wales or Northern Ireland pursuant to prisoner transfer arrangements for as long is reasonable and necessary to enable the transit to take place. They also confer ancillary powers on the Minster to designate any person as having the powers of a constable for the purpose of executing a transit order and confer a power on a constable or any person so designated with a power to arrest the prisoner without warrant should that prisoner escape or be unlawfully at large

469. New section 6C provides a power to detain a prisoner who makes an unscheduled stop in England, Wales or Northern Ireland in the course of being transferred between two other countries, for a period of no more than 72 hours, or until a transit order is issued, as long as the UK has prisoner transfer arrangements with one of those two countries.

## Chapter 6: Out of court disposals

### *Penalty notices*

### Clause 106 and Schedule 14: Penalty notices for disorderly behaviour

470. Penalty notices for disorder ("PNDs") were introduced by Chapter 1 of Part 1 of the Criminal Justice and Police Act 2001 ("the 2001 Act"). They may be issued where a police officer has reason to believe that a person has committed a "penalty offence", that is one of the offences listed in section 1 of the 2001 Act (which include drunk and disorderly behaviour, possession of cannabis, petty retail theft and causing criminal damage). Recipients of a PND have 21 days either to ask to be tried for the alleged offence or to pay in full the fixed penalty so as to discharge their liability to be convicted for the penalty offence. Failure to do either of these things may result in the registration of a fine against the individual equal to one and a half times the penalty amount.

471. Clause 106 gives effect to Schedule 14, which confers a new power on Chief Officers of Police to set up within their area a scheme which will allow police officers, where appropriate, to issue penalty notices with an education option. This gives recipients the opportunity to discharge their liability to be convicted of the penalty offence by paying for and completing an educational course related to the offence for which the notice was given. An educational course might, for example, seek to make individuals aware of the social and health implications of their conduct and would be designed to reduce the likelihood of further offending.

472. The Schedule also:

- ensures that a PND may not be given to a person under the age of 18;
- removes the requirement that a police officer issuing a PND to an individual other than at a police station must be in uniform; and
- removes the requirement that police officers in a police station may not give a PND unless they are "authorised constables".

473. *Paragraph 3* of the Schedule amends section 2 of the 2001 Act so as to allow a constable to offer an education option to a person given a PND where an educational course scheme which relates to the offence committed has been established by the Chief Officer of the police force concerned. Recipients of a penalty notice with an education option will have the opportunity to discharge their liability to be convicted of the penalty offence by paying for and completing the course. For example, a person suspected of committing the offence of being drunk and disorderly might be offered a penalty notice with an option of paying for and completing an alcohol awareness course instead of paying the penalty amount or asking to be tried.

474. *Paragraph 3* also:

- amends section 2 of the 2001 Act so as to prevent PNDs from being given to persons aged under 18;
- repeals section 2(6) to (9) of the 2001 Act which makes provision for the Secretary of State by order (subject to the affirmative Parliamentary procedure) to allow PNDs to be given to persons under the age of 18 but over the age of 10, and to provide for the parents of a person aged under 16 who is given a PND to be informed of the notice and to be liable to pay the penalty; and
- confers a power on the Secretary of State to make regulations (subject to the negative Parliamentary procedure) about the revocation of PNDs.

475. *Paragraph 3* further amends section 2 of the 2001 Act so as to remove the requirement that:

- a police officer issuing a PND at a location other than a police station must be in uniform;
- a police officer issuing a PND in a police station must be an "authorised constable".

476. *Paragraph 4* inserts a new section 2A into the 2001 Act. This confers power on the Chief Officer of a police force to establish an educational course scheme in relation to one or more kinds of penalty offence committed in the Chief Officer's area. It stipulates the necessary arrangements a scheme must include; requires that an educational course must aim to reduce the likelihood of the recipient of the penalty notice re-offending; and makes provision about who may provide an education course. It is for the Chief Officer to set the course fee (which must be paid by the person who attends the course). The Chief Officer may arrange for courses to be provided by his or her force, another force, or by a private provider.

477. New section 2A also:

- allows the Chief Constable of the British Transport Police Force to establish an educational course scheme in relation to penalty offences committed on a railway and other places where that force has jurisdiction; and
- confers power on the Secretary of State by regulations (subject to the negative Parliamentary procedure) to specify the minimum and maximum level of an educational course fee, and allow for the sharing, between the Police and those involved in running educational courses, of personal information about an individual who has selected the education option.

478. *Paragraph 5* amends section 3 of the 2001 Act (which concerns the amount of the

penalty and the form of the penalty notice) in particular:

- to repeal the provision allowing the Secretary of State to specify by order a different level of penalty for persons of different ages (currently £80 for persons aged 18 or over or £50 in the case of person aged under 18 – see S.I. 2002/1837);

- to confer a new power on the Secretary of State by regulations (subject to the negative Parliamentary procedure) to require a penalty notice with an education option to include, or be accompanied by, additional information to that which is provided in a PND without that option.

479. *Paragraph 6* inserts new subsections (6) to (10) into section 4 of the 2001 Act (which concerns the effect of a penalty notice with an education option).

480. New subsections (6) to (8) allow for a sum equal to one and a half times the amount of the penalty to be registered as a fine for enforcement against a recipient of a PND with an education option where the recipient:

- fails within a period of 21 days beginning with the date on which the notice was given either to ask to attend an educational course, or to pay the penalty, or ask to be tried for the offence to which the notice relates; or

- asks within that 21 period to attend a course, but then fails to pay the course fee or pays the fee but fails to attend or complete the course in accordance with regulations made under subsection (9).

481. New subsections (9) and (10) confer a number of new powers on the Secretary of State to make regulations (subject to the negative Parliamentary procedure) in order to make provision:

- as to when an offender will be treated as having attended or not attended a course;

- allowing for extensions of time for attendance on a course (for instance where the offender is unwell) and as to who should determine requests for an extension;

- as to the consequences of the offender failing to attend;

- allowing for the delegation of certain determinations (for instance as to whether extensions of time for completing a course should be granted).

482. *Paragraph 7* amends section 5 of the 2001 Act so as to prevent a criminal prosecution for a penalty offence being brought against a person given a penalty notice with an

education option who:

- asks during the 21 day suspended enforcement period to attend an educational course, unless that person subsequently fails to pay the fee for the course or fails to attend and complete the course; or

- having asked to attend, then pays the fee and completes the course in accordance with regulations made under section 4(9).

483. *Paragraph 8* allows the Secretary of State to issue guidance about educational course schemes under section 6 of the 2001 Act.

484. Section 10 of the 2001 Act concerns enforcement of fines registered against a person given a penalty notice who then fails to pay the penalty amount. Subsection (5) allows a magistrates' court to set aside a fine in the interests of justice. Paragraph 10 of the Schedule inserts a new subsection (7) into section 10. It confers a new power on the Secretary of State to make regulations (subject to the negative Parliamentary procedure) specifying the directions or orders the court may or must give if it sets aside a fine relating to a penalty notice with an education option.

485. *Paragraph 11* inserts a new section 10A into the 2001 Act. This sets out the Parliamentary procedures relating to any power of the Secretary of State to make orders or regulations under Chapter 1 of Part 1 of the 2001 Act, provides for them to be made by statutory instrument, and confers supplementary powers. New section 10A replaces existing provisions currently found in sections 1(4) and (5), 2(8) and (9) and 3(5) and (6), which are repealed.

486. *Paragraphs 13 and 14* make amendments consequential upon the repeal of the requirement that constables must be uniform when giving penalty notices, in particular to the Police Reform Act 2002 (which allows for community support officers, accredited persons and accredited inspectors to issue fixed penalty notices).

487. *Paragraph 15* repeals section 87 of the Anti-social Behaviour Act 2003, which amended section 2 of the 2001 Act so that PNDs could be issued to persons aged under 18 years.

***Cautions***

**Clause 107: Conditional cautions: involvement of prosecutors**

488. Clause 107 amends sections 22 to 25 of the 2003 Act. The clause enables the authorised person (usually a police officer) to make a decision to offer a conditional caution by removing the requirement that, before the authorised person can offer a conditional caution to an offender, they must refer the matter to the relevant prosecutor (usually the Crown Prosecution Service) to decide that there is sufficient evidence to charge the offender with the offence, and that a conditional caution should be given. The clause enables those decisions to be taken by the authorised person

without reference to the relevant prosecutor.

489. Clause 107 also enables the authorised person to vary conditions in the conditional caution without reference to the relevant prosecutor. The other requirements for a conditional caution remain unchanged, including that the offender admits that they committed the offence and that they consent to being given a conditional caution.

490. The intention is that the Code of Practice issued under section 25 of the 2003 Act or guidance will specify those matters that should still be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to vary conditions.

**Clause 108: Conditional cautions: removal etc of certain foreign offenders**

491. Clause 108 amends section 22 of the 2003 Act so as to make available new types of conditions that can be attached to a conditional caution given to an offender who is a foreign national and who does not have leave to enter or stay in the United Kingdom. The object of these conditions is to bring about the departure of the foreign national offender from the UK and ensure that they do not return to the UK for a period. These conditions may be attached to a conditional caution, whether or not it is in addition to a condition with one or more of the existing objectives in section 22(3) of the 2003 Act (namely facilitating the rehabilitation of the offender; ensuring that the offender makes reparation for the offence; or punishing the offender).

492. This clause also defines the category of foreign national offenders who could be offered such conditions as those offenders whose immigration status makes them liable for removal from the UK. This means that a person who has no leave to enter or stay in the UK and in respect of whom there is a power to enforce their departure from the UK. As with all conditional cautions, the offender must admit the offence and agree to accept the conditional caution.

493. If the foreign national offender does not comply with these conditions he or she may be prosecuted for the original offence.

***Youth cautions***

**Clause 109 and Schedule 15: Youth cautions**

494. Section 65 and 66 of the Crime and Disorder Act 1998 created a system of reprimands and warnings known as the Final Warning Scheme. These are out of court disposals for young offenders for use where prosecution is not in the public interest.

495. *Subsection (1)* of clause 109 repeals sections 65 and 66 of the Crime and Disorder Act abolishing the Final Warning Scheme.

496. *Subsection (2)* inserts new section 66ZA, which creates a new 'youth caution', and new section 66ZB, which sets out the effect of the new youth caution.

497. New section 66ZA does the following:

498. *New subsection (1)* sets out the circumstances in which a constable may give a young person a youth caution. They are broadly the same as those in which a warning or reprimand can currently be given. However, unlike reprimands and warnings which cannot be offered if a young person has previously been convicted of an offence or given a youth conditional caution, the new youth caution contains no such restriction. This mirrors changes made to youth conditional cautions (see clause 110).

499. New subsection (1)(a) provides that to issue a youth caution the constable must decide that there is sufficient evidence to charge the young person with an offence. The effect of the test is the same as for issuing a reprimand or warning but the wording has been amended for consistency with the requirement for conditional cautions and youth conditional cautions.

500. *New subsections (2) to (7)* replicate relevant provision from section 65 of the Crime and Disorder Act 1998 on reprimands and warnings. This includes provision:

- requiring appropriate adults to be present when persons under 17 are given a youth caution,
- requiring the effect of receiving a youth caution to the be explained to the person given the caution,
- for the publication of guidance by the Secretary of State, and
- preventing cautions, other than youth cautions and youth conditional cautions, from being given to children and young people.

501. New section 66ZB does the following.

502. *New subsection (1)* provides that if a young person receives a youth caution then the police must refer them to the appropriate youth offending team as soon as is practicable. The purpose of this is to ensure that the youth offending team has complete records of the young person's involvement with the police and so that they can be considered for assessment, both upon receiving a first or subsequent youth caution. Under section 66 of the Crime and Disorder Act 1998 this was only required for warnings, not reprimands.

503. *New subsections (2) and (3)* provide the power for the youth offending team to assess a young person and put in place a rehabilitation programme, where a young person receives a youth caution and they consider this appropriate. It also places a duty on the youth offending team to assess a young person if they receive a second or subsequent referral under subsection (1). Following this assessment, the youth offending team should put in place a rehabilitation programme to prevent further offending unless this is deemed inappropriate. This subsection broadly mirrors the

threshold for assessment and intervention that existed for reprimands and warnings.

504. *New subsection (4)* replicates section 66(3) of the Crime and Disorder Act 1998 by making provision for the Secretary of State to publish guidance setting out what should be included in any rehabilitation programme and the steps that will need to be taken if the offender fails to participate in these programmes.

505. *New subsections (5) and (6)* provide that, save for in exceptional circumstances, a court may not conditionally discharge an offender if they have been given a youth caution in the two years preceding the commission of the offence for which they are being sentenced (unless that youth caution was the offender's first and only caution). Where the court is of the opinion that exceptional circumstances are present it must state in open court why it is of that opinion.

506. *New subsection (7)* replicates section 66(5) of the Crime and Disorder Act 1998 by making provision that where a young person has received a youth caution and has failed to participate in a rehabilitation programme provided as part of that caution, this may be cited in court in any subsequent criminal proceedings involving that person in the same way that a prior conviction would be

507. *Subsection (5)* of clause 109 provides that any reprimand or warning given to a person prior to the commencement of this clause will subsequently be considered a youth caution for the purposes of the Bill. For example a reprimand would be considered a first youth caution for the purposes of determining whether there was a duty on the youth offending team to assess a young person under section 66ZB(2), if they were subsequently to be given a youth caution following the commencement of the Bill.

508. *Subsections (6) and (7)* of clause 109 ensure that a referral and rehabilitation programme provided under section 66 of the Crime and Disorder Act 1998 before the commencement of this clause is to be treated as equivalent to a rehabilitation programme provided under section 66ZB of that Act.

**Schedule 15: Youth cautions: consequential amendments**

509. *Schedule 15* is given effect by Clause 109(3) and makes various amendments and appeals which are consequential on the repeal of reprimands and warnings under the Crime and Disorder Act 1998 and the introduction of youth cautions by clause 109.

***Youth cautions***

**Clause 110: Youth conditional cautions: previous convictions**

510. Clause 110 omits paragraph (a) from section 66A(1) of the Crime and Disorder Act 1998. That paragraph prevents a youth conditional caution from being given to a young person who has previously been convicted of an offence. This will allow a youth conditional caution to be given to a young person when they have admitted to committing an offence for which such a disposal is appropriate, even if they have been convicted of other more serious offences in the past.

**Clause 111: Youth conditional cautions: references to youth offending teams**

511. Clause 111 inserts a new subsection (6A) into section 66A of the Crime and Disorder Act 1998, the effect of which is to require an authorised person who gives a young person a youth conditional caution to refer that young person to the youth offending team as soon as is practicable. The purpose of this is to ensure that the youth offending team has complete records of the young person's involvement with the police and so that they can be considered for assessment to identify rehabilitative programmes. The referral under this provision will also enable the youth offending team to apply for a "parenting order" if voluntary parenting support is not engaged with (parenting orders are created by section 25 of the Anti-Social Behaviour Act 2003).

**Clause 112: Youth conditional cautions: involvement of prosecutors**

512. Clause 112 amends sections 66A, 66B, 66C, 66D and 66G of the Crime and Disorder Act 1998.

513. *Subsection (2)* amends section 66A(4). It removes the requirement that the conditions attached to a youth conditional caution be specified by a relevant prosecutor. A condition that a youth attend at a specified place at specified times may still be attached to a youth conditional caution but the place and times must be specified in that condition by whoever offers the caution.

514. *Subsection (3)* amends section 66B(2). It would allow the decisions as to whether there is sufficient evidence to charge the offender and whether a youth conditional caution should be given to be made by an authorised person. At the moment these decisions have to be taken by a relevant prosecutor (usually the Crown Prosecution Service). The decision taken here is not a charging decision. It is an assessment of the evidence for the purposes of deciding whether to caution only.

515. *Subsection (4)* amends section 66C(5). It removes the requirement that a relevant prosecutor must, if payment of a financial penalty is a condition, specify the amount of the penalty, to whom it must be paid and how it may be paid. Instead, these details must be specified in the condition by whoever offers the caution.

516. *Subsection (5)* amends section 66D. It allows conditions to be varied by any relevant prosecutor or authorised person. At the moment they can only be varied by the relevant prosecutor. An authorised person will be able to vary the conditions, even where they were initially decided by a relevant prosecutor.

517. *Subsection (6)* amends section 66G of the 1998 Act, which relates to the code of practice that is issue by the Secretary of State. The amendment is consequential upon the amendment made by subsection (4)

518. The intention is that the Code of Practice introduced under section 66G of the 1998 Act or guidance will specify those matters that should be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to

vary conditions.

## Chapter 7: Knives and offensive weapons

### Clause 113 and Schedule 16: Offence of threatening with article with blade or point or offensive weapon in public or in school premises

519. Clause 113 creates offences relating to the aggravated use of an offensive weapon or an article with a blade or point, as defined in the offences relating to the possession of such articles under section 1 of the Prevention of Crime Act 1953 ("the 1953 Act") and section 139 of the Criminal Justice Act 1988 ("the 1988 Act") respectively.

520. *Subsections (1) and (2)* of the clause insert the new offences into those Acts to become new section 1A of the 1953 Act and section 139AA of the 1988 Act. The offences are committed where a person (A) commits the relevant possession offence and intentionally uses the weapon or article to threaten another (B) creating an immediate risk of serious physical harm to B.

521. The defences available to A's possession of the weapon or article under these offences are those available to a person charged with the relevant possession offence. In the case of an offensive weapon in a public place, A must have it without lawful authority or reasonable excuse. In the case of an offensive weapon on school premises, or a bladed article in a public place or on school premises, A must have it without lawful authority or good reason. The burden of proving any of these defences falls on A. A's use of the weapon must also be unlawful, allowing A to raise relevant defences to the use such as self-defence, defence of others or property, and the prevention of crime. If raised, the burden of rebutting those defences will rest on the prosecution. "Serious physical harm" is defined as harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861.

522. Like the offences relating to possession of such articles, the offence must be committed in a public place or on school premises, as defined in relation to the relevant possession offences.

523. The offence under this clause will be triable either way, and subject to a maximum penalty of 4 years' imprisonment on indictment. The clause provides that the courts must impose a minimum custodial sentence of 6 months where the offender is aged 18 or over unless there are particular circumstances relating to the offence or offender which would make it unjust to do so.

524. *Subsection (3)* of clause 113 gives effect to Schedule 16 which makes minor and consequential amendments as a result of clause 113. The amendment made by paragraph 3 to section 144 of the 2003 Act will allow a court, where a person pleads

guilty to the new offences created by clause 113, to reduce the sentence of imprisonment it would otherwise have passed; but it may not reduce it to below 80% of the minimum term referred to in the new section 1A(6) of the 1953 Act and the new section 139AA(8) of the 1988 Act.

**Part 4: Final provisions**

**Clause 114: Power to make consequential and supplementary provision etc**

525. Clause 114 gives the Lord Chancellor or Secretary of State a power to make consequential, supplementary, incidental or transitional provision by regulations in relation to any provision in Parts 1 to 3 of the Act. Such provision may amend, repeal, revoke or otherwise modify Acts of Parliament, Acts or Measures of the National Assembly for Wales and instruments made under such Acts or Measures.

526. *Subsection (3)* makes specific provision for regulations made in relation to clause 71. Clause 71 repeals uncommenced provisions of the Criminal Justice Act 2003 which would have increased magistrates' courts' sentencing powers from six months to 12 months or 51 weeks. *Subsection (3)(a) and (b)* provide that regulations made under the clause may amend legislation to provide that an offence under the law of England and Wales is punishable on summary conviction with a term of imprisonment, or to alter the maximum term of imprisonment that may be imposed in relation to such an offence upon summary conviction. The power is limited to imposing a maximum term of imprisonment of six months or less. This will enable the Secretary of State to make the amendments to existing legislation that are necessary to ensure that the maximum term of imprisonment that may be imposed in England and Wales upon summary conviction does not exceed the magistrates' courts' sentencing powers (in respect of which see section 78 of the Powers of Criminal Courts (Sentencing) Act 2000).

527. *Subsections (5) and (6)* provide that, where the regulations amend or repeal an Act of Parliament or an Act or Measure of the National Assembly for Wales, they will be subject to the affirmative resolution procedure. Otherwise, the regulations will be subject to the negative resolution procedure.

**Clause 116: Commencement**

528. Clause 116 makes provision for commencement of the Bill. Part 4 of the Bill comes into force on Royal Assent. The remainder of the Bill will be commenced by order made by the Lord Chancellor or the Secretary of State.

**Clause 117: Extent**

529. Clause 117 sets out the extent of the provisions, details of which are set out at paragraphs 43 to 50.

**Clause 118: Channel Islands, Isle of Man and British overseas territories**

530. Clause 118 provides that, where the Bill amends certain Acts which may be extended to the Channel Islands, Isle of Man and British overseas territories, the amendments

made by the Bill may also be extended to those jurisdictions.

## FINANCIAL EFFECTS OF THE BILL

### Part 1: Legal aid

531. The main financial implications of the Bill for the public sector lie in following areas.

***Provision of legal aid***

532. The proposed abolition of the LSC and the creation of a new Executive Agency has associated costs and savings attached to it. The one-off costs from abolition are estimated to be approximately £8 million. Savings of approximately £8m-£9m are expected to be achieved by the end of 2014/15 (against the 2010/11 baseline), building up to this total in previous years, and continuing at approximately this level each year beyond the end of the spending review.

***Civil legal aid***

533. The changes proposed to civil legal aid in clauses 7 to 11 have associated costs and savings attached to them. The one-off costs of removing various categories of services from the scope of legal aid are estimated to be approximately £1 million and the resulting savings are estimated to be approximately £220 million in 2014/15.

***Financial resources, contributions and costs***

534. The ongoing costs of changing the eligibility for legal aid are estimated to be approximately £1 million and the resulting savings are estimated to be approximately £8 million in 2014/15.

535. The creation of a Supplementary Legal Aid Scheme (SLAS) under clause 22(3) has associated costs and savings attached to it. The one-off costs of creating a SLAS are estimated to be negligible and savings are estimated to be approximately £1 million in 2014/15.

### Part 2: Litigation funding and costs

***Costs in criminal cases***

536. Clause 52 and Schedules 6 and 7 propose changes to the costs which, in criminal cases where the defendant is acquitted, or an appellant is successful, may be ordered to be paid out of central funds (that is, money provided by Parliament). The proposals are to restrict access to central funds to defendants who are acquitted and successful appellants who do not have access to legal aid or legal insurance and to cap central funds payments to the relevant legal aid rates, as the Lord Chancellor considers appropriate. The proposals will raise £40 million savings in cash terms in 2014/15. It is expected to take three years from the implementation date until the full savings are

incurred.

**Part 3: Sentencing and punishment of offenders**

537. We estimate there to be no significant additional financial cost from these proposals. There will be small transitional costs for implementing a number of the provisions, which will be met through existing Ministry of Justice budgets. As a result of these provisions, there will be cashable savings of £80 million in the final year of the Spending Review (2014/15).

## EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

538. The abolition of the LSC and the transfer of legal aid functions to the Lord Chancellor will have an effect on public sector manpower. LSC employees are currently public sector employees, and will be transferred in to the civil service. As at April 2011, the LSC had approximately 1,500 staff (full time equivalents). Once fully implemented, the provisions in Part 1 of the Bill are expected to lead to a reduction in staffing of 35 full time equivalents on LSC's staffing levels as at April 2011.

539. Clause 4 provides for the designation of a civil servant as the Director of Legal Aid Casework. This will be an existing civil servant within the Ministry of Justice and will therefore not have an effect on public sector manpower. The Bill requires the Lord Chancellor, as appropriate, to provide support to the Director by making available civil servants or other persons. It is intended that support will be provided as necessary by Ministry of Justice civil servants working in the Executive Agency which will be created to administer legal aid, and will therefore not have an effect on public sector manpower.

540. As a result of sentencing reform the prison population will be broadly flat over the Spending Review. Over the course of the spending review the prison estate will be reconfigured to meet to future demand for places, this may have a small impact on the number of posts required.

## SUMMARY OF THE IMPACT ASSESSMENT

541. The impact assessments[12], which incorporate Equality Impact Assessments, for the Bill are as follows:

a) Legal Aid
b) Abolition of the Legal Services Commission
c) Central Funds

[12] All impact assessments on the Bill will be published on the Bill website at www.justice.gov.uk/publications/bills-and-acts/bills

d) Lord Justice Jackson reforms
e) Sentencing

**Legal Aid**

542. The impact assessment identifies the impact of each legal aid policy when implemented together and gives a summary of the proposed changes to the legal aid system. The impacts of individual elements are set out in more detail in each of the annexes attached to the cumulative legal aid impact assessment. The document identifies both monetised and non-monetised impacts, with the aim of understanding what the overall impact might be.

**Abolition of the Legal Services Commission**

543. The impact assessment deals with the abolition of the Legal Services Commission (LSC) as an Executive Non-Departmental Public Body (NDPB). It includes the expected benefits of abolishing the LSC and replacing it with an executive agency of the Ministry of Justice.

**Central Funds**

544. The impact assessment refers to provisions to reform the award of legal costs ('legal costs' are lawyers' fees, charges, disbursements and include, in particular, expert witness costs) from public funds to acquitted defendants who had privately funded their defence in England and Wales. The provisions in the Bill will remove compensation from public funds in areas where alternative funding, such as legal aid is available, and, in other cases, cap costs at legal aid rates. This Impact Assessment considers the overall impact of the reforms when all policies are implemented together. The costs savings are quantified.

**Reforms arising from Lord Justice Jackson's report**

545. The impact assessment deals with the implementation of some of the recommendations for reform of civil litigation funding and costs made by Lord Justice Jackson. The aim of the policy is to reduce civil litigation costs, while ensuring that parties who have a meritorious case are able to bring or defend a claim, including through the courts where necessary. A qualitative analysis of the costs and benefits of the policy package is outlined in the document. The document considers the cumulative effect of Lord Justice Jackson's primary recommendations on the basis that all measures are implemented in conjunction as a package.

**Sentencing**

546. The impact assessment refers to the sentencing reform proposals as set out in the Bill. The policies are designed to make the criminal justice system more effective in punishing offenders, protecting the public and reducing reoffending. Where possible, the costs and benefits of the policies have been quantified. The overall impact of the sentencing proposals will result in annual savings of approximately £80m in 2014/15, due to a reduction in the demand for prison places of 2,650, which will result in a

broadly flat prison population over the spending review period.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

547. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act). The Secretary of State for Justice, Kenneth Clarke, has made the following statement:

> "In my view the provisions of the Legal Aid, Sentencing and Punishment of Offenders Bill are compatible with the Convention rights."

**Clause 4: role of the Director of Legal Aid Case Work**

548. Article 6(1) of the European Convention on Human Rights (ECHR) provides that where a person's civil rights and obligations are determined, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

549. It is the Government's view that a decision whether a person qualifies for legal aid is not in itself a determination of that person's civil rights and obligations within the meaning of Article 6(1) (see *X v Germany* [13], *R (on the application of Allinson) v Legal Services Commission* [14] and *R (on the application of Pattison) v Legal Services Commission* [15]). Further, where an award of services or benefits in kind is not an individual right of which the applicant can consider himself a holder but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and, if so, how the need for it should be met, it is not a 'civil right' (see *Tomlinson v Birmingham City Council* [16]). Decisions on both criminal and civil legal aid will be subject to evaluative judgments: provisions on financial resources in and under clause 20, merits criteria for civil legal aid and consideration of the interests of justice for criminal legal aid.

550. Notwithstanding that view, under the Bill, neither the Lord Chancellor nor civil servants acting in the name of the Lord Chancellor will take decisions on individual legal aid cases. All decisions on individual civil legal aid cases will be taken by the Director, or by those to whom the Director delegates the Director's functions, and decisions on individual criminal legal aid cases will be taken by the Director or by a court. Although clause 4 allows the Lord Chancellor to issue the Director with

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[13] [1967] ECHR 32.
[14] [2002] EWHC 927 (Admin).
[15] [2004] EWHC 364 (Admin).
[16] [2010] UKSC 8.

guidance and directions, subsection (4) of clause 4 prevents the Lord Chancellor from issuing such guidance and directions in relation to individual cases.

551. Provision is made in the Bill allowing, and in some cases requiring, the review of, and appeals against, determinations under Part 1 of the Bill. This, together with the availability of judicial review, guarantees any Article 6(1) rights to the extent they are engaged. To the extent there is any lack of independence in the initial decision making process, including review and appeal, in *R (on the application of Allinson) v Legal Services Commission* [17], the court found that the availability of judicial review would be adequate to cure any such lack of independence. Further, the Government considers that in the light of *Tomlinson* (taken together with the earlier case law including *Bryan v UK*[18], *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Region* [19,] *Runa Begum v London Borough of Tower Hamlets*[20] and *Tsfayo v UK*[21]) the availability of judicial review will be sufficient to remedy any lack of independence in the initial decision making process. Even if factual disputes about whether an individual qualifies for legal aid arise, it is considered that the review process combined with available appeal rights means that by the judicial review stage most of the truly factual issues would have been resolved. In particular, there is not the sort of fundamental lack of objectivity found in *Tsfayo v UK*.

**Clauses 7, 8 and 9 and Schedule 1: scope of civil legal aid**

552. It is clear from the case law that Article 6 embodies not only procedural guarantees of fairness, but also the right of access to the court itself[22] However, the provision of legal aid is not a pre-requisite for securing such access (indeed, in certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance will meet the requirements of Article 6[23]) and in *McVicar v United Kingdom*[24] the European Court of Human Rights held that 'the question of whether or not Article 6 requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case'. The case law demonstrates that, in practice, Article 6 only requires legal aid to be provided in exceptional circumstances, where its withholding would make the assertion of a civil claim practically impossible, or would lead to an obvious unfairness in the proceedings[25]. The question of whether legal aid is necessary for a fair hearing will depend upon factors including the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's

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[17] [2002] EWHC 927 (Admin).
[18] [1995] 21 EHRR 342.
[19] [2001] UKHL 23.
[20] [2003] UKHL 5.
[21] [2007] ECHR 656 Application No. 60860/00.
[22] *Golder v United Kingdom* (1975) 1 EHRR 524.
[23] *Airey v Ireland.*
[24] (2002) 35 EHRR 22.
[25] *X v United Kingdom* (1984) 6 EHRR 136.

capacity to represent him or herself effectively. Legal aid funding may also be required where legal representation is necessary in order for a coroner to carry out an effective investigation in accordance with the procedural obligations of Article 2 ECHR.

553. Clauses 7 and 8 together with Schedule 1 set out the range of civil legal services that may be available to a qualifying individual. Schedule 1 limits the scope of civil legal aid to those areas of law identified by the Ministry of Justice as having 'sufficient priority to justify the use of public funds' [26] and accordingly the exclusion of certain categories of law from the scope of civil legal aid funding has the potential to engage Article 6 in individual cases.

554. Clause 9 therefore contains provision for the granting of funding in cases excluded from scope where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law, or where the granting of funding is appropriate having regard to any risk of such a breach.

**Clauses 12 to 15 and 19: scope of criminal legal aid**

555. Article 6(3)(c) of the ECHR makes express provision about legal aid for those charged with a criminal offence.

556. The Government considers that clause 12 (initial advice and initial assistance for individuals who are arrested and held in custody at a police station or other premises), clause 13 (definition of 'criminal proceedings' for the purposes of Part 1 of the Bill), clause 14 (advice and assistance for criminal proceedings or investigations), clause 15 (representation for criminal proceedings) and clause 19 (provisional determination about representation for criminal proceedings) ensure that criminal legal aid is capable of being made available in all cases where Article 6(3)(c) may require it to be made available.

**Clauses 10, 12, 14, 16 and 20: qualifying for legal aid**

557. Provisions about merits and means testing apply in relation to both civil and criminal legal aid.

558. Case law is clear that merits testing for civil legal aid (in those cases that determine civil rights and obligations and which are subject to the procedural guarantees of Article 6(1) ECHR) is permissible. In *X v United Kingdom*[27] the European Court of Human Rights found that a refusal of legal aid on the basis that the claim has no reasonable prospects of success would not constitute a denial of access to the court "unless it could be shown that the decision of the administrative authority was arbitrary". However, the courts have been reluctant to lay down generic principles

[26] Ministerial foreword, *Proposals for the Reform of Legal Aid in England and Wales*
[27] (1984) 6 EHRR 136.

about merits testing and have instead stressed the need to consider each case on its own individual facts in deciding whether legal aid is required to enable access to justice.

559. Determinations whether an individual qualifies for criminal legal aid must be made having regard to the interests of justice and, in relation to representation for the purposes of criminal proceedings, the interests of justice test is defined in clause 16(2). Article 6(3)(c) of the ECHR provides: "everyone charged with a criminal offence shall have the right: … "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Accordingly, regardless of the financial means of the applicant, there is no obligation on the state to provide legal aid unless it is in the interests of justice to do so. The main factors which the European Court of Human Rights has considered to be relevant to the interests of justice under Article 6(3)(c) are: the seriousness of the alleged offence and the severity of the potential sentence (for example, *Boner v UK*[28] and *Benham v UK*[29]; the complexity of the proceedings (for example *Granger v UK*[30]); and the personal circumstances of the individual and their ability to make a "useful contribution" to the legal analysis without legal assistance (*Pakelli v Germany*[31], *Granger v UK*) and to put their case in a concrete and effective way. These factors are reflected in clause 16(2).

560. Clause 20 ensures that, in cases where means testing applies (in relation to criminal and civil legal aid), individuals may only be granted legal aid where their financial resources are such that they are eligible for legal aid. As under the current legal aid scheme, the rules on financial eligibility for legal aid will be set out in regulations and such regulations may provide that, in particular circumstances, legal aid is available regardless of a person's means. It is clear that, in cases where the ECHR requires the provision of legal aid, it is permissible for the availability of such legal aid to be made subject to means testing. In respect of criminal legal aid, Article 6(3)(c) explicitly limits the right to free legal aid to persons who do not have sufficient means to pay for legal assistance. In respect of those cases where civil legal aid is required by the ECHR, it is clear from case law that conditions may be placed on the availability of legal aid, including means testing. For example, in *Winer v United Kingdom*[32], the Commission reiterated that "even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its availability involving inter alia, the financial situation of the litigant or the prospect of success in the proceedings."

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[28] Application No. 18711/91 Judgment of 28th October 1994.
[29] 22 EHRR 293, Application No. 19380/92 Judgment of 10th June 1996.
[30] 12 EHRR 469.
[31] Series A No 64 (1983) ECtHR.
[32] Application No 10817/84, (1986) 48 D.R. 154.

**Clause 22: payment for services**

561. Clause 22 ensures that individuals who receive legal aid services cannot be required to pay anything in connection with the provision of the services expect where regulations provide otherwise. Regulations under clause 22 can, for example, require an individual in prescribed circumstances to pay the cost of the services, a contribution to the cost or an amount in respect of administration costs. Regulations can also provide that, in civil disputes only, individuals must make a payment in excess of the cost of the services where prescribed conditions are met (this allows for a so-called 'Supplementary Legal Aid Scheme', whereby a percentage of certain damages obtained by a successful legally aided person is recouped to the legal aid fund).

562. It is plain from case law that, in circumstances where the ECHR requires legal aid to be provided, it is permissible for persons in receipt of legal aid to be required to make payments in respect of it. So, for example, in the context of criminal legal aid, the *European Court of Human Rights in Morris v UK*[33] (recalling the case of *Croissant v. Germany*) held that there was no violation of Article 6(3)(c) where an individual was required to pay a contribution to the cost of providing legal assistance and had sufficient means to pay. Similarly, in the context of civil legal aid, case law makes clear that it is permissible for payments to be required from the legally aided person. For example, in *X v UK* [34], the Commission recognised that, for legal aid systems to operate effectively within limited resources, machinery is needed to select cases that should be legally aided and that such machinery often includes a requirement for a financial contribution from the legally aided person.

**Clause 26: choice of provider of services**

563. The effect of clause 26 is that, subject to subsections (4) to (10), the Lord Chancellor is not required to make legal aid available by a person selected by an individual. For example, choice of provider will be restricted to those with whom the Lord Chancellor has entered into arrangements about the provision of legal aid. Clause 26 also provides that the Lord Chancellor is not required to make legal aid available by the particular means selected by an individual and this may also impact on the individual's ability to select a provider of their choice. For example, in certain cases an individual may be restricted to receiving telephone advice by a provider with whom the Lord Chancellor has an arrangement to provide such advice.

564. Article 6(3)(c) of the ECHR provides that everyone charged with a criminal offence has rights including the right "to defend himself in person or through legal assistance of his own choosing". In *Croissant v Germany*[35], the European Court of Human Rights found that the right to choose one's own representative was not absolute and that the wishes of the individual could be overridden where there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.

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[33] Application No, 38784/97, (2002) 34 E.H.R.R. 52.
[34] Application No 8158/78, (1980) 21 D.R. 95.
[35] Application No 13611/88 judgment 25th September 1992.

565. The provisions at subsections (4) to (10) of clause 26 are compatible with Article 6(3)(c). To the extent that there is a right under Article 6 to select a representative of one's choosing in civil cases, any such right would not exceed that which applies in the context of criminal legal aid.

**Clause 30 and Schedule 3: legal aid for legal persons**

566. To the extent that Article 6 may require legal aid to be made available for legal persons (that is persons who are not individuals, for example, a body corporate), Schedule 3 makes provision about the circumstances in which civil and criminal legal aid may be made available to legal persons where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law.

**Clauses 21, 32, 33 and 34: protection of information**

567. Clause 21 provides for the provision of information from the Department for Work and Pensions, that Department's counterparts in Northern Ireland and the Commissioners for Her Majesty's Revenue and Customs where the information is relevant to a decision about financial eligibility for legal aid. In addition, individuals will submit, or have submitted on their behalf, a lot of detailed personal information in relation to legal aid. Sharing and disclosure of information potentially engages Article 8 and the right to respect for privacy.

568. Clause 32 restricts the way in which information received under clause 21 may be used or disclosed, including a criminal offence for use or disclosure otherwise than as permitted by clause 32. Clause 33 prevents, subject to the exceptions in clause 34, disclosure of information provided to the Lord Chancellor, the Director, a court, a tribunal or any other person on whom functions are imposed or conferred by or under Part 1 in connection with the case of an individual seeking or receiving legal aid. Disclosure of information contrary to clause 33 is also a criminal offence. These clauses, combined with the Data Protection Act 1998, ensure compliance with Article 8.

**Part 2: Litigation funding and costs**

569. *Clause 41, 43 and 44: Payments for legal services in civil cases* The effect of clauses 41, 43 and 44 is to provide that success fees under conditional fee agreements (CFA), the cost of After the Event (ATE) insurance premiums and the costs to certain bodies which provide legal services to their membership of insuring themselves against the risk of paying costs to another party in the event of losing a claim, can no longer be recovered from a losing party in any proceedings.

570. Article 6(1) of the ECHR provides that in "the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." These clauses effectively return the recoverability of success fees and insurance premiums to the state of affairs which existed prior to 2000. They neither restrict the right of access to

justice nor restrict the right of access to legal representation.

571. Nonetheless, concerns have been expressed that the effect of these clauses will be to reduce access to justice in some cases, particularly in relation to cases involving personal injuries[36]. However, whilst recoverable costs represent a source of funding for a winning party and may promote access to justice, such costs also represent a burden on the losing party and inhibit their access to justice[37]. For example, in *MGN v. UK*[38], the Court held on the facts of the case that the requirement for the applicant to pay a success fee under a CFA to a claimant who could have funded her case privately was disproportionate. Accordingly, there had been a violation of Article 10 (right to freedom of expression). More specifically, there is a suggestion that, in respect of bodies which may insure themselves against the risk of paying costs in the event of losing a claim, the balance has shifted so far in their favour that, for some, personal injury actions have now become a source of profit[39]. Under these provisions, it is intended that costs will become more proportionate, because defendants will no longer have to pay success fees and meet the costs of insurance premiums.

572. In order to address concerns that expert reports in clinical negligence cases can often be very expensive, the cost, or part of the cost, of ATE insurance premiums in respect of these reports will still be recoverable from a losing party.

**Part 3 Sentencing and Punishment of Offenders**

573. To the extent that the Bill expands the discretion of the courts in dealing with offenders such discretion is subject to the overriding principle that the court is a public authority and as such is prohibited from acting incompatibly with the Convention rights and must exercise its discretion accordingly.

**Clause 60 and 61 Community orders increase in curfew powers and prohibition on foreign travel**

574. The Bill contains two amendments to the requirements that can be attached by the Court to community orders that have the potential to raise Convention issues.

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[36] See paragraphs 69 to 71 of the Ministry's consultation paper: *"*Proposals for Reform of Civil Litigation Funding and Costs in England and Wales*"* Cm 7947 available at http://www.justice.gov.uk/consultations/jackson-review-151110.htm. Implementation of Lord Justice Jackson's Recommendations (November 2010) CP 13/10.

[37] *Pankhurst v White and MIB* [2010] EWCA Civ 1445.

[38] *MGN Limited v The United Kingdom* 18 January 2011 (Application No. 39401/04).

[39] See para. 4.4. p.at page 109, Ministry of Justice (2010) ": Review of Civil Litigation Costs: Final Report" available at http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports (2010). Norwich, TSO.

575. Clause 60 extends the maximum period of daily curfew from 12 to 16 hours and the maximum length of a curfew requirement from 6 to 12 months. It is possible for a curfew requirement to give rise to issues under Article 5 (right to liberty and security) or Article 8 (right to respect for private and family life). However, a curfew imposed by a court following conviction falls within the exception set out at Article 5(1)(a) (detention after conviction by a court); and any interference with Article 8 is, in the Government's view, justified under Article 8(2) as a proportionate measure in pursuit of a legitimate aim for the purposes of the Convention.

Clause 61 gives the court a power to impose a foreign travel prohibition requirement. Such a requirement may in some cases amount to an interference with the Convention rights, in particular Article 8 (right to respect for private and family life) -), for example where the offender has close family abroad or needs to travel for a specific occasion such as a funeral -, -, and Article 1 of Protocol No. 1 (right to property) - for example where the offender needs to travel to pursue or protect business interests. However both these rights are qualified rights and the Government considers the power to impose such restrictions is conferred on the Court in pursuit of a legitimate aim and is proportionate in achieving that aim. The court will, in imposing such requirements, consider the particular circumstances of the individual case and be mindful of its obligations to act compatibly with Convention rights.

**Clause 67: Youth rehabilitation orders: curfew requirement**

576. Clause 6767 largely mirrors for youths the increase in the court's powers to impose curfews for adults made by clause 60. The Government considers that similar arguments will apply in support of its view that the provisions are compatible with the Convention rights

**Clause 100: Removal of prisoners from the United Kingdom**

577. Clause 100 provides that prisoners liable to removal from the UK who are subject to an indeterminate sentence may be removed at the expiry of their tariff. (The tariff is the minimum period that must be served in custody by indeterminate sentence prisoners, i.e. life sentences and sentences of imprisonment for public protection.)

578. Different treatment of prisoners regarding release from custody potentially engages Article 5 (right to liberty and security) and Article 14 (prohibition of discrimination) However, the Government does not consider that Article 14 is contravened by these provisions as a prisoner liable to removal from the UK is not in an analogous position to either a foreign prisoner who is not so liable, or a British prisoner. In *R (Brooke) v Secretary of State for Justice* [40],[41], the Divisional Court rejected a discrimination challenge based on nationality. A British prisoner whom the Parole Board had judged

[40] [2009] EWHC 1396 (Admin)
[41] [2009] EWHC 1396 (Admin)

unsuitable for early release on home detention curfew argued that foreign prisoners liable to removal who were serving determinate sentences had preferable provisions relating to their early release from prison (in order to be removed from the country) compared to British prisoners serving determinate sentences. The court held that the differential treatment arose not because of differences in nationality, but because the first class of prisoner is liable to be removed and the second is not.

579. The court went on to hold that the scheme whereby foreign prisoners liable to removal were removed from the country amounted to a distinct legal scheme from that which applied to British prisoners stating: "The two situations are not comparable … release for the purposes of removal is to enable a different sanction from imprisonment in this country to be brought into effect". The Government considers that this reasoning applies with equal force to the proposed scheme of removal at the expiry of the minimum term for prisoners liable to removal from the UK who are serving indeterminate sentences.

580. Further, the Government considers that in any event any difference in treatment on the grounds of immigration status is objectively justified.

**Clause 103: Employment in prisons: deductions etc from payments to prisoners**

581. Clause 103 amends the Prison Act 1952 to give the Secretary of State certain powers to make rules in respect of prisoner earnings. In some circumstances, taking property from a person by operation of statute may constitute a breach of Article 1 Protocol 1.

582. However the Government considers that reductions in, deductions from or levies on the earnings of a prisoner are not an interference with prisoner's property rights and in any event are justified as they strike a fair balance between prisoners' rights and the general interest. New section 47A(3) and (4) of the 1952 Act inserted by the clause sets out a non-exhaustive list of purposes for which payments deducted from prisoners may be applied, in particular protecting the victims of crime and the prevention of crime, specifically by providing funds to support the rehabilitation of offenders and to support the individual prisoner. Further the clause provides for the Secretary of State to make rules setting out the details of the scheme and any such rules would need to be compatible with Convention rights, failing which they would be liable to legal challenge by way of judicial review. The Government therefore considers that to the extent that any rights of prisoners are engaged, there is no breach of Article 1 of Protocol 1.

**Clause 108: Conditional cautions: removal etc of certain foreign national offenders**

583. Clause 108 provides that a caution given to an offender who has no lawful permission to be in the UK (and is therefore liable to expulsion) may contain a condition the purpose of which is to bring about the departure of the offender from the country. This potentially engages issues relating to Article 6 (right to a fair trial) and Article 14

(prohibition on discrimination). However, the Government considers that a relevant foreign offender without permission to be in the UK is not in an analogous position to either a foreign offender who has permission to be in the UK, or a British offender and consider that the reasoning in *Brooke* referred to in relation to clause 100 applies with equal force to this clause and accordingly any difference in treatment does not amount to a breach of Article 14

584. Further even if there were a difference in treatment on the grounds of the status of 'removability' it can nonetheless be objectively justified as ensuring that those with no leave to remain in the United Kingdom are removed as early as possible. The Code of Practice on Conditional Cautions[42] contains a number of safeguards to ensure that conditional cautions are only given when the consequences are fully understood by the offender.

**Clause 113: Offence of threatening with article with blade or point or offensive weapon in public on school premises.**

557. Clause 113 creates new offences of using an article with a blade or point, or offensive weapon, to threaten in public or on school premises. One of the constituent elements of the new offences is that the offender was in possession of the article. It is a defence for an accused to prove that they had good reason (or reasonable excuse) or lawful authority for having the article with them. The burden of proof in relation to these defences falls on the defendant. The Government does not consider that this contravenes Article 6 of the ECHR as the reason for carrying the article is something that is peculiarly within the defendant's knowledge and it is therefore justifiable that the accused discharges the burden on the balance of probabilities. The reverse burden provision exists in relation to the current offences for basic possession and the Court of Appeal has concluded that the provision in relation to possession of a bladed article does not contravene Article 6.

558. The offences also make provision for the imposition of a minimum sentence of imprisonment which potentially engages article 5 ECHR as an interference with the right to liberty and security of the person.

559. However the clause is drafted subject to the proviso that the sentence need not be imposed where the court is of the opinion that there are particular circumstances which relate to the offence or to the offender, and would make it unjust to do so in all the circumstances.

[42] http://www.cps.gov.uk/publications/others/conditionalcautioning04.html

560. The Court of Appeal in *R v Rehman; R v Wood* ([2005] EWCA Crim 2056) held that section 51A of the Firearms Act 1968 (which contains a similar proviso) was compatible with Article 5

561. It is the Government's view that this provision is compatible with Article 5, since the proviso allows for a proper consideration by the court of the particular circumstances of the offender and is therefore lawful within the meaning of Article. 5(1)(a) as interpreted by the courts.

**COMMENCEMENT**

585. Clause 116 makes provision about commencement. The provisions of the Bill will come into force on days specified in orders made by the Lord Chancellor or the Secretary of State, with the exception of Part 4 of the Bill (final provisions) which is to come into force on Royal Assent.

**Annex A**

**Table of contents for Schedule 1**

586. Part 1 of Schedule 1 provides descriptions in each area of law for which civil legal aid services may be made available. Each description includes any applicable conditions and refers to the exclusions in Part 2 and Part 3 that apply as well as, in some cases, making further specific exclusions.

587. The exclusion of advocacy in Part 3 applies to all of the paragraphs of Part 1 with the exception of cross-border disputes (see paragraph 38 of Part 1). In relation to connected matters (see paragraph 39 of Part 1) the exclusion in Part 3 applies subject to any additional exceptions from that exclusion that are prescribed in regulations. Part 3 is explained at paragraph 86 above.

588. The table below summarises which exclusions (other than the exclusion in Part 3) apply in relation to each paragraph of Part 1 of Schedule 1.

| **Part 1 –paragraph number** | **Part 2 and other exclusions that apply** |
|---|---|
| P1 Care, supervision and protection of children | All Part 2 exclusions. |
| P2 Special educational needs | All Part 2 exclusions. |
| P3 Abuse of child or vulnerable adult | All Part 2 exclusions except: personal injury/death, assault, battery or false imprisonment, breach of statutory duty, damages claims for breach of Convention rights.<br><br>Exception from exclusion in relation to negligence, but not in relation to clinical negligence.<br><br>Exclusion in relation to services provided in relation to a matter arising under a family enactment (defined in paragraph 0). |
| P4 Working with children and vulnerable adults | All Part 2 exclusions. |

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|---|---|
| P5 Mental health and mental capacity | All Part 2 exclusions.<br><br>Exclusions in relation to creation of lasting powers of attorney and making of advance decisions under the Mental Capacity Act 2005. |
| P6 Community care | All Part 2 exclusions. |
| P7 Inherent jurisdiction of High Court in relation to children and vulnerable adults | All Part 2 exclusions. |
| P8 Unlawful removal of children from the UK | All Part 2 exclusions. |
| P9 Family homes and domestic violence | All Part 2 exclusions except assault, battery or false imprisonment and trust law. |
| P10 Victims of domestic violence and family matters | All Part 2 exclusions except trust law.<br><br>Exclusion of services provided in relation to a claim in tort relating to domestic violence.<br><br>Services that may be provided include conveyancing in some circumstances. |
| P11 Protection of children and family matters | All Part 2 exclusions. |
| P12 Mediation in family disputes | All Part 2 exclusions except trust law.<br><br>Services that may be provided include conveyancing in some circumstances. |
| P13 Children who are parties to family proceedings | All Part 2 exclusions. |
| P14 Forced marriage | All Part 2 exclusions. |
| P15 EU and international agreements concerning children | All Part 2 exclusions. |

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|---|---|
| P16 EU and international agreements concerning maintenance | All Part 2 exclusions except trust law. |
| P17 Judicial review | All Part 2 exclusions except welfare benefits.<br><br>Exclusion in relation to judicial reviews that do not have the potential to produce a benefit for the individual, a member of the individual's family or the environment.<br><br>Exclusion in relation to immigration cases. |
| P18 Habeas corpus | All Part 2 exclusions. |
| P19 Abuse of position or powers by public authority | All Part 2 exclusions except personal injury/death, assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property, breach of statutory duty and damages claims breach of Convention rights.<br><br>Exception from exclusion in relation to negligence, but not in relation to clinical negligence. |
| P20 Breach of Convention rights by a public authority | All Part 2 exclusions except personal injury/death, assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property, breach of statutory duty and damages claims for breach of Convention rights.<br><br>Exception from exclusion in relation to negligence, but not in relation to clinical negligence. |
| P21 Special Immigration Appeals Commission | All Part 2 exclusions. |

| | |
|---|---|
| P22 Immigration: detention | All Part 2 exclusions. |
| P23 Immigration: temporary admission | All Part 2 exclusions. |
| P24 Immigration: residence etc restrictions | All Part 2 exclusions. |
| P25 Immigration: rights to enter and remain | All Part 2 exclusions.<br><br>Exclusion in relation to attendance at an interview. |
| P26 Immigration: accommodation for asylum seekers etc | All Part 2 exclusions. |
| P27 Loss of home | All Part 2 exclusions except business.<br><br>Exception from those exclusions for certain applications under the Trusts of Land and Appointment of Trustees Act 1996 in connection with bankruptcy.<br><br>Exclusion in relation to certain proceedings under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004. |
| P28 Homelessness | All Part 2 exclusions. |
| P29 Risk to health or safety in rented home | All Part 2 exclusions except damage to property. |
| P30 Anti-social behaviourP30 Anti-social behaviour | All Part 2 exclusions. |
| P31 Protection from harassment | All Part 2 exclusions. |
| P32 Gang related violence | All Part 2 exclusions. |

| | |
|---|---|
| P33 Sexual offences | All Part 2 exclusions except personal injury/death, negligence, assault, battery or false imprisonment, breach of statutory duty, damages claims for breach of Convention rights. |
| P34 Proceeds of crime | All Part 2 exclusions except business.<br><br>Specific exclusions in connection with confiscation orders. |
| P35 Inquests | All Part 2 exclusions except personal injury or death. |
| P36 Environmental pollution | All Part 2 exclusions. |
| P37 Equality | All Part 2 exclusions except welfare benefits. |
| P38 Cross-border disputes | Not subject to the exclusions in Part 2. |
| P39 Connected matters | All Part 2 exclusions except any Part 2 exclusions prescribed in regulations. |