

*These notes refer to the Criminal Justice and Courts Bill (Bill 169)  
as introduced in the House of Commons on 5 February 2014.*

# **CRIMINAL JUSTICE AND COURTS BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Criminal Justice and Courts Bill as introduced in the House of Commons on Wednesday 5 February 2014. They have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. These explanatory notes 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.

### **SUMMARY AND BACKGROUND**

3. The Bill is in 5 Parts and contains 8 Schedules.

4. Part 1 and Schedules 1 to 2 make provision about criminal justice including provision about sentencing and the release and recall of offenders and about the electronic monitoring of offenders released on licence, and about the giving of cautions. Part 1 also contains provision about the offence of possessing extreme pornography.

5. Part 2 and Schedules 3 and 4 make provision about the detention of young offenders, about giving cautions and conditional cautions to youths and about referral orders.

6. Part 3 and Schedules 5 to 8 make provision about courts and tribunals including provisions creating a new procedure for use in criminal proceedings in the magistrates' courts in certain circumstances, provision about the recovery of the costs of the criminal courts from offenders, about appeals and costs in civil proceedings and about contempt of court and juries.

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7. Part 4 provides for the circumstances in which the High Court and the Upper Tribunal may refuse relief in judicial review proceedings and about funding and costs in relation to such proceedings.

8. Part 5 contains a power to make provision consequential on or supplementary to the other provisions of the Bill and general provisions including about the commencement of the Bill and its extent.

### ***Part 1 – Criminal Justice***

9. In the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the Government implemented a number of sentencing reforms following the consultation paper entitled "Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders"<sup>1</sup>. The Government plans to take further action to tackle crime and reoffending and this Bill implements a number of sentencing changes and new offences that are intended to do so.

10. **Adding certain offences, including those of weapons training for terrorist purposes and causing gunpowder or other explosive substances to explode with intent, to the enhanced dangerous offenders sentencing scheme** - The current enhanced dangerous offenders sentencing scheme, introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, was commenced in December 2013 and already covers some serious terrorism offences. The Government considers that further serious terrorism and terrorism-related offences should now be added to the enhanced scheme. The effect of these provisions is that offenders will qualify for an automatic life sentence where they have previously been convicted of an offence included in the scheme (and had a sentence of at least 10 years imposed on both occasions)<sup>2</sup>; offenders with previous convictions for these offences will satisfy one of the conditions for getting an Extended Determinate Sentence. Where these offences do not already carry a life sentence, these provisions also increase the relevant maximum penalties to life. The Government believes that this will ensure that the most serious and dangerous terrorists can be dealt with appropriately in a wide range of cases. Clauses 1 - 3 implement these changes.

11. **Amending the release arrangements for offenders who receive an Extended Determinate Sentence so that, in all cases, they will not be entitled to automatic release at the two thirds point and will only get early release if the Parole Board directs release** - At present offenders convicted of sexual and/or violent offences listed in Schedule 15 to the Criminal Justice Act 2003, who the courts believe are dangerous, can receive an Extended Determinate Sentence (EDS) under which they must serve at least two-thirds of their custodial term before they are

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<http://webarchive.nationalarchives.gov.uk/20120119200607/http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>

<sup>2</sup> Unless the court is of the opinion that there are particular circumstances which relate to the offence, the previous offence or to the offender which would make it unjust to do so in all the circumstances (s.224A(2) CJA 2003).

released into the community on licence. Currently, some of these offenders receive automatic release after two-thirds of their custodial term, whilst in more serious cases release is subject to the discretion of the Parole Board from that point to the end of the custodial term. The Justice Secretary announced on 4 October 2013 his intention that there should no longer be automatic early release for any Extended Determinate Sentence. Under these provisions every offender who receives an Extended Determinate Sentence will only be released into the community on licence, before the end of their custodial term, if the Parole Board directs their release. Clause 4 implements these changes.

**12. Creation of a new custodial sentence for certain terrorism-related and sexual offences (including rape or attempted rape of a child and certain serious terrorism offences) whereby adult offenders sentenced for these offences will not be entitled to automatic release half way through their sentence and will only get early release if the Parole Board directs release** – At present offenders convicted of these terrorism-related and/or sexual offences who receive a standard determinate sentence are automatically released half way through their prison sentence. The Justice Secretary announced on 4 October 2013 his intention that offenders convicted of certain serious child sex and terrorism offences should no longer be automatically released at the half way point of their prison sentence. Instead they would apply to the Parole Board for early release at that point and, if no decision to release was taken, they would remain in prison until the end of their custodial term. This change is intended to ensure that serious violent and sexual offenders are not released early without any consideration of their risk. The new sentence will be made up of a custodial term and a mandatory year of licence to be served subsequently, to ensure that those who end up serving their whole custodial terms are not released without supervision. Clause 5 and Schedule 1 implement these changes.

**13. Introducing powers to enable offenders serving custodial sentences to be tracked on licence as a mandatory condition** – Currently offenders released on licence can be electronically monitored on a discretionary basis on release from prison under section 62 of the Criminal Justice and Court Services Act 2000. These provisions allow for the electronic monitoring of compliance with another licence condition or the electronic monitoring of the offender's whereabouts as a licence condition in its own right. In practice, the available technology has only allowed for the electronic monitoring of a curfew condition. However, technological advances mean that it will be possible to effectively track offenders using GPS and other location tracking technology and the Government intends to enable the use of electronic monitoring more widely. On 9 May 2013 the Justice Secretary announced that the Government would be introducing GPS satellite tracking of offenders to monitor them more closely in the community.

14. Clause 6 and Schedule 2 enable the Secretary of State to extend the use of electronic monitoring to provide for offenders to be subject to electronic monitoring, including monitoring of the offender's whereabouts, as a compulsory licence

condition on release from prison.

**15. Introducing a new statutory test for the re-release of recalled determinate sentence offenders to ensure that prolific and repeat offenders who are persistently non-compliant can be given a standard recall rather than repeated fixed term recalls** - The Criminal Justice Act 2003 provides that prisoners released on licence can, if they breach their conditions, be recalled to prison either:

- a) for a fixed period of 28 days at the end of which they are released automatically (a *fixed term recall*); or
- b) for the remainder of their sentence, subject to discretionary release by the Parole Board or Secretary of State (a *standard recall*).

16. The Bill amends the Criminal Justice Act 2003 to provide that an offender is not suitable for a fixed term recall if it is considered that they would be highly likely to breach their licence again if released and for that reason fixed term recall seems inappropriate. The Bill also provides a new statutory release test for the Parole Board to apply when considering the release of recalled determinate sentence prisoners. This requires the Board to have regard not only to whether the offender needs to continue to be detained for public protection reasons - which will remain the overriding test - but also to consider whether, if the person were to be released, they would be highly likely to breach their licence. This provision is intended to prevent offenders from repeatedly being recalled to prison on a fixed term recall and then being released only to breach and be recalled again. Clauses 7 and 8 (which also give the Secretary of State a power to change the test) implement these changes.

17. For prisoners serving indeterminate sentences, the Bill makes provision for the point at which a prisoner may require the Secretary of State to refer their case to the Parole Board where they are serving a combination of a life or Imprisonment for Public Protection (IPP) sentence together with a determinate sentence. This means that an offender's case may only be referred to the Board where they have completed the requisite custodial periods on all the sentences being served. The Bill also provides that, where an indeterminate sentence prisoner has been released on licence and recalled to prison, the Parole Board must apply the public protection release test when considering release, and a power for the Secretary of State to amend that test by order, but only in respect of its application to recalled IPP (not life) sentence prisoners. Clause 9 implements these changes.

**18. Creating a new criminal offence of being unlawfully at large after recall from licence or after recall from home detention curfew** – In the current legal framework, there is no separate offence for absconding whilst on licence. An offender can only be required to serve the remainder of their original sentence in these circumstances, though it is possible for them to be released earlier. However, it is an offence to escape from custody, to fail to surrender to custody whilst on bail or to fail to return from temporary release. The Government intends to close this loophole so that offenders unlawfully at large, after recall while on licence, without reasonable

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excuse will also be guilty of an offence. The Bill amends the Criminal Justice Act 2003 and the Crime (Sentences) Act 1997 by creating a new offence of remaining unlawfully at large following a recall to custody for determinate and indeterminate sentence prisoners respectively. Clause 10 implements these changes.

19. **Increasing the maximum penalty for the offence of remaining unlawfully at large after temporary release** - Currently failure to return while released on temporary licence (ROTL), contrary to section 1 of the Prisoners (Return to Custody) Act 1995, is a summary only offence with a punishment of up to 6 months imprisonment and/or a level 5 fine. The Government intends to increase the maximum sentence available for this offence to two years to harmonise sentencing powers for all offenders who are released and then either abscond following recall or fail to return from release on temporary licence. Clause 11 implements this change.

20. **Restricting the use of simple cautions** – The Justice Secretary, together with the Home Secretary and the Attorney General, on 3 April 2013 launched a review of simple cautions. The review examined the way in which simple cautions are currently used, and considered the need for any changes to policy or practice to ensure that there is transparency, accountability and public confidence in the use of simple cautions as a disposal. On the 19 November 2013, the Minister for Policing, Criminal Justice and Victims announced by written ministerial statement that the Government intended to accept the recommendations of the review to restrict the use of simple cautions for indictable only offences and certain specified either way offences, as well as restricting the repeated use of cautions for persistent offenders. Clauses 14 and 15 implement the changes announced.

21. **Extending the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 to cover the possession of extreme images that depict rape and non-consensual sexual penetration** - Rape Crisis South London (the “RASASC”) wrote an open letter to the Prime Minister on 7 June 2013 highlighting what they believed to be a loophole in the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008.

22. The section 63 extreme pornography offence currently covers pornographic images - images which can reasonably be assumed to have been “produced solely or principally for the purpose of sexual arousal” – which are grossly offensive, disgusting or otherwise obscene and which realistically depict necrophilia, bestiality or violence that is life-threatening or results or is likely to result in serious injury to the anus, breasts or genitals, but does not explicitly include depictions of non-consensual penetration (save to the extent that the depicted penetration threatens a person’s life or results, or is likely to result, in serious injury to the anus, breasts or genitals of the person penetrated).

23. Clause 16 will extend the extreme pornography offence to cover depictions of rape and other non-consensual sexual penetration.

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## **Part 2 – Young Offenders**

24. Part 2 of the Bill makes provision in relation to secure colleges, a new form of youth detention accommodation with a focus on education. It also makes a number of amendments to sentencing legislation in relation to offenders who are under 18 ('young offenders').

25. **Secure Colleges** - A consultation published in February 2013, *Transforming Youth Custody: Putting education at the heart of detention*<sup>3</sup>, set out plans to increase the focus on high quality education in youth custody, reduce the cost of youth custody and contribute to reduced reoffending among young people leaving custody.

26. On 17 January 2014, the Government published its response<sup>4</sup> to the consultation, and its plans to create a pathfinder Secure College, enhance education provision in Young Offender Institutions and improve the resettlement of young people on release from custody.

27. The Government's response set out its intention to legislate to give the Secretary of State powers to provide secure colleges and to make contracts with other persons for them to provide secure colleges. It is intended that secure colleges will provide a broad curriculum with the aim of supporting young people to refrain from reoffending once released. Clauses 17 – 19 and Schedules 3 and 4 implement the changes announced.

28. **Youth cautions and conditional cautions: involvement of appropriate adults** – To help safeguard the rights of children in the youth justice system the Government is amending the Crime and Disorder Act 1998 to ensure that 17 year olds, like 10 to 16 year olds, are given a youth caution or youth conditional caution in the presence of an appropriate adult.

29. A youth caution can be used as an alternative to prosecution in certain circumstances for any offence where the child admits the offence, there is sufficient evidence for a realistic prospect of conviction but it is not in the public interest to prosecute. A youth conditional caution is a youth caution with conditions attached to it which may, for example, include a requirement to pay a financial penalty or a requirement to attend at a specified place for a specified number of hours. Where there is no reasonable excuse for non-compliance with those conditions criminal proceedings may be brought. For 10-16 year olds an "appropriate adult" must be present when a youth caution or a youth conditional caution is given. An "appropriate adult", for example, may be a parent, guardian, local authority social worker, from a voluntary organisation or some other responsible adult aged 18 or over who is not a police officer or employed by the police.

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<sup>3</sup> <https://www.gov.uk/government/consultations/transforming-youth-custody-putting-education-at-the-heart-of-detention>

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30. The Government believes that all young people should benefit from the presence of an appropriate adult and provisions in this Bill amend the Crime and Disorder Act 1998 to remove the age restriction. Clause 20 implements these changes.

31. **Referral orders** - A referral order is an order available for young offenders who plead guilty to an offence whereby the young offender is referred to a panel of two trained community volunteers and a member of the youth offending team. Compulsory conditions require it to be given in most circumstances where the young offender pleads guilty for a first offence. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed restrictions on the repeated use of the referral order with the aim of promoting its use for the delivery of restorative justice conferencing.

32. Under the order a young offender is referred to a panel of two trained community volunteers and a member of the youth offending team. The offender must agree a contract of rehabilitative and restorative elements to be completed within the sentence. Where the victim and the offender consent, the panel can be used to deliver a restorative justice conference. A restorative justice conference offers victims the opportunity to be heard and to have a say in the resolution of offences, including agreeing restorative or reparative activity for the young offender.

33. The Government is concerned that where the court deals with a breach of a referral order, or a further offence, the original referral order is automatically revoked. The Government believes that, where the court considers it appropriate, the original referral order should be allowed to continue in order to enable the restorative justice process to be completed. Clauses 21 - 23 give effect to this.

### ***Part 3 - Courts and Tribunals***

34. Part 3 of the Bill introduces provisions about the proceedings and powers of courts and tribunals, provisions introducing court charges for convicted adult offenders and provisions creating offences in relation to jurors.

35. **Streamlining certain high-volume, non-imprisonable summary-only offences in the magistrates' court** - In '*Transforming the CJS – A Strategy and Action Plan*<sup>5</sup>', published in June 2013, the Government set out its plans for reform of the criminal justice system. As 95% of court cases in the criminal justice system start and finish in magistrates' courts, transforming summary justice is a significant element of this strategy. As part of this, Ministers outlined their intention to legislate to remove certain high-volume, non-imprisonable summary-only offences from traditional magistrates' courtrooms.

36. These provisions will apply to cases which are characterised by large numbers of uncontested cases and predictable penalties. In many of these cases defendants do not engage with the court process. For example, in around half of summary motoring

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<sup>5</sup> <https://www.gov.uk/government/publications/transforming-the-criminal-justice-system>

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proceedings dealt with by magistrates' courts, defendants enter no plea at all, and cases are heard in their absence. There are also a large number of cases where the defendant pleads guilty by post in advance of the hearing, which can also usually be dealt with effectively in their absence.

37. These provisions will allow adult defendants, charged with these summary-only non-imprisonable offences, to be tried and sentenced by a single magistrate rather than a bench of two or three, and remove the obligation to hear these prescribed cases in open court. This will apply unless a defendant indicates they wish to plead not guilty, or otherwise request for their case to be dealt in open court. Clauses 24 to 28 and Schedule 6 implement these changes.

38. **The creation of a criminal courts charge to be applied to convicted adult offenders to recover some of the costs of their criminal court case** – Courts currently have a number of powers to require offenders to make payments – including compensation for victims, the victim surcharge (which funds victims' services), prosecution costs and fines. Currently, there is no power to make offenders contribute to the cost of the court.

39. This provision will require courts to impose a charge on all adult offenders who have been convicted of a criminal offence and the level of the charge will be set by the Lord Chancellor. In setting the charge the Lord Chancellor expects to have regard to factors likely to affect the cost of proceedings, such as whether the offender pleaded guilty, whether their case was dealt with in the magistrates' or Crown Court, and the offence type. It will be collected after other financial impositions – compensation, victim surcharge, prosecution costs and fines – have been paid off, at a rate the offender can afford. Offenders will be able to apply to pay by instalments and to vary the rate of payment if they are not able to afford it. Clauses 29 and 30 and Schedule 6 implement these changes.

40. Linked to this are provisions that enable fines officers to be able to vary fine repayments following default by the offender; and to vary the repayment terms to make them less favourable to the offender (for example, if their financial circumstance improve) with the offender's consent. This will enable HM Courts and Tribunals Service to take account of an offender's circumstances and adjust repayments accordingly. Clause 31 implements this change.

41. **Extending the scope for appeals to be made direct from the High Court or tribunals to the Supreme Court (“leapfrogging”)** - Leapfrogging refers to the process by which a case can jump directly to the Supreme Court from certain courts, bypassing the Court of Appeal. The Government's view is that some cases which it is clear will not end in the Court of Appeal but will involve a further appeal to the Supreme Court should get there more quickly. As outlined in the consultation *'Judicial Review:*

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*Proposals for further reform*' (published 6 September 2013)<sup>6</sup>, the Government wants to extend the scope for certain cases of major significance to leapfrog to the Supreme Court without being heard in the Court of Appeal.

42. The current powers and procedures are governed by sections 12 to 16 of the Administration of Justice Act 1969. At present, a case may be appealed directly from the High Court in England and Wales or Northern Ireland to the Supreme Court if the High Court grants a certificate, for which the conditions in section 12 must be met.

43. The Bill amends the 1969 Act to widen the circumstances in which a case may be considered suitable to "leapfrog" to the Supreme Court, missing out the Court of Appeal and to remove the requirement for all parties to consent to "leapfrogging". It also extends the possibility of such leapfrog appeals to decisions of certain tribunals which have High Court equivalent jurisdiction. These changes are not limited to appeals in judicial review cases, but apply (as does section 12 of the 1969 Act) to civil and administrative proceedings generally. These changes do not apply to criminal proceedings. Clauses 32 to 35 implement these changes.

44. **Creating a new duty for a court which makes a wasted costs order to consider whether to notify a legal representative's regulatory body and/or the Legal Aid Agency** - The power for a court to make a wasted costs order is set out in section 51 of the Senior Courts Act 1981. Such an order makes a legal or other representative personally liable to pay any costs of litigation which were caused unnecessarily by their improper, unreasonable or negligent conduct, and which it is unreasonable to expect the litigant to meet. Clause 36 amends section 51 of the Senior Courts Act 1981 to put a duty on the court, if it makes a wasted costs order, to consider whether to notify the legal representative's regulator and/or the Legal Aid Agency.

45. **The introduction of 4 offences (research by jurors, sharing research with other jurors, jurors engaging in other prohibited conduct and disclosing jury's deliberations), a power for a court to order temporary removal of electronic communications devices from jurors and changes to strict liability contempt by publication including a notice procedure for temporary removal of potentially contemptuous information from public access** - During 2011 there were a number of cases involving the law of contempt which raised concerns that the current law did not reflect modern developments, particularly in relation to technology, the internet and media behaviour. These concerns had been raised by the Attorney General in a number of speeches and in Parliament. The Government consequently referred the matter to the Law Commission to examine the law of contempt.

46. The Law Commission launched their review of the law of contempt of court in 2012. Following a consultation on four areas of contempt, the Commission published

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<sup>6</sup> <https://consult.justice.gov.uk/digital-communications/judicial-review>

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a report<sup>7</sup> in December 2013 which made recommendations on two of the strands - strict liability contempt by publication and juror contempt (further reports on contempt by publication and contempt in the face of the court are expected during 2014). Clauses 37, 38 and 40 - 58 and Schedules 7 and 8 implement recommendations from the December 2013 report by creating four offences of juror misconduct, reforming the law on contempt by publication and introducing related measures. They have effect in England and Wales. These provisions are intended to modernise the law on contempt, while seeking to ensure that the law and procedures strike a balance between competing rights. The provisions cover misconduct by jurors in the criminal, civil and coroners' courts, and also misconduct by members of the Court Martial.

47. In relation to statutory contempt by publication, currently, the strict liability rule defined by the Contempt of Court Act 1981 applies only to a "publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". Strict liability contempt can be committed only where the proceedings in question are "active" (as defined by the 1981 Act) at the "time of publication". The term "time of publication" is open to interpretation – it can be interpreted either as meaning the "first time of publication" or publication can be understood as the whole period that the material is available for. Case law has adopted the second interpretation, which has given rise to concerns that the current position may place too onerous a burden on media organisations to monitor the content of their online archives. The provisions in the Bill clarify the scope of the strict liability rule contained in the 1981 Act for England and Wales and introduce a notice procedure for temporary removal of prejudicial information from public access. Clauses 39 and 40 implement these changes.

48. Clause 46 and Schedule 7 make provision in respect of juries at inquests. They amend Part 1 of the Coroners and Justice Act 2009.

49. Clause 47 and Schedule 8 make equivalent provision for the service justice system (for the Armed Forces). New service offences are created in respect of each new civilian juror offence (and will apply to all lay members of the Court Martial whether they are subject to service law, civilians subject to service discipline or otherwise), and for one of the offences (disclosure of jury deliberations) there is a further new civilian offence created. These provisions are intended to mirror the developments in the civilian justice system, with necessary adjustments for the service courts.

50. There is no jury in the Court Martial, the service justice system's broad equivalent to the Crown Court. The finders of fact in the Court Martial are called lay members, and they may be either service personnel or civilians depending on the status of the defendant. These new service offences will apply to the lay members to

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<sup>7</sup> [http://lawcommission.justice.gov.uk/publications/contempt\\_of\\_court\\_juror\\_misconduct.htm](http://lawcommission.justice.gov.uk/publications/contempt_of_court_juror_misconduct.htm)

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ensure the defendant's right to a fair trial is equally well protected in the service justice system.

51. **Increasing the upper age limit for jury service to 75** - Anyone registered as an elector and aged 18-70 who has been ordinarily resident in the UK, the Channel Islands or the Isle of Man for any period of at least five years since the age of 13 is qualified to serve as a juror. The only disqualifications are for people who are in hospital, subject to recall to hospital, or subject to a community treatment order as a result of a mental health condition; and people on bail or who have received certain criminal sentences.

52. In coming to the decision to increase the upper age limit, this Government took into account the responses to the previous Government's consultation on changing the upper age limit. The current upper age limit, last set by way of the Criminal Justice Act 1988, does not reflect changes in life expectancy and "disability free life expectancy" over the past 25 years. Clause 39 implements these changes.

53. **Correcting an error in the Crime and Courts Act 2013 regarding the test applied to applications for permission to appeal from the Upper Tribunal in Scotland** - The Crime and Courts Act 2013 enabled rules of court to introduce a second appeals test for applications for leave to appeal from the Upper Tribunal to the Court of Session following a court decision that declared the court rules introducing such a test ultra vires (beyond power). Due to an error the words 'or practice' were omitted from the provision providing that an appeal cannot be granted unless it raises a point 'of principle or practice'. Clause 49 corrects that omission.

#### ***Part 4 – Judicial Review***

54. Judicial review is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions, actions or inactions of the Executive, including those of Government Ministers, local authorities, other public bodies and those exercising public functions. On the 6 September 2013, the Justice Secretary launched a consultation entitled '*Judicial Review: Proposals for further reform*'<sup>8</sup>. The consultation examined proposals in six areas aimed at reducing the burden of judicial review. It closed on 1 November 2013.

55. This consultation followed an earlier consultation, '*Judicial Review: proposals for reform*', which ran from December 2012 to January 2013 and set out some of the background and the Government's concerns about the use of judicial review; the mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. A number of procedural changes were made following that consultation and the Government's response is available at <https://consult.justice.gov.uk/digital-communications/judicial-review>.

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<sup>8</sup> <https://consult.justice.gov.uk/digital-communications/judicial-review>

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56. The consultation in the autumn of 2013 put forward proposals for further reform on a number of key areas, including:

- how the courts deal with judicial reviews based on minor defects that would have made no difference to the final outcome;
- a number of proposals to rebalance the system of financial measures so that those involved have a proportionate interest in the costs of the case. These included a proposal to limit payment to legal aid providers for their work on an application for permission to cases where permission is granted by the court;
- measures aimed at speeding up appeals to the Supreme Court in important cases, provision for which is included in Part 3 of the Bill; and
- a new specialist “planning chamber” for challenges relating to major developments to be taken only by expert judges using streamlined processes. This builds on the “planning fast-track” process implemented in the High Court in July 2013.

57. The Government published its response to the consultation on 5 February 2014 setting out its intention to bring forward a package of reforms to judicial review. The response can be viewed at <https://consult.justice.gov.uk/digital-communications/judicial-review>. Those requiring primary legislation are provided for in this Bill and are explained below.

58. **Requiring the court to consider the likelihood of whether there would have been a substantially different outcome for the applicant** - In judicial review cases the court has discretion over whether to provide a remedy (“relief”), such as a declaration clarifying the rights and obligations of the parties or ordering a decision to be retaken. Whether or not to grant a remedy is up to the court, and the court may already refuse to provide a remedy where there would have inevitably been no difference to the outcome even if the reason for bringing the judicial review had not occurred.

59. Clause 50 modifies the existing approach (which was developed by the courts in case law) so that relief is not to be granted and permission to seek that relief is not to be granted where the court considers the conduct complained about would be highly likely not to have resulted in a substantially different outcome for the applicant.

60. **Information about financial resources in the High Court, Court of Appeal and Upper Tribunal in judicial review cases in England and Wales** – Under section 51 of the Senior Courts Act 1981 and section 29 of the Tribunals, Courts and Enforcement Act 2007, the High Court, the Court of Appeal and the Upper Tribunal respectively have wide powers in respect of awarding costs. This extends to the power to award costs against any person who is not a party to a case. This might include a person who, although not a formal party to a claim, provides financial backing to the claimant and is seeking to drive the litigation for their own purposes. Similarly,

where a “shell company” is created to bring the judicial review, whilst the directors of the company are not parties, they may be both funding and driving the litigation so it may be appropriate to make a costs award against them. However, there is no general requirement for an applicant to reveal the source of the funding he or she is receiving for the judicial review proceeding which may mean that it is difficult for the court to identify who cost orders should be made against.

61. Clause 51 stipulates that where an applicant applies to the High Court or the Upper Tribunal for permission to proceed with a judicial review under the law of England and Wales, the High Court or Tribunal cannot grant permission unless the applicant provides information about the financing of the judicial review. Clause 52 provides that when making costs orders under section 51 of the Senior Courts Act 1981 and section 29 of the Tribunals, Courts and Enforcement Act 2007 the High Court, the Court of Appeal and Upper Tribunal should have regard to the information provided by the applicant and should consider making costs orders against those who are not a party to the judicial review.

62. **Establishing a presumption that interveners in judicial review cases in courts will pay their own costs and any costs incurred by any other party because of their intervention** – Under the Civil Procedure Rules any person who is interested in the issues being considered in a judicial review case can seek permission from the court to intervene in the case usually by filing evidence or making representations. At the end of the judicial review case the court will consider who should bear the costs that arise from any intervention. The courts have powers under section 51 of the Senior Courts Act 1981 to make an award of costs against a person who is not a party to a claim such as an intervener. Clause 53 establishes a presumption that those who intervene in a judicial review case will have to pay their own costs and any costs they have caused to the parties to the hearing that arise from their intervention.

63. **Restricting the situations where a cost capping order can be made** - A cost capping order limits the costs which a party may recover from another party at the conclusion of the case. In judicial review cases, a particular sort of costs capping order, known as a protective costs order, has been developed, in which costs are typically capped on an “asymmetric” basis, with the amount recoverable by a successful defendant from the claimant being capped at a lower level than the amount recoverable by a successful claimant from the defendant (which may not be capped at all). If such an order has been made and the claimant is unsuccessful in the proceedings to which the order applies, the claimant will only be liable to pay the successful defendant’s costs up to the amount specified in the order, and the defendant will have to cover any balance of its legal costs itself. When making an order capping the claimant’s costs liability, the court may also include a “cross-cap”, limiting (generally at an amount rather higher than the cap on the claimant’s liability) the amount of costs the defendant would be liable to pay the claimant if the claim succeeds. This means that an unsuccessful defendant is only liable to pay the successful claimant’s costs up to the amount in the order and the claimant would

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cover any remaining costs he or she had incurred.

64. Protective costs orders were developed by the courts, and the principles governing when and on what terms they will be made were re-stated by the Court of Appeal in the case of *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. The *Corner House* principles provided for protective costs orders to be for exceptional circumstances in cases concerning issues of public importance. However over time their use has widened. This group of clauses makes provision for a codified regime, replacing the regime in case law, to govern the circumstances in which protective costs orders may be made in judicial review proceedings (the position in relation to costs capping in other civil proceedings remaining unchanged). Clause 54 provides that costs capping orders in judicial review proceedings can only be made in certain circumstances. Clause 55 provides that a court must have regard to the matters set out there when considering whether to make a cost capping order and what the terms of such an order should be. Clause 56 enables environmental cases to be excluded from the codified regime provided for in these clauses as such cases are governed by a separate regime arising from the Aarhus Convention and the Public Participation Directive.

65. **Requiring the permission of the High Court before challenging certain planning proceedings** - Section 288 of the Town and Country Planning Act 1990 provides the only mechanism by which an aggrieved person or directly concerned authority can challenge certain planning orders, decisions and directions. Challenges may be brought in the High Court on the basis that the order or action concerned was beyond the power conferred by the Act, or that the procedural requirements in relation to the order or action were not complied with.

66. Clause 57 creates a requirement for the permission of the High Court to be obtained before a challenge can be brought under section 288 of the 1990 Act to an English matter. This replicates the position under section 289 of the 1990 Act.

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## **TERRITORIAL EXTENT AND APPLICATION**

67. Clause 61 sets out the territorial extent of the Bill.

68. 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. Amendments of Acts have the same extent as the provisions they amend, with the exception of certain amendments of the Contempt of Court Act 1981 and the Armed Forces Act 2006 which have a more limited extent (see clause 61(2) to (4)).

69. The Bill addresses non-devolved and devolved matters.

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

70. The following provisions change the law as it operates in Northern Ireland and relate to excepted or reserved matters:

- the increase in the maximum penalty for the possession of explosive substances, weapons training for terrorist purposes and training for terrorism to life imprisonment (clause 1);
- the provision allowing appeals to move directly from the Upper Tribunal and the Special Immigration Appeals Commission to the Supreme Court (clauses 33 and 35);
- amendments to the Armed Forces Act 2006 and any other provision as it is applied by that Act (for example, provisions of the Criminal Justice Act 2003).

71. The following provisions change the law as it operates in Northern Ireland but are consequential on other provisions in the Bill which change the law in England and Wales:

- amendments of Schedule 1 to the Crime (Sentences) Act 1997 relating to the transfer of prisoners within the British Isles (paragraph 11 of Schedule 1) arising from the new sentence and release provisions for certain offenders of particular concern;
- the amendment of section 39 of the Criminal Law Act 1977 relating to the service of summons etc in Scotland and Northern Ireland (paragraph 1 of Schedule 5), which is consequential on the provisions enabling trial by a single justice on the papers.

72. There are other provisions which make amendments to provisions extending to Northern Ireland but where the amendment preserves, or does not materially affect the

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law as it operates there.

73. There are no provisions in the Bill that require a legislative consent motion. If amendments are made to the Bill which 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**

74. The following provisions change the law in Scotland as it relates to reserved matters:

- the increase in the maximum penalty for weapons training for terrorist purposes and training for terrorism to life imprisonment (clause 1);
- the provision amending the test for applications for leave to appeal from the Upper Tribunal to the Court of Session (clause 49(2));
- amendments to the Armed Forces Act 2006 and any other provision as it is applied by that Act (for example, provisions of the Criminal Justice Act 2003).

75. The following provisions change the law as it operates in Scotland but are consequential on other provisions in the Bill which change the law in England and Wales:

- amendments of Schedule 1 to the Crime (Sentences) Act 1997 relating to the transfer of prisoners within the British Islands (paragraph 11 of Schedule 1) arising from the new sentence and release provisions for certain offenders of particular concern;
- the amendment of section 39 of the Criminal Law Act 1977 relating to the service of summons etc in Scotland and Northern Ireland (paragraph 1 of Schedule 5) which is consequential on the provisions enabling trial by a single justice on the papers;
- amendments of section 1 of the Rehabilitation of Offenders Act 1974 (paragraph 1 of Schedule 6) and section 24 of the Criminal Justice Act 1991 (paragraph 7 of Schedule 6) which are consequential on the costs of criminal courts provisions (clause 31).

76. There are other provisions which make amendments to provisions extending to Northern Ireland but where the amendment preserves, or does not materially affect, the law as it operates there.

77. The Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster

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will not normally legislate without 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**

78. The provisions in the Bill that apply in Wales relate, in the view of the United Kingdom Government, to non-devolved matters and do not affect the powers and responsibilities of Welsh Ministers. 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 ON CLAUSES**

### **Part 1 – Criminal Justice**

#### ***Dangerous offenders***

##### **Clause 1: Maximum sentence for certain offences to be life imprisonment**

79. Clause 1 increases the maximum penalty on indictment for three terrorism-related offences to life imprisonment in *subsections (1), (2) and (3)*. These are the offences of making or possession of explosive under suspicious circumstances (section 4 of the Explosive Substances Act 1883); weapons training for terrorism (section 54(6) of the Terrorism Act 2000); and training for terrorism (section 6(5) of the Terrorism Act 2006). This applies in relation to England and Wales, Northern Ireland and Scotland for the latter two offences and England and Wales and Northern Ireland for the former.

80. *Subsection (4)* of clause 1 provides that a life sentence may only be imposed for one of these offences where the offence is committed on or after the date of the commencement of these provisions.

##### **Clause 2: Specified offences**

81. Clause 2 provides for the offence of making or possession of explosive under suspicious circumstances to be added to Schedule 15 to the Criminal Justice Act 2003. It also adds offences of encouraging or assisting in the commission of an offence of murder to that Schedule. Schedule 15 sets out serious sexual and violent offences which are subject to the dangerous offenders sentencing scheme. Schedule 15 is relevant for the purposes of: eligibility for an extended determinate sentence (imposed under sections 226A and 226B of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006); and the duty to impose a life sentence (imposed under section 225 or 226 of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006) where the offence carries a maximum sentence of life imprisonment and the court considers that there is a significant risk to the public of serious harm from further such offences.

82. *Subsection (2)* adds the offence under section 4 of the Explosive Substances Act 1883 (making or possession of explosive under suspicious circumstances) to Part 1 of Schedule 15 to the Criminal Justice Act 2003: thereby making it a specified violent offence for the purposes of Chapter 5 of Part 12 of the Criminal Justice Act 2003 and eligible for the dangerous offenders sentencing scheme in sections 225, 226, 226A and 226B.

83. *Subsection (4)* adds the offence under Part 2 of the Serious Crime Act 2007 of encouraging or assisting the commission of the offence of murder and incitement to murder to Schedule 15. *Subsection (4)* also restates provision about an attempt to

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commit murder and conspiracy to commit murder.

84. In light of the express reference to Part 2 of the Serious Crime Act 2007 added by the amendment made by *subsection (4), subsections (3) and (7)* restate the other provisions about inchoate offences in Schedule 15 to add an express reference to offences under Part 2 of that Act involving other offences listed in that Schedule.

85. *Subsection (5)* omits the offence under section 33 of the Sexual Offences Act 1956 (keeping a brothel) from Schedule 15 and *subsection (6)* adds the offence under section 33A of that Act (keeping a brothel used for prostitution) to Schedule 15.

86. *Subsection (8)* provides that where an offender is sentenced after commencement of these provisions, these provisions will apply, regardless of when the offence was committed.

87. However, *subsections (10) and (11)* provide for some different transitional arrangements for these provisions. A life sentence (under section 225 or 226 of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006) can only be imposed for an offence under section 4 of the Explosive Substances Act 1883 or an offence of encouraging or assisting the commission of the offence of murder or an offence of keeping a brothel used for prostitution under section 33A of the Sexual Offences Act 1956 if that offence is committed on or after the date of the commencement of these provisions.

### **Clause 3: Schedule 15B offences**

88. Clause 3 adds various terrorism and terrorism-related offences to Schedule 15B to the Criminal Justice Act 2003. Schedule 15B sets out particularly serious sexual and violent offences which are relevant for the purposes of: eligibility for the automatic life sentence for a second Schedule 15B offence imposed under section 224A and corresponding provision in the Armed Forces Act 2006; the availability of an extended determinate sentence under section 226A and corresponding provision in the Armed Forces Act 2006, as a conviction for a Schedule 15B offence satisfies the ‘previous conviction’ condition for the imposition of an extended determinate sentence; and the release arrangements for those serving an extended determinate sentence (imposed under sections 226A and 226B and corresponding provision in the Armed Forces Act 2006). The change to the release arrangements for those serving an extended determinate sentence described above has the effect that an offender sentenced for one of these offences will not be eligible for automatic release once the two-thirds point of the appropriate custodial term has been reached, but instead will be referred by the Secretary of State to the Parole Board at that point (clause 4 in the Bill will make early release from an extended determinate sentence discretionary in all cases).

89. *Subsections (2) to (5)* add the listed terrorism and terrorism-related offences to Schedule 15B to the Criminal Justice Act 2003.

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90. *Subsection (6)* provides that an automatic life sentence can only be given on account of one of these offences where the ‘second strike’ offence is committed on or after the date of the commencement of these provisions.

91. *Subsection (7)* provides that a previous conviction for one of these offences will satisfy the ‘previous conviction’ condition for the imposition of an extended determinate sentence for offenders sentenced on or after the date of the commencement of these provisions, regardless of when that prior offence was committed.

92. *Subsection (8)* provides that the changes to the release arrangements for offenders given an extended determinate sentence for one of these offences apply to offenders serving a sentence imposed on or after the date of the commencement of these provisions, whenever the offence in question was committed.

**Clause 4: Parole Board release for when serving extended sentences**

93. Clause 4 alters the release arrangements for extended determinate sentences, so that all offenders serving such sentences are subject to Parole Board release between the two-thirds and end points of the custodial term (instead of automatic release at the two-thirds point) rather than only offenders serving sentences imposed for more serious offences, as at present.

94. Clause 4 amends section 246A of the Criminal Justice Act 2003, which sets out the arrangements for the release of prisoners serving extended determinate sentences (imposed under sections 226A and 226B of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006).

95. *Subsections (2) and (3)* amend section 246A to provide that, in relation to offenders sentenced to an extended determinate sentence after the commencement of these provisions, the Secretary of State must refer all such prisoners to the Parole Board when the two-thirds point of the appropriate custodial term has been reached under section 246A(4).

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***Other offenders of particular concern***

**Clause 5: Sentence and Parole Board release for offenders of particular concern**

96. Clause 5 gives effect to Schedule 1 which sets out arrangements for the sentencing of, and release of, offenders convicted of the listed offences of particular concern. Offenders on whom the new sentence is imposed will be subject to Parole Board release between the halfway and end point of the custodial term instead of automatic release at the halfway point. Paragraph 2 of the Schedule inserts new section 236A of the Criminal Justice Act 2003, which provides for the new sentence; paragraph 6 of the Schedule inserts new section 244A of that Act, which provides for the release arrangements for the new sentence.

**Schedule 1: Sentence and Parole Board release for offenders of particular concern**

97. Schedule 1 introduces a new sentence for adult offenders who have been convicted of an offence listed in new Schedule 18A to the Criminal Justice Act 2003 and have been given a sentence of imprisonment (but not a life sentence or an extended determinate sentence under section 226A). The new sentence must consist of a custodial term and a one year period of licence, and offenders serving the new sentence will be subject to discretionary release by the Parole Board between the halfway and end point of the custodial term.

98. Schedule 1 amends the Criminal Justice Act 2003, in particular to insert new sections 236A and 244A and new Schedule 18A.

99. *Paragraph 2* inserts new Chapter 5A and section 236A.

100. Subsection (1) of new section 236A sets out the circumstances in which an offender will fall to be sentenced under subsection (2). Where the court decides to impose a custodial sentence in respect of an offence listed in Schedule 18A (committed when the offender is 18 or older), and the court does not impose a life sentence or an extended determinate sentence (under section 226A of the Criminal Justice Act 2003), the court is obliged to impose a sentence which consists of an appropriate custodial term (detention in a young offenders institution where the offender is aged 18-20) and a 1 year period to be spent on licence.

101. Subsection (3) of new section 236A defines ‘the appropriate custodial term’ as that which in the opinion of the court ensures the sentence imposed is appropriate. Subsection (4) prevents the offender from receiving a longer sentence than could have been given at the time the offence was committed.

102. Subsection (5) clarifies that this sentence may be imposed in respect of one offence, or in respect of one or more associated offences. Subsection (6) of new section 236A gives the Secretary of State a power to add or remove offences by order (subject to the affirmative procedure) to or from Schedule 18A, or to amend those offences; subsection (7) provides that an amendment made by such an order could

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apply to anyone sentenced on or after the date on which the amendment comes into force, regardless of when the offence was committed.

### ***Offences of particular concern***

103. *Paragraph 4* inserts new Schedule 18A (“Sentence under 236A: offences”) into the Criminal Justice Act 2003. Offences listed in Schedule 18A are subject to the sentence in section 236A and the release arrangements in new section 244A of the Criminal Justice Act 2003.

### ***Terrorism***

104. Paragraphs 1 to 18 list the terrorism and terrorism-related offences which fall under the new sentencing arrangements set out in new section 236A. In relation to the terrorism-related offences listed in paragraphs 1 to 6, these are only subject to the sentence in section 236A and the release arrangements in new section 244A if they are committed with a terrorist connection. A terrorist connection is defined in paragraph 24 of the Schedule; a court must have determined that there is such a connection under section 30 of the Counter-Terrorism Act 2008.

### ***Sexual offences***

105. Paragraphs 19 and 20 list the sexual offences which fall under the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

### ***Attempts etc to commit preceding offences or murder***

106. Paragraphs 21 and 22 provide for inchoate offences involving an offence listed in paragraphs 1 to 20 and inchoate offences in connection with murder where there is a terrorist connection to be included in the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

### ***Abolished offences***

107. Paragraph 23 ensures that historic offences which have been abolished but which are equivalent to the Schedule 18A offences fall under the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

### ***Release on licence to be directed by the Parole Board***

108. *Paragraph 5* amends section 244(1) of the Criminal Justice Act 2003 to exempt the Secretary of State from the general duty to release a fixed-term prisoner on licence once they have served the requisite custodial period, in a case where the

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prisoner will be released in accordance with new section 244A of the Criminal Justice Act 2003.

109. *Paragraph 6* inserts new Section 244A (“Release on licence of prisoners serving sentence under section 236A”) into the Criminal Justice Act 2003. Section 244A provides for the release arrangements which apply to any offender sentenced under new section 236A.

110. Under subsection (2) of section 244A such offenders must be referred to the Parole Board once they have served the requisite custodial period, which is defined in 244A(6) as half of the appropriate custodial period imposed by the court (or where a prisoner is serving consecutive or concurrent sentences the requisite custodial period calculated in accordance with the aggregation of the sentences under sections 263(2) and 264(2)). Section 244A(6) defines ‘the appropriate custodial term’ as that determined by the court as such under section 236A. If an offender is referred to the Parole Board and is not released at that time, they are entitled to be referred to the Parole Board again at least every two years.

111. In accordance with subsections (3) and (4) of section 244A, if the Parole Board believes it is not necessary for the protection of the public for the offender to be detained they may direct the offender’s release and the Secretary of State must release a prisoner if the Parole Board so directs.

112. Subsection (5) of section 244A obliges the Secretary of State to release a prisoner at the end of the custodial term imposed by the court, unless they have already been released on licence and recalled under section 254 of the Criminal Justice Act 2003 within that time.

113. *Part 2* of Schedule 1 makes equivalent provision for new sentencing arrangements set out in section 236A under the Armed Forces Act 2006.

114. *Part 3* of Schedule 1 makes transitional and transitory provision in relation to the new sentencing arrangements set out in section 236A (and corresponding provision in the Armed Forces Act 2006). *Paragraph 9* provides that the new sentencing arrangements apply to anyone sentenced on or after the date of the commencement of these provisions, even if that person was convicted prior to that date. *Paragraph 10* contains a transitory provision to apply the new provisions to detention in young offender institutions, since such a sentence is still possible, pending the coming 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).

115. *Part 4* of Schedule 1 makes provision consequential on the creation of the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

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### ***Release and recall of prisoners***

#### **Clause 6: Electronic monitoring following release on licence etc**

116. Clause 6 makes provision for a mandatory electronic monitoring condition to apply to offenders released from custody on licence. The electronic monitoring condition may be for monitoring of compliance with other licence conditions or monitoring of whereabouts as a stand alone licence condition, or both. Under the current legislation, contained in section 62 of the Criminal Justice and Court Services Act 2000, these conditions may be imposed but only on a discretionary, case by case, basis. In addition, by virtue of section 31 of the Crime (Sentences) Act 1997, conditions may only be attached to an indeterminate sentence prisoner's licence on the recommendation of the Parole Board.

117. *Subsection (2)* amends section 62 of the Criminal Justice and Court Services Act 2000 and provides that any electronic monitoring condition must also state who is responsible for the monitoring and gives the Secretary of State an order-making power, subject to the negative resolution procedure, to specify a description of a person responsible for electronic monitoring.

118. *Subsection (3)* inserts new sections 62A and 62B into the Criminal Justice and Court Services Act 2000. New section 62A(1) provides for an order-making power, subject to the negative resolution procedure, to allow the Secretary of State to provide that offenders released from custody on licence must be subject to compulsory electronic monitoring. New 62A(2) allows for the Secretary of State to require electronic monitoring in particular cases and to specify the duration of the compulsory condition, which may be for a period shorter than the licence period. The period may be different for different groups of offenders (as provided for by section 76 of the Criminal Justice and Court Services Act 2000). New section 62A(3) allows for the Secretary of State to specify which offenders will be subject to electronic monitoring by reference to whoever is monitoring the offender. It also allows the Secretary of State to make provision by reference to whether a person specified in the order is satisfied of a matter. For example, it might refer to cases in which the Secretary of State is satisfied that the offender has a physical or mental health problem which renders the offender unsuitable for the licence condition, or cases in which a person is satisfied that it is impossible to make arrangements for the offender to recharge the battery in the tag. The Secretary of State may prescribe which offenders must be subject to compulsory electronic monitoring; for example, he may specify groups of offenders by type of offence, such as all burglars, or by type of sentence, such as all those serving an Extended Determinate Sentence.

119. New section 62A(4) has the effect that, if an offender is serving one of the specified sentences, a compulsory electronic monitoring condition cannot be applied to that person. The sentences are certain custodial sentences available for young offenders. Under these sentences, electronic monitoring will still be available but on a discretionary basis.

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120. The use of data, including location data, gathered under an electronic monitoring condition (whether one imposed for the purpose of monitoring whereabouts or one imposed for the purpose of monitoring compliance) is subject to the requirements of the Data Protection Act 1998. New section 62B imposes a duty on the Secretary of State to issue a code of practice on the processing of such data (which will include retention, use and sharing of data).

121. *Subsection (4)* introduces Schedule 2 which contains a number of consequential provisions.

122. *Subsection (5)* applies the provisions to offenders released from custody on or after the day on which they are commenced.

**Schedule 2: Electronic monitoring and licences etc: consequential provision**

123. Schedule 2 makes consequential amendments relating to the provisions in clause 6. *Paragraph 1* amends section 3 of the Crime (Sentences) Act 1997 to enable a compulsory electronic monitoring licence condition to be imposed on a life sentence prisoner without a recommendation or direction from the Parole Board.

**Clause 7: Test for release after recall: determinate sentences**

124. Clause 7 amends the provisions dealing with the recall and further release of prisoners in Chapter 6 of Part 12 of the Criminal Justice Act 2003. It adds to the current public protection tests applicable when the Secretary of State determines whether a recalled prisoner is suitable for automatic release and, where they are subject to discretionary release, when the Secretary of State and the Parole Board are considering re-release, to include consideration of whether the offender is highly likely to breach their licence conditions if released.

125. *Subsection (2)* inserts a new subsection (4A) into section 255A of the Criminal Justice Act 2003 to require the Secretary of State to consider the likelihood of further non-compliance with licence conditions when deciding on the appropriate type of recall for an offender, as well as whether they present a risk of serious harm to the public.

126. *Subsection (3)* amends section 255B of that Act which deals with recalled offenders who are subject to automatic release after 28 days. *Subsection (3)(b)* inserts a new subsection (3A) in section 255B so the Secretary of State must consider when exercising his or her discretionary release powers whether it appears that the offender would be highly likely to breach a condition contained in their licence if released as well as the existing restriction based on risk of serious harm to the public.

127. Where a referral is made to the Parole Board to consider the offender's release before the end of the automatic release period, *subsection (3)(d)* inserts further subsections in section 255B – (4A), (4B) and (4C) – which set out the basis on which the Board may consider release in these circumstances.

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128. New subsection (4A) provides for the directions the Parole Board may make when determining the referral. New subsection (4B) reproduces the current public protection release test to be applied by the Parole Board when considering release. New subsection (4C) adds to that test by restricting the Board's power to release where the Board considers the offender would be highly likely to breach a condition contained in their licence if released.

129. *Subsection (3)(e)* replaces the current subsection (5) to make clear that the Secretary of State must give effect to any direction of the Board to release.

130. *Subsection (4)* makes the same changes in respect of the Secretary of State and Parole Board's discretion to release recalled offenders not subject to the automatic release provision in section 255B who are, instead, liable to be detained until the end of their sentence. It imposes a restriction on the Secretary of State and Parole Board's discretionary release powers where the prisoner would be highly likely to breach a condition contained in their licence if released by inserting new subsections (3A), (4A), (4B) and (4C) in section 255C of the Criminal Justice Act 2003. These replicate the new subsections inserted in section 255B.

131. *Subsection (5)* repeals section 256 of the Criminal Justice Act 2003. Section 256 provides for how the Secretary of State and the Parole Board deal with referrals of recalled prisoners where the Board does not direct immediate release. This section is no longer needed as provision for how the Secretary of State and the Board are to deal with such cases is now made in each of the relevant sections of that Act as amended by clause 6.

132. *Subsection (6)* replaces subsection (1) of section 256A of the Criminal Justice Act 2003 with three new subsections, (1), (1A) and (1B), dealing with the further review of recalled prisoners. For a recalled prisoner who is serving one sentence of imprisonment the current position is maintained i.e. that the prisoner must have their case referred to the Parole Board annually. Where the prisoner is serving multiple sentences, however, and the recall period is running concurrently with the custodial part of another sentence (for example, where a further sentence has been imposed in addition to the recall for offences committed while on licence) then the case will not be referred to the Board until the custodial part of the other sentence has been completed and the prisoner can be released on all sentences – rather than referred annually during that period.

133. *Subsection (6)(c)* replaces the provision for the Board to fix a date for release on licence (section 256A(4)(b) of the Criminal Justice Act 2003) with provision for the Board to direct that the prisoner be released on licence as soon as conditions in the direction are met. This wording reflects, and ensures consistency with, the Board's power to direct release in these terms as contained in the new subsection (4A) inserted in sections 255B and 255C of that Act.

134. *Subsection (6)(e)* inserts new subsections (4A) and (4B) in section 256A to

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provide that the Board must apply the risk of breach of a licence condition test as well as the public protection test when considering the release of recalled prisoners whose cases have been referred to the Board on their review date under section 256A.

135. *Subsection (7)* removes a transitional provision for prisoners subject to earlier release provisions which becomes redundant on the repeal of section 256 of the Criminal Justice Act 2003.

136. *Subsection (8)* provides that the amendments made by this clause apply to those recalled before the day on which these changes are brought into force, as well as those recalled after that date.

**Clause 8: Power to change test for release after recall: determinate sentences**

137. Clause 8 inserts a new section – 256AZA – in Chapter 6 of Part 12 of the Criminal Justice Act 2003. This provides an order-making power subject to the affirmative resolution procedure to change the test to be applied (provided for in clause 7) when the Secretary of State decides whether automatic release recall is suitable (as prescribed in section 255A) and the tests applied by the Secretary of State and the Parole Board for release following recall (as prescribed in sections 255B, 255C and 256A).

**Clause 9: Initial release and release after recall: life sentences**

138. *Subsection (1)* amends section 28(7) of the Crime (Sentences) Act 1997 to refer to the ‘requisite custodial period’ which is defined in section 268 of the Criminal Justice Act 2003 (as inserted by clause 12). Section 28(7)(c) of the Crime (Sentences) Act 1997 makes provision in relation to the point at which a life prisoner may require the Secretary of State to refer their case to the Parole Board to consider their release, where such a prisoner is also serving a determinate sentence of imprisonment or detention. This amendment is a consequence of the creation of the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A of the Criminal Justice Act 2003; and of the creation of the extended determinate sentence under section 226A and 226B of that Act, as inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

139. *Subsection (2)* amends section 32 of the Crime (Sentences) Act 1997 by inserting the public protection release test currently applied when considering initial release so that it also applies where the Board is considering the release of recalled life sentence prisoners. This includes prisoners serving sentences of Imprisonment for Public Protection (IPP) who have been recalled.

140. *Subsection (3)* inserts a new subsection in section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which allows the release test to be changed by an order subject to the affirmative resolution procedure. This ensures that the power to change the release test applies equally to the test as it appears in new subsection (5A) of section 32 of the 1997 Act, in relation to the release of recalled IPP prisoners. The power to amend the release test in section 128 does not apply to the test

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in respect of those serving life sentences, which cannot be amended by order.

141. *Subsections (4) and (5)* provide that the amendments made by this clause apply to those sentenced or recalled before the day on which these changes are brought into force, as well as those sentenced or recalled after that date.

**Clause 10: Offence of remaining unlawfully at large after recall**

142. Clause 10 creates a new offence of remaining unlawfully at large following a recall to custody.

143. *Subsection (1)* inserts a new section 32ZA into the Crime (Sentences) Act 1997 to provide for it to be a criminal offence for recalled indeterminate sentenced prisoners to remain unlawfully at large. The offence is committed once the offender has been notified of the recall and fails to take all necessary steps to return to prison unless they have a reasonable excuse. Subsection (2) of section 32ZA provides that an offender is treated as being notified of recall if written notification has been delivered to a specified address and the period specified in the notice has expired. Subsection (3) of section 32ZA defines appropriate address as either an address at which the offender is permitted to stay or an address which is nominated under their licence. Subsection (4) of section 32ZA provides that a offender is also treated as being notified of their recall if their licence requires them to keep in contact with probation in accordance with instructions given by probation officers, they have failed to comply with an instruction and they have not complied with an instruction for at least 6 months.

144. Subsection (5) of section 32ZA provides that the offence of being unlawfully at large is 'triable either way' and can be tried in either the magistrates' court or the Crown Court. The maximum penalty of 6 months which can be imposed by a magistrates' court will become 12 months when section 154(1) of the Criminal Justice Act 2003 is commenced (subsection (6) of section 32ZA). Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, when brought into force, will remove the limit on the fine that can be imposed in the magistrates' court for this offence; however until that point any fine imposed by the magistrates' court shall not exceed the statutory maximum (subsection (7) of section 32ZA).

145. *Subsection (2)* inserts a new section 255ZA into the Criminal Justice Act 2003 to provide for it to be a criminal offence for recalled determinate sentence prisoners to remain unlawfully at large and provides the same provisions as outlined in paragraphs 146 and 147 above.

146. *Subsection (3)* provides that the offence of remaining unlawfully at large after recall will apply to all those who are already unlawfully at large after the revocation of their licences. Therefore, on commencement, offenders who are already unlawfully at large will be committing this offence once they have been notified of the recall, the time in the notification expires and the offender has not, without reasonable excuse,

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taken all necessary steps to return to prison.

**Clause 11: Offence of remaining unlawfully at large after temporary release**

147. Clause 11 provides for an increase in the maximum sentence for the offence of remaining unlawfully at large after a period of temporary release on licence and makes it an offence which can be tried in either the magistrates' court or Crown Court (an "either way" offence).

148. The clause amends section 1 of the Prisoners (Return to Custody) Act 1995. *Subsection (2)* changes the maximum penalties that can be imposed by (a) the Crown Court and (b) the magistrates' court to 2 years and 12 months respectively.

149. *Subsection (3)* provides that until section 154(1) of the Criminal Justice Act 2003 is commenced the maximum penalty which can be imposed by a magistrates' court is 6 months.

150. It also provides that until section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is commenced the maximum fine which can be imposed by a magistrates' court is a fine not exceeding the statutory maximum (currently £5,000).

151. *Subsection (4)* provides that the increased maximum penalties will not apply to those whose period of temporary release on licence had expired, or order of recall was made, before commencement.

**Clause 12: Definition of 'requisite custodial period'**

152. Clause 12 inserts a definition of 'requisite custodial period' into the interpretation provision in Chapter 6 of Part 12 of the Criminal Justice Act 2003. "Requisite custodial period" has different meanings for different sentences – see sections 243A, 244, 244A (inserted by Schedule 1 to the Bill), 246A and 247 (as amended by this clause) The definition is relevant for the purposes of section 246 of that Act (power to release prisoners on licence before required to do so); sections 255B, 255C and 256A (as amended by clause 6) (provision in relation to the release following recall of determinate sentence prisoners); and section 28 of the Crime (Sentences) Act 1997 (as amended by clause 9) (initial release and release after recall: life sentences).

153. *Subsection (2)* makes amendments to section 247 of the Criminal Justice Act 2003 to introduce, for the purposes of section 260 of that Act, a definition of the 'requisite custodial period' in respect of an offender serving one sentence or two or more concurrent or consecutive sentences. The requisite custodial period for this type of extended sentence is one half of the custodial term imposed by the court where one sentence is being served and, for those serving multiple sentences, it is the period determined by sections 263(2) and 264(2) which deal with calculating relevant dates for concurrent and consecutive sentences.

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154. *Subsection (3)* inserts a definition of ‘requisite custodial period’ into section 268 of the Criminal Justice Act 2003. For the purposes of a standard determinate sentence (covered by section 243A and 244), the ‘requisite custodial period’ ends at the half-way point; for the purposes of an extended determinate sentence (imposed under section 226A or 226B) it ends at the two-thirds point of the custodial term, or the half-way point of the custodial term for extended sentences imposed under the previous regime (under section 227 or 228); for the purposes of the new sentencing arrangements under new section 236A (inserted by Schedule 1 to the Bill), it ends at the half-way point of the custodial term.

**Clause 13: Minor amendments and transitional cases**

155. Clause 15 makes minor consequential amendments and provision to deal with transitional cases stemming from the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

***Cautions***

**Clause 14: Restrictions on use of cautions**

156. Currently, a simple caution provides a means for a constable to deal with a person aged 18 or over who has admitted committing a criminal offence in England and Wales and agrees to be given a caution. It does not involve any court or tribunal process or the imposition of any condition or sanction. The current provisions for adult simple cautions are set out in non-statutory guidance issued by the Secretary of State for Justice.

157. Clause 14 places restrictions on the circumstances in which cautions may be used. The restrictions are greater the more serious the offence. *Subsection (1)* provides that the section applies where the person is aged 18 or over, has committed an offence in England and Wales and admits to committing the offence.

158. *Subsection (2)* provides that a constable may not give a caution for an offence triable only on indictment (“indictable only offence”) unless there are exceptional circumstances and the Director of Public Prosecutions consents.

159. *Subsection (3)* provides that a constable may not give a caution for an offence that is triable either way and which is specified in an order (subject to the negative resolution procedure) made by the Secretary of State (“specified either way offence”) unless there are exceptional circumstances.

160. *Subsection (4)* provides that a constable may not give a caution for a summary or a non specified either-way offence (those offences not already restricted by *subsections (2) and (3)*) if the person has, in the two years before the commission of the current offence, received a caution (including a youth caution and youth conditional caution under the Crime and Disorder Act 1998 as well as an adult conditional caution) or conviction for a similar offence unless there are exceptional circumstances. The Secretary of State has the power to amend by order (subject to the

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affirmative procedure), the period of two years between the current offence and previous similar offence (*subsection (7)*).

161. Whether there are exceptional circumstances and whether a previous offence is similar to the current offence are not to be determined by a police officer below a rank specified by the Secretary of State by order (*subsection (5)*). A determination must be made in accordance with guidance issued by the Secretary of State (*subsection (6)*).

162. *Subsection (10)* provides that the restrictions on giving a caution under this section apply to an offence irrespective of whether it was committed before or after this section comes into force.

#### **Clause 15: Orders under section 14**

163. Clause 15 sets out the different parliamentary procedures for the orders that the Secretary of State may make under clause 14 and provides that an order must be made by statutory instrument.

#### ***Offence of possession of extreme pornographic images***

#### **Clause 16: Possession of pornographic images of rape and assault by penetration**

164. This clause amends the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 (“the 2008 Act”) to cover the possession of extreme pornographic images that depict non-consensual sexual penetration. These amendments will form part of the law of England and Wales and Northern Ireland (like section 63 of the 2008 Act) but change the law only for England and Wales.

165. The clause inserts a new subsection (7A) into section 63 of the 2008 Act which contains two additional categories of prohibited material: an image which portrays, in an explicit and realistic way - a) an act which involves the non-consensual penetration of a person’s vagina, anus or mouth by another with the other person’s penis, and (b) an act which involves the non-consensual sexual penetration of a person’s vagina or anus by another with a part of the other person’s body or anything else.

166. *Subsection (3)* applies a defence to possession of an image that portrays an act within subsection (7A), alongside existing defences to the section 63 offence, to a person who is a participant in the image, as well as the possessor, where he or she can prove that, despite any appearance to the contrary, consent was given (freely and by someone who had capacity).

167. *Subsection (4)* provides that a person found guilty of an offence of possessing images coming within the ambit of new subsection (7A) will be liable to a maximum sentence of imprisonment of three years, or a fine, or both.

168. *Subsection (5)* amends Schedule 14 to the 2008 Act to incorporate the

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extended definition of an extreme pornographic image in England and Wales. Schedule 14's purpose is to ensure compliance with the UK's obligations under the EU E-Commerce Directive. Paragraph 1 of the Schedule extends liability for the section 63 offence to internet service providers established in England and Wales or Northern Ireland who possess an extreme pornographic image in an EEA state other than the UK. This is subject to the exemptions in paragraphs 3 to 5 of the Schedule for where they are acting as mere conduits for the material or are caching or hosting it. For internet service providers established in England and Wales who possess an image in an EEA state other than the UK the extended definition of an extreme pornographic image will apply in determining whether they have committed an offence.

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## **PART 2 – YOUNG OFFENDERS**

### ***Detention of Young Offenders***

#### **Clause 17: Secure colleges and other places for detention of young offenders**

169. *Subsection (1)* substitutes section 43 of the Prison Act 1952 (young offender institutions etc.). Currently section 43 gives the Secretary of State a power to provide young offender institutions, remand centres and secure training centres. New section 43 additionally gives the Secretary of State powers to provide secure colleges (a new form of youth detention accommodation) in England (see section 43(1)(c)).

170. Section 43 currently also provides that certain provisions of the Prison Act 1952 do not apply in relation to young offender institutions and secure training centres, and provides that certain provisions of that Act do apply in relation to those institutions (with or without modifications). Subsections (4) to (8) of section 43 largely replicate existing provision about the application of other provisions of the Prison Act 1952 in relation to young offender institutions and secure training centres, but this provision is expressed in clearer language. These subsections also make provision about the application of provisions of that Act in relation to secure colleges.

171. The provisions give the Secretary of State the power, in relation to secure colleges, to (among other things) purchase land, remove prisoners for judicial and other reasons and to make regulations for the measuring, photographing and drug/alcohol testing of prisoners.

172. *Subsection (2)* provides that rules modifying provisions of the Prison Act 1952 as they apply in relation to young offender institutions, secure training centres and secure colleges are subject to annulment by Parliament.

#### **Schedule 3: Secure colleges etc: further amendments**

173. Schedule 3 contains further amendments of legislation relating to secure colleges and other places for the detention of young offenders.

#### **Clause 18: Contracting out secure colleges**

174. Clause 18 introduces Schedule 4, which makes provision about contracting out the provision and running of secure colleges, about certification of secure college custody officers and about contracting out functions at directly managed secure colleges.

#### **Schedule 4: Contracting out secure colleges**

##### ***Part 1 Contracting out provision and running of secure colleges***

175. *Paragraph 1* gives the Secretary of State a power to enter into a contract with another person for the other person to provide a secure college (or part of one) or run a secure college (or part of one), or both. Express provision is made allowing such a

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contract to provide for the running of the college to be sub-contracted.

176. *Paragraph 2* limits the power in paragraph 1 by providing that a contracted-out secure college must be run in accordance with this Schedule, the Prison Act 1952 as it applies to contracted-out secure colleges, and secure college rules (that is, rules made under section 47 of the Prison Act, as amended by Schedule 4 to the Bill).

177. *Paragraph 3* exempts land leased by the Secretary of State for the purposes of a secure college from the operation of certain specified landlord and tenant and property legislation.

178. *Paragraph 4* provides that a contracted-out secure college is to have a principal, imposes requirements as to the appointment of the principal and makes provision about the principal's functions.

179. *Paragraph 5* provides that a contracted-out secure college is to have a monitor, whose reviewing, investigatory and reporting functions are set out in subparagraph (3). The contractor (and any sub-contractors) are under a duty to take all reasonable steps to facilitate the carrying out of the monitor's functions.

180. *Paragraph 6* provides that the constabulary powers of prison officers do not apply in relation to officers of a contracted-out secure college. *Paragraph 7* sets out who may be an officer of a contracted-out secure college who performs custodial duties. The officers' duties and powers are set out in *paragraphs 8 to 11*. In particular, an officer has duties to prevent escape, to prevent the commission of unlawful acts, to ensure good order and discipline and to attend to the well-being of a person detained in a secure college. An officer has powers of search, and may use force if authorised to do so by secure college rules.

181. *Paragraph 12* makes provision in relation to intervention by the Secretary of State. The Secretary of State may, where it appears to him that the principal of a contracted-out secure college has lost effective control of the college, and the intervention is necessary to preserve a person's safety or prevent serious damage to property, replace the principal with a Crown servant whom the Secretary of State has appointed. During the period of intervention that person is to carry out the functions of the principal and the monitor. *Paragraph 12(4) and (5)* make provision about notification at the end of a period of intervention.

182. *Paragraph 13* creates an offence of resistance or obstruction of a secure college custody officer. *Paragraph 14* creates an offence of assaulting a secure college custody officer.

183. *Paragraph 15* creates an offence of wrongful disclosure, by a person who is or has been employed at a contracted-out secure college, of information relating to persons in youth detention accommodation.

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***Part 2 Certification of secure college custody officers***

184. Part 2 makes provision in relation to the eligibility of a person to be certified by the Secretary of State as a secure college custody officer, and the procedure for becoming so certified.

185. In particular, *paragraph 17* sets out the criteria of which the Secretary of State must be satisfied before he certifies a person as a secure college custody officer. *Paragraphs 18 and 19* make provision in relation to the suspension and revocation respectively of certificates.

***Part 3 Contracting out functions at directly managed secure colleges***

186. *Paragraph 20* gives the Secretary of State a power to enter into a contract with another person for secure college custody officers provided by that person to carry out functions at a directly managed secure college. *Paragraph 21* applies paragraphs 8 to 11 in relation to such officers.

187. *Paragraphs 23 and 24* create offences of obstruction and assault of such officers, and are substantively the same as the offences in paragraphs 13 and 14.

188. *Paragraph 25* creates an offence of wrongful disclosure by such an officer, and is substantively the same as the offence in paragraph 15.

**Clause 19: Powers of Youth Justice Board in relation to provision of accommodation**

189. Clause 19 amends section 41(5) of the Crime and Disorder Act 1998 (which sets out powers of the Youth Justice Board for England and Wales ('the YJB')), to provide that the YJB may enter into agreements for the provision of accommodation in relation to young offenders subject to a sentence of detention for public protection (under section 226 of the Criminal Justice Act 2003), an extended determinate sentence of detention (under section 226B of that Act), an extended sentence of detention for public protection (under section 228 of that Act), and the Armed Forces Act 2006 equivalents.

***Other matters***

**Clause 20: Youth cautions and conditional cautions: involvement of appropriate adults**

190. Clause 20 amends the Crime and Disorder Act 1998 so that any youth caution or youth conditional caution given to a young person aged 17 must be given in the presence of an appropriate adult. That is already a requirement where a caution or conditional caution is given to a child or young person aged under 17.

**Clause 21: Referral orders: alternatives to revocation for breach**

191. Clause 21 amends Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000) to provide for alternatives to revocation of a referral order where the court finds that the terms of the youth offender contract under s.23 have not

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been complied with).

192. *Subsection (1)* inserts a new paragraph 6A into Schedule 1 to the PCC(S)A 2000 to allow a court, where a breach of a referral order has been found, to impose a fine up to a maximum of £2500 on an offender or extend the youth offender contract up to a maximum overall length of 12 months. The power for the court to extend the youth offender contract is not available when the referral order has already expired (new paragraph 6A(4)). The offender must be present in order for the court to impose a penalty under this section (new paragraph 6A(5)).

193. New paragraph 6A(6) provides for the enforcement of any fine given by the court under new paragraph 6A(2)(a).

194. The powers of the court to impose a fine or extend the period for which the youth offender contract takes effect in circumstances where the terms of the contract have been breached will apply where:

- the offender has been referred back to the court for failure to attend the progress meeting (under section 26(5) of PCC(S)A 2000).
- the offender is referred back to court for failure to attend any part of a panel meeting (under section 22(2)(b) of PCC(S)A 2000).
- the panel determine at the final meeting that the offender's compliance with the terms of the contract has not been such as to justify the conclusion that the offender has satisfactorily completed the contract (under section 27(4) of PCC(S)A 2000).

195. *Subsection (3)* amends the heading of the relevant part of Schedule 1 to make it clear that this paragraph sets out what procedures apply where a court does not revoke a referral order.

196. *Subsection (4)* amends section 160(3) of the PCC(S)A 2000 to provide that any rules made under new paragraph 6A(7) of Schedule 1 are subject to the affirmative resolution procedure.

197. *Subsection (5)* provides that the amendments made by clause 23 apply only in relation to a person who fails to comply with a youth offender contract after this clause has come into force.

#### **Clause 22: Referral orders: extension on further conviction**

198. Clause 22 amends provisions in Part II of Schedule 1 to the PCC(S)A 2000 which provide for extension of a referral order where the offender has committed further offences.

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199. *Subsection (1)* replaces paragraphs 10 to 12 with a new paragraph 10 that provides for a court to extend any existing referral order on further conviction for a period of up to 12 months, where the child or young person has been convicted of additional offences.

200. *Subsection (2)* amends paragraph 13 of Schedule 1 to the PCC(S)A 2000 as a result of the amendments made by subsection (1). It removes references to paragraphs 11 and 12 in consequence of subsection (1) and, where appropriate, inserts a reference to new paragraph 10.

201. *Subsection (3)* amends paragraphs 5(3), 9 and 14(1)(a) of Schedule 1, as well as the heading before paragraph 13 of that Schedule, also as a result of the amendments made by subsection (1).

202. *Subsection (4)* provides that the amendments made by this clause will apply where the court sentences for offences committed before and after these provisions are commenced.

**Clause 23: Referral orders: revocation on further convictions**

203. Clause 25 amends provisions in paragraph 14 of Schedule 1 to the (PCC(S)A 2000) which set out circumstances in which the court must revoke an existing referral order or orders in circumstances where the offender is convicted of further offences.

204. *Subsection (2)* substitutes a new paragraph 14(2) of Schedule 1 to the PCC(S)A 2000, to replace the current duty on the court to revoke one or more extant referral orders (and any related orders) with a power to revoke an order if it appears to be in the interests of justice to do so. It also amends paragraph 14(1) to include a conditional discharge as an order exempt from the current duty on the court (and the proposed discretionary power of the court) to revoke any existing orders in the event that the offender is convicted of further offences.

205. *Subsection (3)* amends section 18 of the PCC(S)A 2000 so that where a court makes a referral order in respect of an offender who is already subject to a referral order the court may direct that the new youth offender contract should not take effect until the earlier order has been revoked or completed.

206. *Subsection (4)* provides that these amendments will apply on commencement to an offence committed either before or after that date for which the court is dealing with the offender.

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### **PART 3 – COURTS AND TRIBUNALS**

#### ***Trial by single justice on the papers***

##### **Clause 24: Instituting proceedings by written charge**

207. Clause 24 amends section 29 of the Criminal Justice Act 2003. At present, section 29 provides for criminal proceedings to be commenced by way of “written charge and requisition”. This clause amends that section so that criminal proceedings can also be initiated by way of written charge and single justice notice procedure. A single justice notice procedure is a document that requires the person to respond to it stating whether they plead guilty or not guilty to the charge, and if they plead guilty whether they are content for the case to be dealt with by the single justice procedure. This new single justice procedure is contained in new section 16A to 16E of the Magistrates’ Courts Act 1980, inserted by clause 26. The single justice procedure provides that cases may be dealt with by a single magistrate, and there is no obligation to hold a trial in open court. The defendant would therefore not have to attend court. This only applies to summary only, non-imprisonable offences (cases such as TV licence evasion, speeding and rail fare evasion).

208. Initiation by way of written charge and single justice notice procedure must be by a “relevant prosecutor”. “Relevant prosecutors” (previously public prosecutors) are those named in section 29 or those named by order of the Secretary of State (including those named in existing orders). *Subsections (9) and (10)* of clause 24 make provision relating to the order-making power that is contained in section 29(5)(h) of the 2003 Act. *Subsection (9)* provides that an order specifying a person as a relevant prosecutor must also specify whether they are authorised to issue both written charge and requisitions and single justice procedure notices, or only written charge and single justice procedure notices. *Subsection (10)* makes transitional provision to ensure that persons who had been previously specified using the power as “public prosecutors” will continue to have the power to issue requisitions, and will also have the power to issue single justice procedure notices.

##### **Clause 25: Instituting proceedings: further provision**

209. Clause 25 amends Section 30 of the Criminal Justice Act 2003 to ensure that Criminal Procedure Rules can make provision relating to the single justice procedure notice where it can already make provision relating to requisitions.

210. *Subsection (4)(b)* inserts a new section 30(5)(c) into the 2003 Act. This provides that references to “a summons” under section 1 of the Magistrates’ Courts Act 1980 are to be read as including a reference to the single justice procedure notice so that legislation applying to “summons” will apply equally to the single justice procedure notice.

##### **Clause 26: Trial by single justice on the papers**

211. Clause 26 provides a single magistrate with the powers to deal with summary

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only, non-imprisonable offences where the defendant is an adult and certain procedural requirements have been complied with. These procedural requirements are that the accused has been served with a written charge and single justice procedure notice and any other documents that are prescribed by the Criminal Procedure Rules, and that the accused has not entered a plea of not guilty or specifically requested an oral hearing before a magistrates' court in response to the single justice procedure notice. Where these criteria are met, the case can be dealt with in the absence of the parties and with no obligation to sit in open court, providing greater flexibility as to the date and time when these cases can be heard.

212. *Subsection (2)* disapplies certain sections of the Magistrates' Courts Act 1980. These sections are superseded by the single justice procedure, but will apply to a case if the procedure ceases to apply.

213. *Subsection (3)* introduces new sections 16A to 16F into the Magistrates' Courts Act. These new sections make provision for a single justice to exercise the jurisdiction of a magistrates' court in certain cases, although they do not require that a single justice decide such cases.

214. New section 16A sets out when and how a case may be tried under the single justice procedure.

215. Subsection (1) of new section 16A provides for the circumstances in which a single justice may try a written charge in accordance with this procedure. The conditions are that the offence charged is a summary only offence that cannot be punishable by imprisonment and that the accused is at least 18 years old on the date they are charged. The single magistrate must also be satisfied the relevant documents (see subsection (2)) have been served on the accused at the same time and that the accused has not indicated either that he or she pleads not guilty or that the accused does not want to be tried under this procedure.

216. Subsections (3) to (10) describe how the new procedure will operate. They enable a single justice to constitute a magistrates' court, and to try the case solely on the papers.

217. Subsection (3) of new section 16A specifies that a decision under this procedure must be made in reliance only on the documents sent to the accused, along with any written submission provided by the accused that aims to mitigate the sentence imposed. Subsection (4) makes clear that the court does not have to consider a written submission served on the wrong court designated officer or where the submission is received late.

218. Subsection (5) of new section 16A provides that a single justice acting under this section does not have to sit in open court.

219. Subsection (6) of new section 16A allows the court to try the charge in the

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absence of the parties, and makes clear that even if a party appears then the court must proceed as if that party was absent.

220. Subsection (7) of new section 16A provides that a single justice cannot remand the accused.

221. Subsection (8) of new section 16A makes provision for the situation where a single justice trying a case under this procedure adjourns the case, and consideration of the case is resumed at a later time. This subsection provides that no notice of the resumption of the trial is required in these circumstances. A single justice can exercise the jurisdiction of a magistrates' court in such cases (subsection (9)),

222. Subsection (10) allows that a magistrates' court other than the one specified in the single justice procedure notice can try a written charge using the single justice procedure. This enables a case to be tried by a court that has spare capacity, and not just by the court named in the documents sent to the defendant.

223. New section 16B makes provision for cases that are not to be tried under the single justice procedure set out in new section 16A.

224. A case cannot be tried under the single justice procedure where a single justice decides it would be inappropriate to do so (subsection (1) of new section 16B).

225. Similarly, where at any time before a trial the accused or his legal representative gives notice to the relevant designated officer that the accused does not wish the case to be tried under the single justice procedure, the case cannot be tried under the single justice procedure notice (subsection (2) of new section 16B).

226. In either of these situations, or where the criteria set out in new section 16A(1) are not satisfied, the magistrates' court is required to adjourn the trial if it has begun and issue a summons requiring the accused to appear before a magistrates' court for trial of the written charge (subsection (3) of new section 16B). Such a summons may be issued by a single justice (new section 16B(4)).

227. New section 16C makes provision for the situation where a magistrates' court convicts a person using the single justice procedure, but then decides that it is not appropriate to try the written charge using the single justice procedure. Subsection (1) of this section provides that the single justice may not continue to try the charge.

228. Subsection (2) of new section 16C applies where a single justice proposes to order a driver disqualification under section 34 or 35 of the Road Traffic Offences Act 1988. In this situation, the accused must be given the opportunity to make representations about the proposed disqualification. Where the accused does wish to make such representations, the case can no longer be considered by a single justice.

229. In either of these situations, the single justice must adjourn the trial and issue a

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summons requiring the accused to appear at a magistrates' court (subsection (3) of new section 16C).

230. New section 16D sets out further provisions relating to new sections 16B and 16C.

231. Subsection (1) applies where a single justice issues a summons in the circumstances where the case can not be decided by a single justice. It provides that where a summons has been issued requiring the accused to appear before a magistrates' court, any reference to "summons" in sections 11 to 13 of the Magistrates' Courts Act 1980 should be read as including a summons so issued by a single justice. Subsection (1)(b) then requires that the magistrates' court mentioned in the summons and the magistrates' court issuing the summons are to be treated as being in the same local justice area.

232. Subsection (2) makes clear that a single justice can issue an additional summons where required.

233. Subsection (3) requires that, when a single justice issues a summons to a magistrates' court, that court that tries the written charge must be either composed of at least two justices or a District Judge (Magistrates' Court) sitting alone. Such a hearing would be in open court.

234. Subsection (4) applies where the accused has been convicted under the single justice procedure, but then the case is adjourned because the single magistrate may no longer try the case. It provides that for the purposes of section 142 of the Magistrates' Court Act 1980 (which enables a magistrates' court to vary or rescind an order it has made if it appears to the court to be in the interests of justice to do so), the court to which the case was transferred is the court that can exercise this power under s.142.

235. New section 16E introduces a new statutory declaration procedure. This provides that a defendant that did not know of the single justice procedure notice or proceedings is entitled to make a declaration to that effect, and if done in accordance with subsection (2) that declaration will have the effect of rendering the proceedings void.

236. Subsection (2) sets out the conditions that have to be satisfied in order that such a declaration will render the single justice proceedings void. The declaration has to be made within 21 days of the defendant finding out about the single justice procedure notice or the proceedings, and the defendant must also enter a response to the single justice procedure notice. This means that they have to enter a plea, and where they plead guilty they must indicate whether or not they wish to have the case dealt with by way of an oral hearing.

237. Subsection (3) provides that the making of a statutory declaration does not

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affect the validity of the written charge or the single justice procedure notice.

238. Subsection (4) allows a magistrates' court to accept a statutory declaration from the defendant after the 21 day deadline if it appears to them that it was not reasonable to expect the accused to serve the statutory declaration in that time. This may be done by a single justice (subsection (9)).

239. Subsections (5) to (9) set out the procedures for dealing with a statutory declaration. This includes where the initial written charge becomes void as a result of the court accepting the statutory declaration and enables the same single magistrate to re-start the proceedings against the accused. The process also allows for another single magistrate to consider the case in the event that proceedings have been re-started against the accused under the single justice procedure.

**Clause 27: Trial by single justice on the papers: sentencing etc**

240. Clause 27 amends the Magistrates' Court Act 1980 to specify the range of sentencing powers available to a single justice acting under this procedure, whilst also providing for a single magistrate to have the power to make certain ancillary orders to enable them to effectively deal with all the cases in scope. These powers enable a single justice to deal with summary only non imprisonable offences in a similar way to a bench of three magistrates under a written charge and requisition notice. This includes the ability to: endorse a driving licence; disqualify a driver; and order compensation to be paid to a victim.

241. The new powers will also include the imposition of a fine (without regard to limit), for example to allow a single magistrate to impose the appropriate level of financial penalty for speeding, as guided by existing Sentencing Guidance taking into consideration the offenders financial means.

**Clause 28: Further Amendments**

242. Clause 28 introduces Schedule 5.

**Schedule 5: Trial by single justice following a written charge: further amendments**

243. Schedule 5 sets out amendments required to other areas of legislation to reflect the availability of the new single justice procedure notice, and in particular the change to section 29 of the Criminal Justice Act 2003. In relevant places, it substitutes the term 'public prosecutor' with 'relevant prosecutor' and includes references to "single justice procedure notice" alongside "requisitions".

244. *Paragraph 15* of the Schedule amends section 162 of the Criminal Justice Act 2003 to allow a single justice to make a financial circumstances order, which requires a defendant to give to the court a statement of his financial circumstances.

***Costs of criminal courts***

*These notes refer to the Criminal Justice and Courts Bill (Bill 169)  
as introduced in the House of Commons on 5 February 2014.*

**Clause 29: Criminal courts charge**

245. Clause 29 makes provision about the imposition on persons convicted of offences of a charge in respect of the costs of the criminal courts.

246. *Subsection (1)* inserts a new Part 2A into the Prosecution of Offences Act 1985 consisting of sections 21A-21F. New section 21A(1) requires a court to order someone who is convicted of an offence to pay a charge in respect of relevant court costs (defined in *subsection (5)*). The amount of the charge is to be prescribed by the Lord Chancellor (new section 21C). The charge must be imposed by a court listed in new section 21B at a time listed in that section.

247. *Subsection (4)* requires the court to disregard the criminal courts charge when otherwise dealing with a person for an offence. This means that the court must not take into account the charge when, for example, sentencing or ordering the payment of prosecution costs. So, if the court is considering an offender's means for the purpose of deciding the amount of a fine that is to be imposed, the court is not permitted to take into account the fact that the offender will be obliged to pay the criminal courts charge.

248. New section 21B lists the courts that are required to order the criminal courts charge, and the times at which the charge must be ordered.

249. *Subsection (1)* requires a magistrates' court to order an offender to pay the charge when dealing with a person for an offence, for breach of a community order, for breach of the community requirements of a suspended sentence order, or for breach of the supervision requirements imposed under section 256AC of the Criminal Justice Act 2003 (to be inserted by the Offender Rehabilitation Bill).

250. *Subsection (2)* requires the Crown Court to order an offender to pay the charge when dealing with a person for an offence, for breach of a community order, for breach of the community requirements of a suspended sentence order or for breach of supervision requirements under section 256AC of the Criminal Justice Act 2003, or when dismissing an appeal by the person against conviction or sentence.

251. *Subsection (3)* requires the Court of Appeal to order an offender to pay the charge when dismissing an appeal against conviction or sentence, or when dismissing an application for leave to bring an appeal.

252. New section 21C provides that the Lord Chancellor will have the power to set the amount of criminal courts charge in regulations. *Subsection (2)* requires the Lord Chancellor to set the charge at a level that does not exceed the relevant court costs (defined in new section 21A(5)) reasonably attributable to a case of the particular class. This means that in exercising the power, the Lord Chancellor will be required to identify classes of case and attribute reasonably the amount of relevant court costs in relation to that class and specify a charge for that class of case which reflects the relevant court costs reasonably attributable to it. An offender will not be charged more

than that amount.

253. New section 21D provides the Lord Chancellor with the power by regulations to require offenders to pay interest on the criminal courts charge where it has not been paid (subsection (1)). Subsection (2) sets out that those regulations may, in particular, deal with the rate of interest and set out periods in which interest is not payable. The regulations may make provision by reference to a measure or document. So, for example, it would be possible for the Lord Chancellor to specify a measure like the consumer price index (as it exists from time to time) as the rate of interest.

254. Subsection (3) of section 21D restricts the rate of interest that the Lord Chancellor can charge to a value that is not higher than a rate that the Lord Chancellor considers would maintain the real terms value of the unpaid debt. Subsection (4) provides that the interest added to the criminal courts charge will be treated in the same way as if it were part of the charge itself. This means that the interest can be collected and enforced in the same way as the rest of the criminal courts charge.

255. New section 21E provides magistrates' courts with the power to cancel either all or part of the amount of the charge still owing. Subsection (2) provides that the court will not be able to cancel the charge unless it believes that the offender has taken all reasonable steps to repay the amount they owe, taking into account their personal financial circumstances. The court will also be able to cancel the charge where it believes that it is not practicable to collect or enforce it.

256. Subsection (3) of section 21E provides that a court may not remit the charge at a time when the person is in prison.

257. In addition, subsection (4) provides that the court may only remit the charge after certain periods of time have elapsed, the length of which is to be specified in secondary legislation. The periods of time start at the point the most recent criminal courts charge was imposed for that offender, on the date an offender was last convicted of an offence and on the day which the offender was last released from prison. "Prison" is defined in subsection (7) to include a place of detention (such as a young offender institution).

258. New section 21F provides that regulations made by the Lord Chancellor under Part 2A can include transitional, transitory or saving provision in connection with prescribing the amounts for the criminal courts charge.

259. *Subsection (2)* of clause 29 adds the criminal courts charge to the list of payments which are enforceable as a sum adjudged to be payable on conviction by a magistrates' court. This means that payment of the criminal courts charge would be enforced in the same way as other such sums, including compensation orders, the victim surcharge, prosecution costs and fines. Subsection (2) also corrects a numbering error in Part 1 of Schedule 8 to the Administration of Justice Act 1970.

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as introduced in the House of Commons on 5 February 2014.*

260. *Subsection (3)* gives effect to Schedule 6 which makes further provision about the criminal courts charge. *Subsection (4)* provides that the charge will only be ordered in relation to offences committed after clause 31 comes into force.

**Schedule 6: Further provisions about criminal courts charge**

261. Schedule 6 makes further provision about the criminal courts charge including consequential amendments relating to the provisions in clause 34.

262. *Paragraph 1* provides that an order to pay a criminal courts charge is not treated as a sentence under the Rehabilitation of Offenders Act 1974. This means that the criminal courts charge results in no rehabilitation period in relation to that order under that Act.

263. *Paragraph 3* anticipates provision which is sought to be made under the Anti-social Behaviour, Crime and Policing Bill, which will ensure that the victim surcharge may not be discharged as extra days added to an immediate sentence of imprisonment. *Paragraph 3* substitutes a new subsection (1A) into section 82 of the Magistrates' Courts Act 1980, which provides for this approach to extend to the criminal courts charge.

264. *Paragraph 4* clarifies that those ordered by a magistrates' court to pay the criminal courts charge will have a right of appeal to the Crown Court under the Magistrates' Courts Act 1980 (which brings the criminal courts charge into line with the position on the victim surcharge for the purposes of appeals from a magistrates' court).

265. *Paragraph 5* amends the heading of Part 2 of the Prosecution of Offences Act 1985 (presently "Costs in Criminal Cases") to distinguish the costs in that Part from the costs dealt with in new Part 2A inserted into that Act by clause 31.

266. *Paragraph 6* clarifies that the criminal courts charge is to be treated as a fine imposed for an offence for the purpose of the Insolvency Act 1986, which means that bankruptcy does not release the bankrupt from liability in respect of the criminal courts charge.

267. *Paragraph 7* enables regulations to be made to allow payment of the criminal courts charge to be secured by deduction from social security benefits. The power already exists in relation to fines and compensation orders.

268. *Paragraph 9* makes clear that the criminal courts charge can be ordered when an offender is discharged absolutely or conditionally.

269. *Paragraph 10* adds the criminal courts charge to the disposals in consequence of which the Crown Court can order that an offender before it be searched and any money found applied towards sums payable by the offender.

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270. *Paragraph 11* amends section 151 of the Criminal Justice Act 2003 to provide that the criminal courts charge is not to be taken into account for the purpose of identifying whether someone is a persistent offender previously fined.

271. *Paragraphs 12, 13 and 14* provide that where there are rights of appeal against orders made when the court is dealing with an offender for breach of supervision requirements, a community order or suspended sentence order, those rights of appeal can be exercised in relation to the criminal courts charge ordered in respect of those breach proceedings.

### **Clause 30: Duty to review criminal courts charge [j6206]**

272. Clause 30 requires the Lord Chancellor to carry out a review of the operation of the criminal courts charge after the end of an initial period. *Subsection (2)* specifies that the initial period is three years after the criminal courts charge provisions come into force. *Subsection (3)* requires the Lord Chancellor to repeal the criminal courts charge provisions should he consider it appropriate to do so having regard to the conclusions reached on the review. *Subsection (4)* enables the Lord Chancellor to make consequential and transitional provisions in regulations providing for the criminal courts charge provisions to be repealed. *Subsections (5) and (6)* require the regulations to be made by statutory instrument, subject to the affirmative procedure.

### ***Collection of fines etc***

#### **Clause 31: Variation of collection orders etc**

273. Clause 31 amends Schedule 5 to the Courts Act 2003 (collection of fines and other sums imposed on conviction). That Schedule concerns the powers of fines officers to collect and enforce sums treated as adjudged to be paid by a conviction of a magistrates' court. Such sums include sums payable under compensation orders and fines and will include the criminal courts charge. This clause makes changes to the powers of fines officers to vary court orders about the payment of sums adjudged. These court orders are known as collection orders.

274. *Subsection (3)* amends paragraph 22 of Schedule 5 to provide that an offender may apply to a fines officer for the payment terms in a collection order to be varied at any time, including when he or she has defaulted on a collection order. Currently, the power to vary payment terms only exists while an offender is not in default. This subsection also amends paragraph 22 to provide that a fines officer can vary payment terms or reserve terms in a way which is less favourable to the offender. At present, the power of variation is limited to variations in the offender's favour. Less favourable changes will however be made only with an offender's consent.

275. "Payment terms" are terms requiring an offender to pay sums within a period or by instalment. "Reserve terms" are, like payment terms, terms requiring an offender to pay sums within a period or by instalment. Reserve terms only have effect if the offender is subject to an attachment of earnings order or application for benefit

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deductions and such an order or application has failed.

276. *Subsection (5)* makes the same changes to the power to vary reserve terms as made by subsection (3) for reserve terms.

277. *Subsections (4) and (6)* amend Schedule 5 to provide that an application by an offender for variation of payment terms or reserve terms once the offender is in default does not prevent the fines officer taking the enforcement action in, respectively, Parts 7 and 9 of Schedule 5. Part 7 involves the fines officer on first default making an attachment of earnings order or application for benefit deductions unless impracticable or inappropriate. Under Part 9, the fines officer must either refer the case to a magistrates' court or issue a notice setting out the further enforcement steps to be taken.

### ***Appeals in civil proceedings***

#### **Clause 32: Appeals from the High Court in to the Supreme Court**

278. Clause 32 amends section 12 and 16 of the Administration of Justice Act 1969 in order to widen the scope for appeals from the High Court to be made directly to the Supreme Court.

279. *Subsection (2)* amends subsection (1) of section 12 and provides for an appeal to the Supreme Court where the alternative conditions in subsection (3A) of section 12 (inserted by *subsection (3)* of this clause) are satisfied. *Subsection (2)* also removes the requirement for all parties to the proceedings to consent to a leapfrog appeal.

280. *Subsection (3)* inserts a new subsection (3A) into section 12 which provides that a certificate for appeal straight to the Supreme Court may be granted where the appeal raises a point of law of general public importance and one of three conditions (set out in paragraphs (a) to (c) of the new subsection) is met. The effect of this is to expand the circumstances under which an appeal is allowed to leapfrog, to include cases which raise issues of national importance or cases where the result is of particular significance or cases where the benefits of not delaying consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal. Appeals will still have to be on a point of law of general public importance.

281. Currently under the 1969 Act leapfrogging to the Supreme Court from the High Court in Northern Ireland is possible in the same circumstances as from the High Court in England and Wales. *Subsection (4)*, however, inserts a new subsection (1A) into section 16 of the Administration of Justice Act 1969. The effect of this new subsection is that section 12 of the Administration of Justice Act 1969 will continue to apply in relation to Northern Ireland as if the changes made by subsection (2) and (3) were not made.

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**Clause 33: Appeals from the Upper Tribunal to the Supreme Court**

**Clause 34: Appeals from the Employment Appeal Tribunal to the Supreme Court**

**Clause 35: Appeals from the Special Immigration Appeals Commission to the Supreme Court**

282. Clause 33 inserts new sections 14A to 14C in the Tribunals, Courts and Enforcement Act 2007 with the effect of allowing leapfrog appeals to the Supreme Court to be initiated in the Upper Tribunal under the same conditions as appeals from the High Court.

283. New section 14A establishes the conditions under which the Upper Tribunal may grant a certificate allowing an application for permission to appeal direct to the Supreme Court. It has the effect of replicating in the Upper Tribunal the conditions for the High Court granting a certificate as set out in the Administration of Justice Act 1969 (as amended by this Bill). *Subsections (1) to (5)* stipulate that, following an application by one of the parties to the proceedings, the Upper Tribunal may grant a certificate if a sufficient case has been made out to justify appeal to the Supreme Court and the decision of the Upper Tribunal involves a point of law of general public importance which meets the conditions set out in *subsection (4)(a) and (b) and subsection (5)(a) to (c)*. *Subsection (6)* requires the Upper Tribunal to specify which court would be the ‘relevant appellate court’ and *subsection (3)* establishes that the Upper Tribunal may only grant a certificate if the relevant appellate court is the Court of Appeal England and Wales or the Court of Appeal in Northern Ireland. A certificate may not therefore be granted if the relevant appellate court is the Court of Session in Scotland.

284. New section 14B sets out the procedure under which, following a certificate being granted by the Upper Tribunal, a party may seek permission to appeal to the Supreme Court. It has the effect of replicating the provisions of section 13 of the Administration of Justice Act 1969 (which apply to the High Court) in relation to the Upper Tribunal. *Subsection (2)* lays down the time limits for such an application. Under *subsection (4)* if a certificate is granted then there is a right to appeal direct to the Supreme Court and no appeal may be made to the relevant appellate court. *Subsection (6)* re-connects the right to appeal to the relevant appellate court only if the time for applying to the Supreme Court for permission has expired and, if the permission application is made, the Supreme Court has refused that application.

285. New section 14(C) establishes certain exclusions from the granting of a certificate by the Upper Tribunal. It has the effect of replicating the provisions of Section 15 of the Administration of Justice Act 1969 (which apply to the High Court) in relation to the Upper Tribunal. Under *subsections (1) and (2)* no certificate may be granted if there would have been no right of appeal at all to the relevant appellate court or from the relevant appellate court to the Supreme Court. *Subsection (3)* provides that no certificate can be granted where no right of appeal to the relevant appellate court would exist without first obtaining permission to appeal, unless the Upper Tribunal considers that the case merits such permission being granted. In

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common with the position which applies in the High Court, the leapfrog provisions do not apply to appeals from decisions relating to contempt of court.

286. Clauses 34 and 35 amend the Employment Tribunals Act 1996, and the Special Immigration Appeals Commission Act 1997 respectively. They replicate the provisions applying to the Upper Tribunal in clause 33 of the Bill in relation to the Employment Appeals Tribunal and the Special Immigration Appeals Commission, with the effect of allowing leapfrog appeals to the Supreme Court to be initiated in these bodies under the same conditions as appeals from the High Court.

### ***Costs in civil proceedings***

#### **Clause 36: Wasted costs in certain civil courts**

287. Clause 38 amends section 51 of the Senior Courts Act 1981 and creates a duty for the court to consider whether to notify either the legal representative's regulator and/or the Legal Aid Agency when making a wasted costs order.

288. *Subsection (2)* inserts a new subsection (7A) in section 51. This provides that where a court makes a wasted costs order it must, if it considers it appropriate to do so, notify either an approved regulator (under the Legal Services Act 2007) or the Director of Legal Aid Casework.

289. *Subsection (3)* inserts new subsection (12A) into section 51 which defines an "approved regulator" and "the Director of Legal Aid Casework".

### ***Contempt of court***

#### **Clause 37: Strict liability: limitations and defence in England and Wales**

290. Clause 37 makes amendments to the Contempt of Court Act 1981 to clarify the scope of strict liability for contempt of court in England and Wales. Section 1 to that Act provides that "the strict liability rule" means the rule of law whereby conduct may be treated as contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.

291. Strict liability contempt can currently be committed only where the proceedings in question are "active" (as defined in Schedule 1 to the 1981 Act) at the "time of publication". The strict liability rule applies to (and only to) the period during which both the publication is available and the proceedings in questions are active. Most criminal proceedings become active from the time an arrest warrant is issued or at the point of arrest and cease to be active when the defendant is acquitted or sentenced.

292. *Subsection (2)* inserts a new subsection (2A) into section 2 of the Contempt of Court Act 1981 so as to provide that, in England and Wales, the strict liability rule applies to a publication only when proceedings are active at a time when the publication is available to the public or a section of the public. This ensures that

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material made available to the public prior to active proceedings, but which is still available during active proceedings, can be covered by the 1981 Act. The liability in respect of such material is subject to new section 4A of the Contempt of Court Act 1981, referred to below.

293. *Subsection (3)* inserts a new subsection (5) into section 3 of the Contempt of Court Act 1981 (defence of innocent publication or distribution) to ensure that a person continues to have the defence under that section as regards the making available of matter until the person has relevant knowledge or a reason to have a relevant suspicion.

294. *Subsection (4)* inserts a new subsection (5) into section 4 of the Contempt of Court Act 1981 (defence relating to contemporary reports of proceedings) to limit the defence so that it applies only as regards strict liability for contempt of court in connection with the proceedings that are the subject of the report and other proceedings that are active when the report is first published.

295. *Subsection (5)* inserts a new section 4A into the Contempt of Court Act 1981 to provide that a publication will not be treated as being in contempt of court under the strict liability rule in England and Wales in connection with proceedings where it is first made available before the proceedings are active. However, if the Attorney General gives the person a notice informing the person that there are active proceedings in respect of which the publication may be contemptuous, this defence ceases to be available to the person in connection with those proceedings.

296. *Subsection (6)* amends section 21 of the Contempt of Court Act 1981 to specify that the new provisions do not extend to Scotland or to Northern Ireland.

#### **Clause 38: Strict liability: appeal against injunction**

297. Clause 38 provides that if a person is subject to an injunction granted under the Senior Courts Act 1981 in respect of material that is judged to constitute contempt under section 1 of the Contempt of Court Act 1981, the person can appeal against that injunction to the Court of Appeal.

#### ***Juries and members of the Court Martial***

#### **Clause 39: Upper age limit for jury service to be 75**

298. Clause 39 will increase the upper age limit for jury service from 70 to 75, enabling a person to serve as a juror up to their 76<sup>th</sup> birthday.

#### **Clause 40: Jurors and electronic communications devices**

299. Clause 40 inserts new section 15A into the Juries Act 1974, to create a statutory discretionary power for a judge to order a juror to surrender their electronic communication devices for a period of time. Subsection (2) of new section 15A outlines that the order can only be made if the judge considers that the order is necessary or expedient in the interests of justice, and that the terms of the order are a

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proportionate means of safeguarding those interests.

300. The order can specify a period for which the devices must be surrendered, but that period must be during one of the occasions set out in subsection (3) of new section 15A, such as when the members of the jury are in court, and the order may also be subject to exceptions (see subsection (4) of new section 15A).

301. Failure to surrender a device following such an order is a contempt of court (subsection 5).

302. Paragraph 1 of Schedule 7 creates an identical power for senior coroners by amending Part 4 of the Courts Act 2003.

**Clause 41: Jurors and electronic communications devices: powers of search etc**

303. Clause 41 inserts a new section 54A into the Courts Act 2003. This provides that a court security officer (acting in the execution of the officer's duty) must, if ordered to do so by a judge or a senior coroner who has made an order for the surrender of such devices, search a member of the jury in order to determine whether the juror has failed to surrender such a device. If the search reveals a device which is required by the order to be surrendered then (a) the officer must ask the juror to surrender the device, and (b) if the juror refuses to do so, the officer may seize it (subsection (4) of new section 54A).

304. Subsection (3) of new section 54A places limits on the court security officer's power to require a person to remove clothing for the purposes of the search.

305. *Subsection (3)* of clause 43 amends section 55 of the Courts Act 2003. It inserts a new subsection (1A) which outlines that a court security officer may retain the article that was surrendered or seized until the end of the period specified in the order made under the Juries Act 1974 or the Coroners and Justice Act 2009.

306. Paragraph 1 of Schedule 7 creates a similar power of search for coroners' officers. It also inserts a new section 9B(8) into the Coroners and Justice Act 2009, which makes provision equivalent to that in section 56 of the Courts Act 2003. This ensures that the Lord Chancellor can make regulations in relation to juries in inquests in the same way as he can for juries under the Courts Act 2003. These regulations allow him to make provision as to the retention and disposal of articles seized.

**Clause 42: Research by jurors**

307. Clause 42 inserts a new section 20A into the Juries Act 1974, which creates the offence of juror research. This will make it an offence for a juror intentionally to seek information during the "trial period" (defined in subsection (5)) where he or she knows, or ought to reasonably know, that the information sought is or may be relevant to the case.

308. Subsections (3) - (5) of new section 20A set out more detail about the

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circumstances in which the offence will apply, including: a non-exhaustive list of the circumstances in which a person may be considered to be seeking information (subsection (3)) and types of information considered relevant to the case (subsection (4)).

309. Subsections (6) and (7) of new section 20A set out circumstances in which a person would not be guilty of the research by jurors offence. This includes where the person needs the information for a reason not connected with the case (subsection (6)), or in other circumstances including when he or she seeks information from the judge or where the activity is done as part of his or her proper role as a juror (subsection 7)).

310. Subsections (8) and (9) of new section 20A set out the penalty for an offence under this section (imprisonment for up to 2 years or a fine or both) and provide that proceedings for such an offence can only be instituted by or with the consent of the Attorney General

311. *Paragraph 5* of Schedule 7 replicates the offence for members of the jury during an inquest by amending Part 1 of Schedule 6 to the Coroners and Justice Act 2009.

#### **Clause 43: Sharing research with other jurors**

312. Clause 43 inserts a new section 20B into the Juries Act 1974 to create a new offence for a member of a jury that tries an issue in a case before a court intentionally to provide information to another member of the jury during the trial period if (a) the member contravened section 20A of the Juries Act 1974 in the process of obtaining the information, and (b) the information has not been provided by the court.

313. Subsection (2) of new section 20B defines information which has been provided by the court.

314. Subsections (3) and (4) of new section 20B set out the penalty for an offence under this section (imprisonment for up to 2 years or a fine or both) and provide that the consent of the Attorney General is required to institute such an offence.

315. *Paragraph 5* of Schedule 7 replicates the offence for members of the jury during an inquest by amending Part 1 of Schedule 6 to the Coroners and Justice Act 2009.

#### **Clause 44: Jurors engaging in other prohibited conduct**

316. Clause 44 inserts new section 20C into the Juries Act 1974, which makes it an offence for a member of a jury trying a case before a court intentionally to engage in “prohibited conduct” during the trial period. Subsection (2) of the new section 20C defines prohibited conduct as conduct from which it may be reasonably concluded that the person intends to try the issue otherwise than on the basis of the evidence presented in the proceedings on the issue. Subsection (3) of the new section 20C

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outlines that an offence is committed whether or not the person knows the conduct is prohibited conduct. Subsections (4) and (5) of new section 20C outline circumstances in which an offence is not committed under this section.

317. Subsections (6) and (7) of new section 20C set out the penalty for an offence under this section (imprisonment for up to 2 years or a fine or both) and provide that proceedings for such an offence can only be instituted by or with the consent of the Attorney General.

318. Paragraph 5 of Schedule 7 replicates this offence for members of the jury during an inquest by amending Part 1 of Schedule 6 to the Coroners and Justice Act 2009.

#### **Clause 45: Disclosing jury's deliberations**

319. *Subsection (1)* introduces new sections 20D, 20E and 20F to the Juries Act 1974 and makes it an offence for a person intentionally (a) to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberation in proceedings before a court, or (b) to solicit or obtain such information, subject to the exceptions in new sections 20E and 20F.

320. Subsection (2) of new section 20D provides that the sentence for this offence is imprisonment for a term not exceeding 2 years or a fine (or both).

321. Subsection (3) of new section 20D sets out that proceedings for such an offence can only be instituted by or with the Attorney General's consent.

322. New section 20E provides for exceptions to the offence of disclosure of juror deliberations. These exceptions ensure that the offence does not operate so as to preclude proper investigations into alleged juror offences or irregularities.

323. Subsection (1) of new section 20E provides that it is not an offence under section 20D to disclose information in the proceedings in question for the purpose of enabling the jury to arrive at their verdict or in connection with the delivery of that verdict.

324. Subsection (2) of new section 20E provides that it is not an offence for a judge to disclose information for the purposes of dealing with the case or for the purposes of an investigation by a relevant investigator. Relevant investigator is defined in subsection (7).

325. Subsection (3) of new section 20E provides an exception to the offence where the person's disclosure is for the purposes of the investigation. For such a disclosure to be covered by this subsection, the person making the disclosure has to reasonably believe that the judge has made disclosure in accordance with subsection (2)(b). This ensures that legitimate disclosure other than to the judge can only be made where a

judge has decided that there is an issue that requires further attention.

326. Subsection (4) of new section 20E allows for the publication of information obtained by means of a disclosure described in subsection (1) or (2)(a).

327. Subsection (5) of new section 20E allows a person to solicit a disclosure or publication described in subsections (1) to (4).

328. Subsection (6) of new section 20E allows a person to obtain information by means of a disclosure described in subsections (1) to (4) or from a document that is available to the public or section of the public.

329. Subsection (7) sets out the meaning of ‘relevant investigator’ to include a police force, the Attorney General and any other persons or classes of persons specified in regulations by the Lord Chancellor with the consent of the Lord Chief Justice.

330. New section 20F provides that particular disclosures after the conclusion of the trial do not constitute an offence under section 20D. The purpose of these exceptions is to allow for disclosure to the Court of Appeal or the registrar of criminal appeals to ensure that any offence alleged to have been committed by or in relation to a juror can be investigated. Further disclosure can then be made by a judge of the Court of Appeal or the registrar of criminal appeals to a “relevant investigator” (defined in subsection (9) of new section 20F) to ensure that the alleged offence is investigated, and further disclosures can be made for the purposes of that investigation. Disclosure can also be made by the Court of Appeal or the registrar of criminal appeals to the defence in order that they may consider whether a ground of appeal against conviction may arise.

331. Subsection (5) of new section 20F provides that it is not an offence for a person to disclose information in evidence in proceedings for an offence or contempt of court by or in relation to a juror, or an appeal arising out of such proceedings.

332. Subsections (6), (7) and (8) of new section 20F provide that it is not an offence to publish information obtained by means of a legitimate disclosure under this section, nor is it an offence to solicit or obtain such a disclosure.

333. Subsection (9) of new section 20F sets out the meaning of ‘relevant investigator’ to include a police force, the Attorney General, the Criminal Cases Review Commission, other listed persons and any other persons or classes of persons approved by the Lord Chancellor with the consent of the Lord Chief Justice.

334. Subsection (9) of new section 20F also defines the term “publish” as meaning to make available to the public or a section of the public, as well as the term “relevant investigator” as outlined above.

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335. *Subsection (2)* of clause 45 repeals section 8 of the Contempt of Court Act 1981 as it extends to England and Wales, on the basis that this new offence covers similar conduct to that provision.

336. *Subsections (3) and (4)* clarify that section 8 of the Contempt of Court Act 1981 will continue to apply in relation to Scotland and Northern Ireland.

337. Paragraph 5 of Schedule 7 replicates this offence for members of the jury during an inquest.

**Clause 46: Juries at inquests and Schedule 7: Juries at inquests**

338. Schedule 7 makes provision about juries at inquests and their deliberations including surrender of electronic devices by jurors and creation of offences of juror misconduct.

**Clause 47: Members of the Court Martial**

339. Clause 47 gives effect to Schedule 8 which amends Chapter 2 of Part 7 of the Armed Forces Act 2006, and inserts a new Schedule 2A into that Act. New Schedule 2A creates new service offences and one new civilian offence relating to lay members and other members of the Court Martial and their deliberations. These offences mirror the new civilian juror offences created in clauses 42-45 of this Bill, adapted for the purposes of the service justice system.

**Schedule 8: Members of the Court Martial**

340. Clauses 42-45 create 4 new offences for various types of contempt which may be committed by civilian jurors. It is important for the protections afforded to defendants in the civilian justice system to be replicated as far as possible in the service justice system. This Schedule inserts a new Schedule 2A to the Armed Forces Act 2006 to create 4 equivalent service offences which may be committed by a lay member of the Court Martial. For one of the offences, disclosing information about members' deliberations, it has also been necessary to create a new civilian offence to provide the same protection for lay members as is offered by clause 45.

341. These new offences will apply wherever the Court Martial sits. Whilst the Attorney General's consent will be required for proceedings for the civilian offence, as is normally the case in the service justice system his consent will not be required to prosecute the new service offences.

342. *Paragraph 2* of Part 1 of this Schedule inserts a new section 163A into the Armed Forces Act 2006. New section 163A gives effect to a new Schedule 2A to be inserted into the Armed Forces Act 2006 and which makes provision about the new service offences.

***New Schedule 2A to the Armed Forces Act 2006: Offences relating to members of the Court Martial***

343. Paragraph 1 of new Schedule 2A to the Armed Forces Act 2006 defines "lay

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member” and “the trial period” for the purposes of that Schedule. The trial period is defined as beginning when the lay member is sworn to try the case and ends when proceedings terminate or the lay member is discharged. This is intended to limit the period of time during which the lay members can commit these offences. It also makes clear that the offences may be committed by all lay members of the Court Martial (or in one case members) whether or not they are or were subject to service law or civilians subject to service discipline at the time of committing the offence.

***Paragraph 2 of new Schedule 2A: Research by lay members***

344. Paragraph 2 of new Schedule 2A creates the offence of research by lay members. This will make it an offence for a lay member intentionally to seek information where he or she knows, or ought reasonably to know, that the information sought is or may be relevant to the case.

345. Paragraphs 2(3) and (4) of new Schedule 2A set out more detail about the circumstances in which the offence will apply, including: the ways in which a person may seek information (sub-paragraph (3)) and types of information considered relevant to the case (sub-paragraph (4)).

346. Paragraph 2(5) and (6) of new Schedule 2A clarify the circumstances in which a person would not be guilty of an offence. This includes where the person needs the information for a reason not connected with the case (sub-paragraph (5)), or in other circumstances including when he or she seeks information from the judge or a member of the Military Court Service (sub-paragraph (6)).

347. Paragraph 2(7) of new Schedule 2A sets out the penalty for an offence under this paragraph.

***Paragraph 3 of new Schedule 2A: Sharing research with other lay members***

348. Paragraph 3 of new Schedule 2A creates a new offence for a lay member intentionally to provide information to another lay member during the trial period if (a) the member contravened paragraph 2 of new Schedule 2A in the process of obtaining the information, and (b) the information has not been provided by the Court Martial in the course of the proceedings.

349. Paragraph 3(2) of new Schedule 2A defines information which has been provided to the Court Martial during the course of proceedings.

350. Paragraph 3(3) of new Schedule 2A sets out the penalty for an offence under this paragraph.

***Paragraph 4 of new Schedule 2A: Engaging in other prohibited conduct***

351. Paragraph 4 of new Schedule 2A creates a new offence for a lay member intentionally to engage in “prohibited conduct” during the trial period. Paragraph 4(2) of new Schedule 2A defines prohibited conduct as conduct from which it may be

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reasonably concluded that the person intends to make a finding or decision otherwise than on the basis of the evidence presented in the proceedings. Paragraph 4(3) of new Schedule 2A outlines that an offence is committed whether or not the person knows the conduct is prohibited conduct. Paragraphs 4(4) and (5) of new Schedule 2A outline the circumstances where an offence is not committed under this paragraph.

352. Paragraph 4(6) of new Schedule 2A sets out the penalty for an offence under this paragraph.

***Paragraph 5 of new Schedule 2A: Disclosing information about lay members deliberations***

353. Paragraph 5 of new Schedule 2A makes it an offence for a person intentionally (a) to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of the Court Martial in the course of their deliberations, or (b) to solicit or obtain such information, subject to the exceptions in paragraphs 6 and 7.

354. Paragraph 5(2) of new Schedule 2A sets out the penalty for an offence under this paragraph where the person who is guilty of the offence was a member of the Court Martial for proceedings, or at the time the offence was committed was a person subject to service law or a civilian subject to service discipline.

355. Paragraph 5(3) of new Schedule 2A sets out the penalty for any other person guilty of an offence, e.g. a civilian guilty of soliciting this information. Proceedings for such an offence against an individual subject neither to service law nor to service discipline, can only be instituted by or with the Attorney General's consent as it is a civilian offence.

356. Paragraph 5(4) of new Schedule 2A provides that the Crown Court will have jurisdiction to try an offence under paragraph 5 committed in England and Wales by an individual subject neither to service law nor to service discipline sentence (and not described in paragraph 5(2), over whom the Court Martial would not have jurisdiction, notwithstanding that the members of the Court Martial may have been sitting in a Court Martial outside England and Wales.

***Paragraphs 6 and 7 of new Schedule 2A: Initial and further exceptions to paragraph 5***

357. Paragraphs 6 and 7 of new Schedule 2A provide a series of exceptions to the paragraph 5 offence. Paragraph 6 provides for the "initial exceptions" which largely cover excepted disclosures during the trial period. These permitted disclosures are allowed for the purposes of investigating a possible offence under paragraph 5. The disclosures may be made to a number of defined "relevant investigators", such as a police force. Paragraph 7 then provides for "further exceptions" which are largely focused on post-trial disclosures to the Court Martial Appeal Court, the Service Prosecuting Authority (or their civilian equivalents) for the purposes of investigating a potential paragraph 5 offence. The list of "relevant investigators" in paragraphs 6(7)

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and 7(9) may be specified for the purposes of those paragraphs by the Lord Chancellor by regulations with the consent of the Lord Chief Justice of England and Wales.

***Paragraph 8 of new Schedule 2A: Saving for contempt of court***

358. Paragraph 8 of new Schedule 2A provides that paragraphs 2, 3 and 4 do not affect what constitutes contempt of court at common law nor what may be certified under section 311 of the Armed Forces Act 2006 (the service court's power to refer contempts to a civilian court which has the power to commit for contempt).

***Part 2 of Schedule 9: Further amendments***

359. *Paragraph 5* of Part 2 of this Schedule amends section 50(2) of the Armed Forces Act 2006 to add the new service offences to that subsection.

360. *Paragraph 6* of Part 2 of this Schedule amends section 50(2) of the Armed Forces Act 2006 to exclude these new offences from the jurisdiction of the Service Civilian Court.

361. *Paragraph 8* of Part 2 of this Schedule inserts two of the new service offences, those in paragraphs 4 and 5 of new Schedule 2A to the Armed Forces Act 2006, into Schedule 2 of the Armed Forces Act 2006. The effect of that is that those offences will need to be referred to a service police force or the Director of Service Prosecutions under sections 113 and 116 of the Armed Forces Act 2006 for investigation.

**Clause 48: Supplementary provision**

362. *Subsection (1)* amends the Juries Act 1974 (persons disqualified for jury service) to provide that a person who at any time in the last 10 years has been convicted of any of the new offences inserted into the Juries Act 1974 or Schedule 6 to the Coroners and Justice Act 2009 or Schedule 2A to the Armed Forces Act 2006 by the provisions of the Bill will be disqualified from undertaking jury service for a period of ten years.

363. *Subsection (2)* makes clear that the creation of the new offences to be inserted in the Juries Act 1974 does not affect what constitutes contempt of court at common law. The common law of contempt of court is therefore unaffected by these new provisions. *Paragraph 7* of Schedule 7 makes equivalent provision in connection with the new offences inserted in the Coroners and Justice Act 2009.

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***Further provision***

**Clause 49: Minor amendments**

364. *Subsection (1)* makes a minor amendment to section 132 of the Powers of Criminal Courts (Sentencing) Act 2000 by replacing “House of Lords” with “the Supreme Court”.

365. *Subsection (2)* amends section 13 of the Tribunals, Courts and Enforcement Act 2007 to allow rules of court in Scotland to alter the test that is applied to applications for permission to appeal from the Upper Tribunal to the Court of Session. Section 23 of the Crime and Courts Act 2013 gave the Court of Session the power to introduce the requirement that an application for permission to appeal should demonstrate that an appeal would raise an important point of principle, or some other compelling reason for the court to hear it. *Subsection (2)* provides that the rules may also provide that the court should hear an appeal if an application demonstrates that the appeal would raise an important point of practice. *Subsection (2)* enables rules to bring the test applied to applications for permission to appeal from the Upper Tribunal in Scotland into line with the test applied to such applications in England and Wales and Northern Ireland.

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## **PART 4 – JUDICIAL REVIEW**

### ***Judicial review in the High Court and Upper Tribunal***

#### **Clause 50: Likelihood of substantially different outcome for applicant**

366. Clause 50 amends section 31 of the Senior Courts Act 1981 (“the 1981 Act”), which sets out the remedies available for judicial review and the requirement to get permission to proceed. The amendments require the High Court or Upper Tribunal to refuse a remedy or permission on an application for judicial review if it considers it highly likely that the defendant’s conduct in the matter in question would not have affected the outcome for the applicant.

367. *Subsection (1)* inserts new subsection (2A) into section 31 of the 1981 Act. New subsection (2A) provides that the High Court (a) must refuse to grant a remedy and (b) may not award damages on an application for judicial review where it considers it highly likely that the outcome for the applicant would have been substantially the same had the conduct complained of not occurred. For example, a public authority might fail to notify a person of the existence of a consultation where they should have, and that person does not provide a response where they otherwise might have. If that person’s likely arguments had been raised by others, and the public authority had taken a decision properly in the light of those arguments, then the court might conclude that the failure was highly unlikely to have affected the outcome. If it did, new subsection (2A) would mean it could not grant a remedy, and so the original decision would stand (in the absence of other challenges or factors).

368. *Subsection (2)* inserts new subsections (3B) and (3C) into section 31 of the 1981 Act. These new subsections will apply to a consideration of whether to grant permission to an application for judicial review.

369. New subsection (3B) provides that the High Court may of its own motion (without a party requesting it to) or must, on application of the defendant, consider whether the conduct complained of would have made a substantial difference to the outcome for the applicant when considering whether to grant permission to an application for judicial review. If it considers it highly unlikely that there would have been any substantial difference to the outcome, new subsection (3C) requires the High Court to refuse permission.

370. *Subsection (3)* inserts new subsection (8) into section 31 of the 1981 Act which provides the meaning of “the conduct complained of” in new subsections (3B) and (3C). Broadly, the conduct complained of will be the ground(s) for the judicial review. In the example above (concerning the consultation), the conduct complained of would be the failure to notify the individual.

371. *Subsections (4), (5) and (6)* make parallel provision to subsections (1), (2) and (3) for judicial reviews arising under the law of England and Wales in the Upper

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Tribunal by amending sections 15 and 16 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”).

**Clause 51: Provision of information about financial resources**

372. Clause 51 provides that where an applicant applies to the High Court under the law of England and Wales for permission to proceed with a judicial review, permission cannot be granted unless the applicant provides information about the financing of the judicial review.

373. *Subsection (1)* amends section 31(3) of the 1981 Act to prevent the High Court from granting permission for an applicant to proceed to judicial review unless the applicant has provided the court with information specified in rules of court on how the judicial review is financed.

374. *Subsection (2)* inserts a new subsection (3A) into section 31 of the 1981 Act which makes provision about the information that rules of court may require the applicant to provide. This information includes the source, nature and extent of any financial support that has been or is likely to be provided to the applicant for use in the judicial review proceedings; and if the applicant is a corporate body that cannot demonstrate that it has the financial resources needed to meet its costs liabilities, then rules may require information to be provided about the body’s membership and members’ ability to provide financial support for the judicial review.

375. *Subsections (3) and (4)* insert new subsections into section 16 of the 2007 Act which makes parallel provision about the provision of information about the financing of judicial reviews in the Upper Tribunal.

**Clause 52: Use of information about financial resources**

376. Clause 52 applies to the High Court, the Upper Tribunal and the Court of Appeal in deciding liability for costs in judicial review proceedings under the law of England and Wales. The High Court and the Court of Appeal have a broad discretion under section 51 of the 1981 Act which enables them to determine by whom and to what extent costs are to be paid. The Upper Tribunal has similar discretion under section 29 of the 2007 Act.

377. *Subsection (2)* provides that when making costs orders the courts must have regard to information about the financing of proceedings provided pursuant to section 31 of the 1981 Act or section 16 of the 2007 Act, as amended by clause 51, and any additional information about financing provided in accordance with rules of court or the Tribunal Procedure Rules.

378. *Subsection (3)* stipulates that when a court or tribunal is considering an order for costs it must consider whether to order costs to be paid by a person who, although not a party to the judicial review, has financially assisted the proceedings.

379. *Subsection (4)* defines the types of proceedings which are ‘judicial review

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proceedings' for the purpose of this clause, which include judicial reviews being appealed.

**Clause 53: Interveners and costs**

380. Clause 53 establishes a presumption that interveners in a judicial review will pay their own costs and, in addition, any costs incurred by any other party because of the intervention, unless there are exceptional circumstances which justify a different order. This applies to judicial review proceedings in the High Court and the Court of Appeal.

381. *Subsection (1)* states that this clause applies in judicial review proceedings where a party who is not a party to the judicial review (an 'intervener') has been granted permission by the court to either provide evidence or make submissions on the case. The effect is that the clause only applies where an intervener applies to the court, since a person or body invited by the court to intervene is not granted permission, and is accordingly not in the same position.

382. *Subsections (2) and (3)* stipulate that a court cannot order a relevant party to the judicial review to pay any costs the intervener incurs unless the court considers there are exceptional circumstances.

383. *Subsections (4) and (5)* stipulate that the court must order an intervener to pay any additional costs incurred by a "relevant party" to the proceedings (see *subsection (8)*), if the party makes such an application, unless there are exceptional circumstances which would make this inappropriate.

384. *Subsection (6)* explains that in deciding whether there are exceptional circumstances where an intervener should have their costs paid, or should not pay costs (as set out in *subsections (3) and (5)*), the court must have regard to criteria set out in rules of court.

385. *Subsection (7)* defines the types of proceedings which are 'judicial review proceedings' for the purpose of this clause.

386. *Subsection (8)* defines a relevant party as the applicant or defendant or, on an appeal from a judicial review decision, the appellant or respondent, or any other person directly affected by the judicial review who has been served with the application for judicial review or leave to appeal the judicial review.

**Clause 54: Capping of costs**

387. Clause 54, along with clauses 55 and 56, removes the ability of the High Court and the Court of Appeal to award costs capping orders in a judicial review case unless specified criteria are met. A costs capping order is an order that removes or limits the liability of a party to the proceedings (whether only for the claimant or both the claimant and the defendant) to pay another party's costs incurred in bringing or defending a judicial review. This type of order, as developed in case law, is

commonly referred to as a “Protective Costs Order”.

388. *Subsection (1)* provides that a costs capping order may only be made in accordance with this clause and clauses 55 and 56.

389. *Subsection (2)* defines a costs capping order as an order which limits the costs liability of any party to a judicial review.

390. *Subsections (3) and (4)* provide that a costs capping order may only be made when leave to bring a judicial review has been granted and the applicant for judicial review has made an application for such an order in accordance with rules of court.

391. *Subsection (5)* requires an applicant for a costs capping order to provide such information to the court as may be specified in rules of court, and makes it clear that this can include information about the source, nature and extent of any financial support that has been or is likely to be provided to the applicant for use in the judicial review proceedings; and if the applicant is a corporate body that cannot demonstrate that it has the financial resources needed to meet its costs liabilities, information about the body’s membership and its members’ ability to provide financial support for the judicial review.

392. *Subsection (6)* allows a court to make a costs capping order only if it is satisfied that the judicial review proceedings are “public interest proceedings” (defined in *subsection (7)*) and that, if a costs capping order is not made, the applicant for judicial review would no longer continue with the case and that it would be reasonable not to continue with the case.

393. *Subsection (7)* defines “public interest proceedings”. Proceedings are public interest proceedings if – and only if – an issue being argued in the case is of general public importance, it is in the public interest for that issue to be resolved and these judicial review proceedings are an appropriate means of resolving the issue. *Subsection (8)* makes provision about matters which the court must consider in deciding whether the proceedings are public interest proceedings. It sets out a non-exhaustive list of such matters, including the number of people who are likely to be directly affected if the judicial review succeeds, the likely effect on those people and whether the issues being argued involve consideration of a point of law of general public importance.

394. *Subsections (9), (10) and (11)* allow the Lord Chancellor to amend subsection (8) by adding, removing or amending a matter that a court must consider when deciding whether proceedings are public interest proceedings. Amendment must be made by statutory instrument (subject to the affirmative resolution procedure).

395. *Subsection (12)* defines what is meant by the terms ‘costs capping order’ and ‘judicial review proceedings’: in particular, it makes it clear that proceedings on appeal are covered. Furthermore, it specifies that references to the court in this

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section are only references to the High Court or the Court of Appeal.

396. *Subsection (13)* explains that for the purposes of this section and section 57 the term ‘applicant for judicial review’ means the person who is or was the applicant who brought the application for judicial review and references to relief being granted include where the decision to grant relief has been upheld on any appeal brought against that decision.

**Clause 55: Capping of costs: orders and their terms**

397. Clause 55 sets out the way in which the High Court and the Court of Appeal should approach the decision whether to make a costs capping order and decisions about the terms of the order.

398. *Subsection (1)* requires the court to consider certain matters when considering whether to make such an order and (if it does decide to make an order) the terms of the order. These include the financial resources of the parties, including any third party who has provided or may provide financial support; the extent to which the applicant - or any other person who has provided or may provide funding - will benefit from the costs capping order if the applicant succeeds in the judicial review; whether the applicant’s legal representatives are acting free of charge; and whether the applicant is an appropriate person to bring the judicial review on behalf of the wider public.

399. *Subsection (2)* requires that where the court makes a costs capping order limiting the applicant’s liability for the defendant’s costs in the event of the application for judicial review not being successful, the court must also make an order limiting the defendant’s liability for the applicant’s costs in the event of the judicial review succeeding.

400. *Subsections (3), (4) and (5)* allow the Lord Chancellor to amend subsection (1) by adding, amending or removing matters that the court must have regard to when considering whether to make a costs capping order and the terms of the order (subject to affirmative resolution procedure).

401. *Subsection (6)* defines the terms ‘free of charge’ and ‘legal representative’.

**Clause 56: Capping of costs: environmental cases**

402. Clause 56 enables provision to be made excluding from the codified regime established under clauses 54 and 55 judicial reviews about issues which, in the Lord Chancellor’s opinion, relate entirely or partly to the environment. Different considerations may apply in those cases (and a separate costs protection regime, which is set out in the Civil Procedure Rules, already applies).

403. *Subsections (1), (2) and (3)* allow the Lord Chancellor to set out in regulations (subject to negative resolution) the types of judicial review that are excluded from the costs capping regime set out in these clauses. This clause does not require all cases

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which may be argued to relate to the environment to be excluded.

### ***Planning proceedings***

#### **Clause 57: Leave of court required for certain planning proceedings**

404. Clause 57 amends section 288 of the Town and Country Planning Act 1990 (proceedings for questioning the validity of certain orders, decisions and directions) to provide that applications under that section relating to an English matter may only be brought with the leave of the High Court.

405. *Subsection (3)* inserts new subsections (3A) and (3B) into section 288. New subsection (3A) imposes the requirement to obtain the leave of the High Court for the making of an application relating to an English matter. New subsection (3B) provides that an application for leave to make such an application must be brought within 6 weeks of the confirmation or taking effect of the order, or the taking of the action which is being challenged.

406. *Subsection (4)* inserts new subsection (5A) into section 288. This provides that the High Court may, when considering whether to grant leave to make an application concerning an English matter, suspend the operation of an order or action that is being challenged until final determination of the question of whether leave should be granted or, where leave is granted, until the final determination of the proceedings themselves.

407. *Subsection (5)* amends section 288(6), so as to provide that the power under new subsection (5A) of section 288 is not available where leave is sought to make an application questioning the validity of a tree preservation order.

408. *Subsection (6)* inserts new subsection (9A) into section 288, defining an “English matter” as an order to which section 288 applies which is made by a local planning authority in England, a mineral planning authority in England or the Secretary of State, or action taken by the Secretary of State to which section 288 applies.

409. *Subsection (7)* inserts new subsection (11) into section 288, confirming that references to an application under section 288 elsewhere in the Town and Country Planning Act 1990 do not include an application for leave for the purposes of new subsection (3A).

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## **PART 5 – FINAL PROVISIONS**

### **Clause 58: Power to make consequential and supplementary provision etc**

410. This clause gives the Lord Chancellor or Secretary of State a power to make regulations containing consequential, supplementary, incidental, transitional, transitory or saving provision in relation to any provision of the Bill. Where such regulations amend primary legislation they will be subject to the affirmative procedure.

### **Clause 59: Financial provision**

411. Clause 59 provides that money is to be paid out of money provided by Parliament for any expenditure incurred by the provisions of the Bill and any increases in sums payable under other Acts as a result of this Bill (see paragraphs 419 to 436 for further details).

### **Clause 60: Commencement**

412. Clause 60 provides for commencement of the Bill (see paragraph 442 for further details). Part 5 is to come into force on the day the Act is passed.

### **Clause 61: Extent**

413. Clause 61 sets out the territorial extent of the Bill (see paragraphs 67 to 80 for further details).

### **Clause 62: Channel Islands, Isle of Man and British overseas territories**

414. Clause 62 sets out the powers available to extend provisions of Acts which the Bill is amending substantively to the Channel Islands, Isle of Man and/or British Overseas Territories.

### **Clause 63: Short title**

415. Clause 63 sets out the short title for the Bill providing that the Act may be cited as the Criminal Justice and Courts Act 2014.

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## **FINANCIAL EFFECTS**

416. The main financial implications of the Bill for the public sector lie in Parts 1 to 3. Some of the figures set out in the paragraphs below are based on a number of assumptions about implementation and are subject to change. Further details of the costs and benefits of individual provisions are set out in more detail in the published impact assessments.

417. Part 1 of the Bill introduces a range of criminal justice provisions, including changes to the sentencing framework, a new criminal offence and extension to an existing offence.

418. It is estimated that the provisions to restrict the use of simple cautions would result in a total cost of around £7m per year to the criminal justice system. This is broken down into costs of prohibiting the use of cautions for:

- indictable only offences (£1m);
- certain triable either way offences (£3m); and
- where the offender has been cautioned for a similar offence in the last two years (£3m).

419. These costs take into account pre-charging decision costs, prosecution costs and sentencing costs. The costs will be met by the police, Crown Prosecution Service, Her Majesty's Courts and Tribunals Service (HMCTS), the Legal Aid Agency and the National Offender Management Service (NOMS).

420. The impact of provisions to add certain offences to the dangerous offenders sentencing scheme and a new custodial sentence for certain serious violent and sexual offences will not be fully realised until 2030. It is estimated that there would be no increase in the prison population or Parole Board hearings in the current Spending Review period (ending March 2015), with an increase of less than 10 prison places and less than 50 Parole Board hearings per year in the next Spending Review period (ending March 2016) and an increase of 200 prison places and 300 Parole Board hearings in the following Spending Review period. In the longer term, it is estimated that there will be an increase of 1,000 prison places and 1,100 Parole Board hearings per year by 2030.

421. It is estimated that the new test to deter offenders from repeatedly breaching their licence conditions or wilfully refusing to submit to supervision will impact an additional 75 offenders per year and require up to an additional 50 prison places at a cost of around £1.5m per annum.

422. The creation of a new offence of 'being unlawfully at large following recall to custody' and the increase in the maximum sentence for the Release on Temporary Licence offence are estimated to increase costs to the criminal justice system by up to

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£1.2m per annum from 2015/16, falling to HMCTS, the Crown Prosecution Service and the Legal Aid Agency.

423. Part 1 of the Bill also introduces a power to require the imposition of Electronic Location Monitoring (ELM) as a licence condition for offenders specified by order. It is not possible at this stage to provide the costs associated with ELM hardware and service provision, due to the ongoing process of procuring the equipment and associated services from private sector providers.

424. The Bill extends the extreme pornography offence in section 63 of the Criminal Justice and Immigration Act 2008 to cover depictions of rape and non-consensual penetrative sexual conduct. The estimated total cost per case is up to around £10K in 2013/14 prices. It is not possible to estimate the likely volumes for this offence, but they are likely to be minimal.

425. Part 2 of the Bill introduces provisions to create secure colleges for young offenders in England. We have undertaken detailed modelling of the additional costs that would be expected to be generated as a result of the development of new secure colleges. However, as the costs will be dependent upon the outcome of a competition for the construction and operation of a secure college, it would be inappropriate to publish these as it may prejudice the effectiveness of the competition.

426. Part 3 of the Bill contains provisions to change how the magistrates' courts deal with low-level, summary-only non-imprisonable offences. It is currently estimated that the discounted annual savings will be up to £10.6m per annum (at 2013/14 prices).

427. Part 3 of the Bill also contains provisions to recover some of the costs of the criminal courts from offenders in order to fund criminal courts. Analysis indicates that criminal costs charging will bring net savings in 2015/16.

428. Provisions to raise the upper age limit for jury service in England and Wales from 70 to 75 may incur additional costs of up to £100k in 2016/17 for HMCTS, however this is offset by a reduction in juror expenses payments of up to £1m per annum. The provisions may also result in implementation costs of up to £250k during 2015/16 which will fall to HMCTS. The measure is also like to result in a gain to GDP, which is currently estimated to be some £3-7m per year higher than otherwise from 2016/17 as fewer workers would be temporarily diverted away from their jobs as they are effectively replaced by economically inactive jurors.

429. The Bill includes provisions to create four new offences of juror misconduct and other measures including a discretionary power for a judge to order the temporary removal of electronic communication devices and the disqualification from jury service for 10 years for a person who has been found guilty of one of the new offences. The behaviour being made subject to the new criminal offences is already covered by common law contempt. The main difference would be the manner in which the

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misconduct was tried, and the procedures that would apply. The costs associated with the new procedures are likely to remain at a similar level to current costs.

430. Amendments of the provisions in the Contempt of Court Act 1981 relating to the strict liability rule and contempt of court will have minimal cost implications since cases are expected to be rare and would be administered by the Attorney General's Office (AGO). Data from the AGO, based on four previous cases, suggests that the average cost to the Attorney General to prosecute a strict liability contempt case is £43k.

431. Part 4 provides for the circumstances in which the High Court and the Upper Tribunal may refuse relief in judicial review proceedings and makes provisions about funding and costs in relation to such proceedings. The Bill introduces provisions to reduce the incidence of unmeritorious judicial reviews by providing financial incentives to discourage unmeritorious or frivolous cases. It has not been possible to fully monetise the impacts of this reform. One-off transition costs for HMCTS (such as adapting IT systems) are negligible. There are no anticipated costs for claimants as cases should be resolved more promptly.

432. The other provisions in the Bill are not expected to have a material financial impact on public sector bodies.

## **PUBLIC SECTOR MANPOWER**

433. Overall, the Bill will not have any significant impacts on public sector manpower.

434. However, in relation to the provisions which make changes to the framework for the sentencing and release of serious and dangerous sexual and violent offenders, there may be some public sector manpower commitments arising from these provisions, because these provisions will result in an increase in Parole Board hearings which will increase the workload and may result an increase in staffing requirements.

## **SUMMARY OF IMPACT ASSESSMENT**

435. The Bill is accompanied by an overarching impact assessment. A further fourteen impact assessments are available on individual provisions. The impact assessments, signed by Ministers, are available on the Parliament website.

*These notes refer to the Criminal Justice and Courts Bill (Bill 169)  
as introduced in the House of Commons on 5 February 2014.*

## **COMPATIBILITY WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS**

436. 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 by section 1 of that Act). The Secretary of State for Justice, the Rt. Hon. Chris Grayling MP, has made the following statement:

437. "In my view the provisions of the Criminal Justice and Courts Bill are compatible with the Convention rights."

438. The Government has published a separate ECHR memorandum with its assessment of the compatibility of the Bill's provisions with the Convention rights: the memorandum is available on the Ministry of Justice website

## **COMMENCEMENT**

439. The Bill will come into force on such day as the Secretary of State may appoint by order made by Statutory Instrument. Different days may be appointed for different purposes.

440. Part 5 is to come into force on the day the Act is passed.

# CRIMINAL JUSTICE AND COURTS BILL

## EXPLANATORY NOTES

*These notes refer to the Criminal Justice and Courts Bill as introduced in the House of Commons on 5 February 2014 [Bill 169]*

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*Ordered, by The House of Commons,  
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