

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011. They have been prepared by the Ministry of Justice in order to assist the reader in their understanding of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The Legal Aid, Sentencing and Punishment of Offenders Bill has 4 Parts and 23 Schedules.
- Part 1: Legal Aid**
4. Part 1 of the Access to Justice Act 1999 sets out the current statutory framework for legal aid in England and Wales. That Act established the Legal Services Commission (LSC), the non-departmental public body responsible for administering civil and criminal legal aid schemes in England and Wales. It also gives the Lord Chancellor powers to set the overall scope of legal aid, along with a number of powers and duties in relation to the LSC.
 5. In *The Coalition: Our Programme for Government*, the Government set out its intention to “carry out a fundamental review of Legal Aid to make it work more efficiently.”
 6. In March 2010, Sir Ian Magee published the conclusions of his review into the delivery of legal aid. A key recommendation was that consideration should be given to transferring the administration of the civil and criminal legal aid schemes to an executive agency of the Ministry of Justice. The previous Government announced later that month that it had accepted this recommendation. In November 2010 the Ministry of Justice published a consultation paper on proposals for reform of legal aid (see paragraph 7 below). In the paper the coalition Government stated that it had reached a similar conclusion and would seek to legislate when

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

parliamentary time allowed. The Bill therefore contains provisions to abolish the LSC and transfer the day-to-day administration of legal aid to the Lord Chancellor. In practice, this will be done by civil servants in an executive agency of the Ministry of Justice. However, decisions on legal aid in individual cases will be taken by a statutory office holder: a civil servant designated by the Lord Chancellor as the Director of Legal Aid Casework. The Lord Chancellor will have no power to direct or issue guidance to the Director in relation to individual cases.

7. The Ministry of Justice published a consultation paper entitled “*Proposals for the Reform of Legal Aid in England and Wales*”¹ on 15th November 2010. The consultation closed on 14th February 2011. On 21st June 2011 the Government published its response to the consultation, which set out its finalised proposals for reform². This Bill implements many of these proposals.

Part 2: Litigation funding and costs

8. The Ministry of Justice published on 15th November 2010 a further consultation paper entitled “*Proposals for reform of civil litigation funding and costs in England and Wales*”³ which relates to proposals from Lord Justice Jackson’s review⁴ (published in January 2010). This consultation exercise closed on 14th February 2011. On 29th March 2011 the Government published its response to the consultation exercise, announcing its intention to implement the proposals to reform “no win no fee” Conditional Fee Agreements (CFAs)⁵. This Bill implements these proposals.
9. On 9th September 2011, the Government announced its intention to ban referral fees in personal injury claims via written ministerial statement to Parliament⁶ as part of the wider package of reforms of civil litigation funding and costs and provision to achieve that is now made in Part 2 of the Bill.
10. In some circumstances, the courts have power to order that an amount in respect of costs incurred by a successful defendant, witness or successful appellant is to be paid out of central

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

² The Government’s response is available at: <http://www.justice.gov.uk>. It is Command Paper CM8072.

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

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

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

⁶ *Personal Injury Cases (referral fees)*, available at:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110909/wmstext/110909m0001.htm#11090987000046>

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

funds (in other words, out of money provided by Parliament). In the case of *R (on the application of the Law Society of England and Wales) v Lord Chancellor*⁷ in June 2010, the court held that the Lord Chancellor cannot cap the amounts that the courts award. This Bill will provide the Lord Chancellor with a power to do so for the purposes of proceedings in England and Wales, other than in relation to costs incurred in proceedings in the Supreme Court. It will also largely prevent orders being made in respect of legal costs (that is, lawyers fees, charges and disbursements including expert witness costs) where legal aid is available.

Part 3 Sentencing and Punishment of Offenders –

11. The current sentencing framework is broadly governed by the Criminal Justice Act 2003 (the 2003 Act).
12. In *The Coalition: Our Programme for Government*, the Government set out its intention to: “conduct a full review of sentencing policy to ensure that it is effective in deterring crime, protecting the public, punishing offenders and cutting reoffending.”
13. On 7 December 2010, the Ministry of Justice published a consultation paper entitled “*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*”⁸. The document set out the Government’s plans to cut crime and reoffending through fundamental changes to the criminal justice system. The consultation paper proposed a number of reforms to the existing sentencing legislation including a number of changes to the sentencing framework, reform of release and recall arrangements, and reforms to the youth justice system. The consultation ran for 12 weeks and concluded on 4th March 2011. The Ministry of Justice published its response to the consultation on 21st June 2011. This Bill implements a number of the sentencing reforms that formed part of the consultation.
14. On 13th July 2011, the Ministry of Justice published a consultation paper entitled “*Options for dealing with squatting*.”⁹ The purpose of the consultation was to gather more information about the nature and extent of squatting in England and Wales, and to invite views on whether, and how, existing criminal and civil mechanisms should be strengthened to deal with it. The consultation ran for 12 weeks and concluded on 5th October 2011. The Ministry of Justice published its response to the consultation on 26th October 2011. Following the consultation clause 130 creates a new offence of squatting in residential buildings.

⁷ *R (on the application of the Law Society of England and Wales) v Lord Chancellor* available at www.bailii.org/ew/cases/EWHC/Admin/2010/1406.html

⁸ “*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*” Cm 7972 available at www.justice.gov.uk/consultations/consultation-040311

⁹ “*Options for dealing with squatting*” CP12/2011 available at www.justice.gov.uk/consultations/dealing-with-squatters.htm.

SUMMARY

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

Part 1: Legal Aid

16. Part 1 of the Bill abolishes the Legal Services Commission and places a duty on the Lord Chancellor, subject to the provisions of Part 1, to secure the availability of civil and criminal legal aid. The intention is that an executive agency within the Ministry of Justice will administer the delivery of legal aid services in England and Wales. However, in relation to decision-making in individual cases, the Bill requires the Lord Chancellor to designate a civil servant to be the Director of Legal Aid Casework (“the Director”). The Director will have statutory responsibility for taking decisions on legal aid in individual cases. The Bill prevents the Lord Chancellor from giving directions or guidance to the Director in relation to individual cases.
17. Provisions in Part 1 ensure that, together with the powers the Lord Chancellor has as a Minister of the Crown, the Lord Chancellor has power to enter into appropriate arrangements with others for them to provide legal aid. The Lord Chancellor will have power to set quality standards for those providing legal aid services and to make arrangements for accreditation and monitoring of such providers. (The LSC currently have accreditation schemes such as the Specialist Quality Mark, responsibility for which will fall to the Lord Chancellor once the LSC is abolished). The Lord Chancellor will have power to make provision in regulations about the payment of remuneration to those providing legal aid services.

Civil legal aid

18. Part 1 of the Bill defines civil legal services as encompassing advice, assistance and representation by legal professionals and also the services of non-legal professionals, including for example mediation and other forms of dispute resolution.
19. Part 1 of Schedule 1 describes the civil legal services that can generally be made available under the arrangements for civil legal aid.
20. The Bill also provides the Director with the power to require civil legal services not mentioned in Schedule 1 to be made available, *either* where the Director considers that it is necessary to make the services available because the failure to provide legal services to an individual would be a breach of the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or any rights of the individual to the provision of legal services that are enforceable EU rights, *or* where the Director considers that it is appropriate to make services available, in the particular circumstances of the case, having regard to any risk that failure to do so would result in a breach of such rights.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

21. The Bill requires the Director to determine whether an individual qualifies for civil legal services by reference to their financial resources (clause 20) and the criteria set out in regulations prepared by the Lord Chancellor. The Bill lists the factors which the Lord Chancellor must consider in setting those criteria. They are similar to the factors that the LSC is currently required to consider when setting the Funding Code criteria (see section 8(2) of the Access to Justice Act 1999).
22. The Bill also provides the Lord Chancellor with a power to make regulations about the making and withdrawal of determinations by the Director about civil legal aid, including regulations about the means by which an application for legal aid must be made. The regulations must make provision about the review of determinations and may make provision about appeals against determinations.

Criminal legal aid

23. Part 1 of the Bill makes provision for individuals in custody at a police station or facing criminal investigation to be able to secure the provision of advice and assistance and representation (usually by a duty solicitor). Determinations about whether individuals qualify for such services must be made having regard, in particular, to the interests of justice. The Bill confers power to require such determinations to be made subject to an assessment of the individual's financial resources and by reference to other criteria.
24. The Bill also provides for individuals to be provided with representation for criminal proceedings. Whether such services should be provided is to be determined having regard to the interests of justice and, where provided for in regulations, following an assessment of the individual's financial resources. Determinations about whether an individual qualifies for criminal legal aid will be made by the Director or by a court. Provisional determinations may be made in favour of individuals involved in a criminal investigation. Such a determination may be made, for example, where plea negotiations are initiated by a prosecutor under the guidelines issued by the Attorney General.

Contributions and costs

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

Providers of services

26. Part 1 of the Bill enables the Lord Chancellor to restrict the choice of provider in certain conditions, for example to providers who hold a contract with the Lord Chancellor to provide

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

such services. In publicly funded cases the professional relationship between provider and client is unaffected. The Bill restricts payments to providers of legal aid from other sources and enables regulations to provide that, where legal aid is withdrawn, the provider is still to be paid for work undertaken.

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

Part 2: Litigation funding and costs

28. Part 2 of the Bill contains provisions to implement reforms to the existing arrangements for civil litigation funding and costs as recommended by Lord Justice Jackson, a judge of the Court of Appeal, in his *Review of Civil Litigation Costs: Final Report*.¹⁰
29. This Part of the Bill also amends the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 to give the court powers to make orders in divorce proceedings, and corresponding civil partnership proceedings, for payments to be made by one party to another for the purposes of paying for legal services.
30. Part 2 of the Bill also provides for the prohibition in personal injury cases both of the payment of referral fees (for access to potential claimants) by regulated persons such as solicitors to third parties such as claims management companies and insurers, and of the receipt of such fees. Provision is also made for a power to extend the prohibition to other types of claim and legal services. It will be for the appropriate regulators, for example the Law Society, the Claims Management Regulator and the Financial Services Authority, to enforce the prohibition.
31. Part 2 of the Bill also amends the Prosecution of Offences Act 1985 by restricting the powers of the courts in England and Wales to order the payment out of central funds of amounts in respect of costs incurred by defendants, witnesses and appellants in criminal proceedings, particularly amounts in respect of legal costs (that is, lawyers' fees, charges and disbursements including expert witness costs). Similar restrictions are to be applied to amounts awarded by courts in England and Wales in respect of costs incurred by persons who make representations to the court in the course of references made by the Attorney General, persons who are discharged following extradition proceedings and persons involved in proceedings before the Court Martial Appeals Court. The restrictions will not apply in relation to costs incurred in proceedings in the Supreme Court.

¹⁰ Ministry of Justice (2010) "*Review of Civil Litigation Costs: Final Report*", available at <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>

Part 3: Sentencing and punishment of offenders

Chapter 1: Sentencing

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

- imposes a duty on courts to consider the imposition of compensation orders for certain types of offence;
- simplifies the provision setting out the court's duty to give reasons for and to explain the effect of a sentence imposed by the court;
- amends the court's power to suspend a prison sentence by increasing the length of sentences that can be suspended, giving the court discretion not to impose community requirements as part of the sentence and enabling it to impose a fine for breach of a suspended sentence order.
- makes a number of changes in relation to community orders for adults and offenders who are less than 18 years old. These are non-custodial sentences with specific treatment or behaviour requirements attached. It clarifies when community orders come to an end and makes amendments to certain requirements, in particular curfew requirements and mental health, drug rehabilitation and alcohol treatment requirements. It also creates a new power to prohibit foreign travel as part of an order.
- It provides for offences currently punishable by the magistrates' court on summary conviction with a maximum fine of £5,000 to be punishable by an unlimited fine instead and gives the Secretary of State power to increase the maximum sentences of certain other fines and the sums specified as levels 1- 4 on the standard scale of fines.

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

34. It also repeals an unimplemented provision in the 2003 Act relating to "Custody Plus", which was a new type of sentence for offenders sentenced to less than 12 months imprisonment, and intermittent custody, which would have enabled offenders to spend part of their sentence in prison and part in the community.

Chapter 2: Bail

35. Chapter 2 of Part 3 of the Bill makes a number of changes (contained in Schedule 11) to restrict the court's powers to remand adult unconvicted defendants in custody where it is

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

apparent that there is no real prospect that the defendant would receive a custodial sentence if convicted. A court would still be able to remand in custody for the defendant's own protection, or where there was a risk of further offending involving domestic violence.

36. A similar restriction on the remand to youth detention accommodation of defendants under 18 is made by Chapter 3 of Part 3 of the Bill.
37. In addition, the definition of 'young person' in the Bail Act 1976 is amended to include 17 year olds. This amendment is made as a consequence of changes to the provisions about remands for youths, the provisions for which are set out in Chapter 3 of Part 3 of the Bill.

Chapter 3: Remand of children otherwise than on bail

38. Chapter 3 of Part 3 creates new custodial remand provisions for under 18s who are charged with or convicted of a criminal offence or concerned in extradition proceedings. It repeals the existing framework set out in the Children and Young Persons Act 1969 and removes provisions under which 17 year olds are currently remanded in prison.
39. This Chapter makes provision for all under 18s who have been refused bail to be remanded in custody according to the same tests. It removes the existing distinctions based on age and gender and imposes a more rigorous test before under 18s can be remanded to youth detention accommodation.

Chapter 4: Release on licence etc.

40. Chapter 4 of Part 3 makes amendments to the 2003 Act provisions about the release and recall of prisoners. As amended by this Chapter, the 2003 Act will apply to all sentences to be imposed for offences committed after 4th April 2005 (the date on which the provisions of the 2003 Act came into force). The Chapter also contains a power to restate earlier enactments and transitional provisions. The exercise of this power will enable the release and recall of all prisoners (including those sentenced for offences committed before 4th April 2005) to be brought within the 2003 Act framework. The amendments to the 2003 Act will:
- make the crediting of remand time an administrative function (rather than dependent on a direction of the court);
 - simplify the calculation of crediting periods of remand on bail;
 - provide for the unconditional release of prisoners serving sentences of less than 12 months at the half-way point of sentence;
 - provide for additional restrictions for early release on Home Detention Curfew;
 - make provision for a revocation of a licence to be cancelled where a mistake was made;

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

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

Chapter 5: Dangerous offenders

41. Chapter 5 repeals provision in the 2003 Act about indeterminate sentences for public protection and extended sentences and replaces them with provision for life sentences to be imposed on conviction for a second serious offence and new provision for extended sentences.

Chapter 6: Prisoners etc

42. Chapter 6 gives the Secretary of State the power to make rules in respect of the employment and payment of prisoners and persons in young offender institutions aged 18 or over, including in respect of reductions in, deductions from or levies upon such payments.
43. Chapter 6 also includes amendments to the Repatriation of Prisoners Act 1984, which governs the transfer of prisoners to and from the United Kingdom. The amendments provide for transit through Great Britain of prisoners serving sentences of imprisonment and statutory protection from prosecution of prisoners transferred to Great Britain under international prisoner transfer arrangements.

Chapter 7: Out of court disposals

44. Chapter 7 contains amendments to the legislation under which police constables may issue a penalty notice for disorder and authorised persons may give conditional cautions. This

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

includes the introduction of a penalty notice with an education option and provision for conditional cautions to be given without the need to refer the case to the relevant prosecutor. The amendments also allow new types of conditions to be attached to a conditional caution given to a foreign offender without leave to enter or remain in the United Kingdom. The Chapter creates a new kind of youth caution. It also makes amendments to youth conditional cautions by making them more flexible.

Chapter 8: Offences

45. Chapter 8 creates new offences of threatening with an offensive weapon or an article with a blade or point thereby creating an immediate risk of serious physical harm with a maximum penalty of 4 years imprisonment. There will be a minimum sentence of 6 months imprisonment for persons aged 18 or over found guilty of this new offence (unless this would be unjust in all the circumstances) and a minimum sentence for persons aged 16 and 17 years old of a 4 month Detention and Training Order again unless it would be unjust in the circumstances.
46. It creates a new offence of causing serious injury by dangerous driving and a criminal offence of squatting in a residential building.
47. It also contains provision amending section 76 of the Criminal Justice and Immigration Act 2008 (reasonable force for the purposes of self-defence etc).

TERRITORIAL EXTENT AND APPLICATION

48. Clause 135 sets out the territorial extent of the Bill.
49. The majority of the Bill's provisions extend to England and Wales only, but certain provisions also extend to Scotland or Northern Ireland or both. The Bill addresses non-devolved and devolved matters.

Provisions in the Bill that extend to Northern Ireland

50. The following provision extending to Northern Ireland relates to excepted matters:
 - Schedule 8 amends the Court Martial Appeals Act 1968 and aligns the availability of legal costs under that Act with the availability of legal costs in criminal proceedings in England and Wales under the Prosecution of Offences Act 1985, as amended by the Bill.
51. The following provisions extending to Northern Ireland relate to transferred matters:

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

- Clause 21 enables the Director of Legal Aid Casework and others to obtain access to benefits information from the Department for Social Development in Northern Ireland and the Department of Finance and Personnel in Northern Ireland for the purpose of assessing individual financial eligibility for criminal and civil legal aid.
- Clause 32 restricts the circumstances in which information provided under clause 21 can be disclosed, including providing a criminal offence for disclosure in contravention of clause 32.
- Clause 39 and Schedule 6 make provision about sharing benefits information in relation to checking a person's financial eligibility for legal aid in Northern Ireland in two ways. First, they allow the chief executive of the Northern Ireland Legal Aid Commission (or other prescribed person) to request information from the Secretary of State and the Commissioners for Her Majesty's Revenue and Customs. Second, they allow the chief executive of the Northern Ireland Legal Aid Commission (or other prescribed person) to request information from the Department for Social Development in Northern Ireland and the Department of Finance and Personnel in Northern Ireland.

52. As these provisions relate to devolved matters, they required the consent of the Northern Ireland Assembly through a legislative consent motion. This was agreed to on 17th October 2011. If amendments are made to the Bill which further trigger a requirement for a legislative consent motion, the consent of the Northern Ireland Assembly will be sought for them.

Provisions in the Bill that extend to Scotland

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

- Schedule 8 amends the Court Martial Appeals Act 1968 and aligns the availability of legal costs under that Act with the availability of legal costs in criminal proceedings in England and Wales under the Prosecution of Offences Act 1985, as amended by the Bill.
- Clause 129 creates a new offence of causing serious injury by dangerous driving. The offence will extend to Scotland as well as England and Wales. The offence amends the Road Traffic Act 1988 and requires consequential amendments to the Road Traffic Offenders Act 1988. The subject matter of this legislation is reserved.

54. Clauses 119 and 120 relate to the transfer of prisoners into and out of Great Britain. International relations, including the negotiation of prisoner transfer arrangements are a reserved matter. However, consideration of individual transfers is a devolved matter. Clauses 119 and 120 make amendments to the Repatriation of Prisoners Act 1984. At the request of the Scottish Executive these amendments will apply to Scotland. The Sewel Convention

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. In this case the Scottish Executive has confirmed that it will seek the necessary Legislative Consent Motion.

Provisions in the Bill that apply in Wales

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

COMMENTARY

Part 1: Legal Aid

Provision of legal aid

Clause 1: Lord Chancellor's functions

56. Clause 1 gives the Lord Chancellor overall responsibility for legal aid.
57. *Subsection (1)* provides that the Lord Chancellor must secure that legal aid is made available in accordance with Part 1 of the Bill. "Legal aid" is defined in *subsection (2)* as civil legal services and advice, assistance and representation for criminal investigations and proceedings that are required to be made available under clauses 8, 9, 12, 14 or 15 or paragraphs 3 to 5 of Schedule 3.
58. *Subsections (3) and (4)* ensure that the Lord Chancellor has the power to arrange for the provision of general information about the law and legal system, including information about where people may obtain advice and assistance about the law and legal system, and to perform functions that support the Lord Chancellor's functions in relation to legal aid. For example, the Lord Chancellor may make arrangements for a legal advice helpline which, as well as assisting people who qualify for legal aid, would also be able to assist callers who do not qualify for legal aid by referring them to providers of appropriate services.

Clause 2: Arrangements

59. Clause 2 makes provision about the arrangements the Lord Chancellor may enter into in order to fulfil the Lord Chancellor's duty in clause 1 to secure the availability of legal aid and for the purposes of carrying out the Lord Chancellor's other functions under this Part.
60. As a Minister of the Crown, the Lord Chancellor has power, for example, to enter into contracts relating to the Lord Chancellor's functions. *Subsection (1)* ensures the Lord Chancellor may make any other arrangements appropriate for fulfilling the Lord Chancellor's functions in relation to legal aid and *subsection (2)* ensures that arrangements the Lord

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

Chancellor may enter into include arrangements of the type referred to in subsection (2), such as establishing a body to provide services.

61. *Subsection (3)* allows the Lord Chancellor to make regulations about remuneration for those providing legal aid services. Clause 41(1) provides that remuneration includes disbursements. This would include, for example, power to set the level of fees for lawyers and experts who are providing such services. Where such fee levels are set in regulations, or in other arrangements (such as contracts) made by the Lord Chancellor in relation to legal aid, *subsection (4)* provides that if the Lord Chancellor makes arrangements for a court, tribunal or other person to assess such remuneration, the court, tribunal or other person must apply the remuneration levels set by the Lord Chancellor.

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

Clause 3: Standards of service

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

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

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

Clause 4: Director of Legal Aid Casework

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

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

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

69. *Subsection (3)* requires the Director to comply with directions given by the Lord Chancellor and to have regard to guidance issued by the Lord Chancellor. *Subsection (5)* requires the Lord Chancellor to publish such guidance and directions. Examples of directions which may

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

be given include directions about the delegation of the Director's functions under clause 5 and directions about determinations in respect of exceptional cases under clause 9.

70. *Subsection (4)* provides for the independence of the Director in relation to decision-making in individual cases by providing that the Lord Chancellor may not give directions or guidance to the Director in relation to individual cases.

Clause 5: Delegation

71. Clause 5 makes provision about the delegation of the Lord Chancellor's and Director's functions.
72. *Subsection (1)* allows the Lord Chancellor to delegate the functions of the Lord Chancellor under clause 1(3), which would include aspects of the civil legal advice telephone helpline, and under clause 3, which may include delegating the accreditation and monitoring function to an outside organisation.
73. *Subsection (2)* allows the Lord Chancellor to make regulations delegating any functions that may be given to the Lord Chancellor under regulations made under Part 1 of the Bill.
74. *Subsection (3)* allows the Director to delegate the Director's functions. This enables the Director to delegate, for example, decision-making in relation to the merits of a legal aid application, the application of any relevant means test for a particular area of work in relation to a legal aid application and the ongoing monitoring of decisions.
75. *Subsection (4)* enables the Lord Chancellor to make regulations delegating the functions of the Director under regulations made under Part 1 of the Bill to any person or employee of that person authorised by the Director.
76. *Subsection (5)* provides that under clause 4 the Lord Chancellor may give directions to the Director about the delegation of the Director's functions. The Lord Chancellor will be able to require the Director to delegate, or not to delegate, particular functions and to give directions about the persons to whom the Director may or may not delegate those functions.
77. *Subsections (6) to (8)* ensure that a function of the Lord Chancellor or Director may be delegated entirely or subject to limitations or conditions. For example, decision-making in relation to the merits and financial eligibility might be delegated to providers in relation to particular matters, or subject to particular financial limits as to the amount of work that can be carried out before the case must be referred to the Director for a decision on further legal aid funding.

Clause 6: Authorisations

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

79. *Subsection (1)* gives the Lord Chancellor and the Director the power to limit the duration of a delegation as well as to vary or revoke the delegation at any time. It also reserves the right of the Lord Chancellor and the Director (or another person) to continue to exercise a function that has been delegated.
80. *Subsections (2) and (3)* provide that any act or omission by a person (“authorised person”) in exercising a function of the Lord Chancellor or Director delegated to them under clause 5 is to be treated as being done or omitted to be done by the Lord Chancellor or the Director.
81. However the liability of the Lord Chancellor or Director for acts or omissions of an authorised person is not absolute. *Subsection (4)* provides that *subsections (2) and (3)* do not affect the rights and liabilities of the Lord Chancellor and the authorised person between themselves (for example, contractual disputes), do not prevent civil proceedings from being brought against the authorised person, do not apply to criminal offences alleged to have been committed by the authorised person and do not make the Lord Chancellor or Director liable under section 6 of the Human Rights Act 1998 for acts of the authorised person which are private in nature.

Civil legal aid

Clause 7: Civil legal services

82. Clause 7 defines civil legal services for the purposes of Part 1.
83. *Subsections (1) and (2)* explain what is meant by “legal services”, namely services comprising advice and assistance provided in relation to the law as it applies to a particular case, legal proceedings and the resolution of legal disputes. Those services include, in particular, representation and mediation (and other forms of dispute resolution).
84. *Subsection (3)* provides that “civil legal services” are all legal services other than those services that are required to be made available under the provisions about criminal legal aid. This is in order to avoid any overlap between civil and criminal legal aid.

Clause 8: General cases

85. Clause 8 makes provision about when civil legal services are to be made available.
86. *Subsection (1)* provides that civil legal services are to be made available subject to two conditions. The first is they are civil legal services described in Part 1 of Schedule 1 to the Bill. The second is that the Director has determined, in accordance with the provisions of this Part of the Bill, that the individual qualifies for those legal services and the Director has not withdrawn that determination (that is, the individual continues to qualify for those services).
87. *Subsection (2)* provides that the Lord Chancellor may by secondary legislation omit services from Schedule 1. The Lord Chancellor has no power to add new services to Schedule 1.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

88. Clause 8 and Part 1 of Schedule 1 reverse the arrangements in the Access to Justice Act 1999, which provided for civil legal aid to be available in relation any matter not excluded by Schedule 2 to that Act. Under this Bill, the types of case for which legal aid may be made available are set out in Part 1 of Schedule 1.

Schedule 1: Civil legal services

Introduction

89. Each paragraph of Part 1 of Schedule 1 describes a type of civil legal services that may be made available under the Bill. Each paragraph is subject to exclusions – either exclusions specific to the paragraph or the general exclusions set out in Parts 2 and 3 of the Schedule. For example, paragraph 2 of Part 1 of Schedule 1 describes civil legal services provided in relation to matters relating to special educational needs. It states that the exclusions in Part 2 and 3 of the Schedule apply.
90. Part 2 of Schedule 1 lists civil legal services that are not to be available, even where they might otherwise fall within the descriptions of services in Part 1. Some paragraphs in Part 1 provide exceptions from the exclusions in Part 2, so that one or more of the general exclusions are disapplied. For example, under paragraph 36 of Part 1 of Schedule 1 civil legal services provided to an individual in relation to an inquest under the Coroners Act 1988 into the death of a member of the individual’s immediate family can be made available. However, the services provided cannot include the services listed in Part 2, with the exception of civil legal services provided in relation to personal injury or death. This means that civil legal services in relation to death could be made available by virtue of paragraph 36 of Part 1.
91. Part 3 of Schedule 1 provides that the civil legal services listed in Part 1 of Schedule 1 do not include advocacy unless the type of advocacy in question is listed in Part 3 of the Schedule. Clause 41(1) defines advocacy as meaning the exercise of a right of audience before a court, tribunal or other person.
92. Part 4 of Schedule 1 makes provision about the interpretation of Schedule 1. Paragraph 1 of Part 4 provides that if one paragraph of Part 1 includes a type of civil legal service which is either expressly or impliedly excluded by another paragraph of Part 1, that type of service is still a type of civil legal service that may be made available. The remainder of Part 4 of Schedule 1 makes further provision about the interpretation of references to legislation and services that appear in the Schedule.
93. Schedule 1 includes a number of powers for the Lord Chancellor to make regulations to clarify or adjust particular paragraphs. For example, under paragraph 6 of Part 1 civil legal services provided in relation to community care services can be made available. Paragraph 6(3) defines community care services as services which a relevant person may provide under a number of listed enactments. Paragraph (m) of that definition allows other enactments to be prescribed for the purposes of that definition. The definition of “relevant person” allows other relevant persons to be prescribed.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

94. There is a table setting out the contents of Schedule 1 at Annex A and a more detailed explanation of the paragraphs in Schedule 1 at Annex B.

Clause 9: Exceptional cases

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

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

97. *Subsection (3)(a)* provides that an exceptional case determination is a determination by the Director that it is necessary to make legal services available to an individual because the failure to do so would amount to a breach of the individual's Convention rights (as defined in s.1(1) of the Human Rights Act 1998) or any rights of the individual to the provision of legal services that are enforceable EU rights (as defined in section 2(1) of the European Communities Act 1972).

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

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

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

101. *Subsection (5)* provides that a wider public interest determination may be made in relation to advocacy for the purposes of an inquest into the death of a member of an individual's family

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

where, in the particular circumstances of the case, the provision of advocacy is likely to produce significant benefits for a class of person other than the individual or the individual's family.

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

Clause 10: Qualifying for civil legal aid

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

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

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

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

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

Clause 11: Determinations

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

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

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

111. *Subsection (3)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, provision requiring applicants to be given reasons for the making or withdrawal of a determination and provision about giving information to unsuccessful applicants about other ways in which they might obtain the advice they are seeking. This is similar to the provision about procedure that may be made in the LSC's Funding Code (see section 8(5) of the Access to Justice Act 1999).
112. *Subsection (4)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.
113. *Subsection (5)* requires the regulations to include provision about the review of determinations and of the withdrawal of determinations. *Subsection (6)* enables the regulations to include provision about appeals against determinations and against the withdrawal of determinations.

Criminal legal aid

Clause 12: Advice and assistance for individuals in custody

114. Clause 12 makes provision about initial advice and assistance for an individual who has been arrested and is being held in custody at a police station or other premises.
115. The current provision governing police station advice and assistance is at section 13(1)(a) of the Access to Justice Act 1999.
116. *Subsection (1)* requires initial advice and assistance to be made available to individuals who are arrested and held in custody at a police station or other premises if the Director has determined that the individual qualifies for advice and assistance and has not withdrawn that determination. "Initial advice" and "initial assistance" are defined in *subsection (8)* as the sort of advice and assistance that an individual might need while in custody. *Subsection (9)* enables the Lord Chancellor to make regulations providing that certain advice and assistance is not initial advice and assistance for the purposes of this clause.
117. In making a determination, *subsection (2)* places a duty on the Director to have regard to the interests of justice. *Subsection (3)* allows the Lord Chancellor to make regulations which would require the Director to apply the provisions about means testing (clause 20) and any other criteria specified in the regulations. Advice and assistance described in clause 12 is not currently means tested under the equivalent provision of the Access to Justice Act 1999, but clause 12 provides the flexibility to make it so in the future if it is considered appropriate.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

118. *Subsection (4)* provides that any determination under this clause must specify the types of advice or assistance to be made available. *Subsection (5)* provides that the Lord Chancellor may make regulations about determinations and the withdrawal of determinations. *Subsections (6) and (7)* make further provision about the procedure for determinations under this clause.
119. *Subsection (6)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and about how an application or determination must be made or withdrawn. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn and provision requiring applicants to be given reasons for the making or withdrawal of a determination.
120. *Subsection (7)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.

Clause 13: Criminal proceedings

121. Clause 13 defines “criminal proceedings” for the purposes of this Part of the Bill and is based on the existing provision at section 12(2) of the Access to Justice Act 1999.
122. “Criminal proceedings” include criminal trials (clause 13(a)), sentencing hearings (clause 13(b)), extradition hearings (clause 13(c)), binding over proceedings (clause 13(d)), appeals on behalf of a convicted person who has died (clause 13(e)), proceedings on a reference on a point of law following acquittal on indictment (clause 13(f)) and proceedings for contempt in the face of a court (clause 13(g)). Clause 13(h) allows the Lord Chancellor to specify in secondary legislation further types of proceedings that are to be considered to be criminal proceedings for the purposes of this Part of the Bill.

Clause 14: Advice and assistance for criminal proceedings

123. Clause 14 gives the Lord Chancellor the power to prescribe in regulations when advice and assistance must be made available to individuals in connection with criminal proceedings (*subsection (1)*). The power broadly reflects the provision about advice and assistance in section 13(1)(b) of the Access to Justice Act 1999.
124. *Subsection (2)* describes the individuals in respect of whom provision can be made under this clause. It covers those involved in investigations that could lead to criminal proceedings (other than where the individual has been arrested and held in custody), those who are before a court, tribunal or other person in criminal proceedings, and those who have been the subject of criminal proceedings.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

125. When making the regulations, the Lord Chancellor must take into account the interests of justice (*subsection (3)*) and the regulations must require the Director, in making a determination whether an individual qualifies for advice and assistance, to take into account the interests of justice (*subsection (4)*).
126. *Subsection (5)* provides that the regulations may also require the Director, in making determinations, to apply the means testing provisions (clause 20) and any other criteria specified in the regulations.
127. *Subsection (6)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (7) to (9)* make further provision about the procedure for determinations under this clause.
128. *Subsection (7)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of a determination.
129. *Subsection (8)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.
130. *Subsection (9)* provides that the regulations may make provision about reviews of and appeals to a court, tribunal or other person against a decision of the Director that an individual does not qualify for advice and assistance on the grounds that the interests of justice or other criteria set out in regulations made under *subsection (5)(b)* are not met.
131. *Subsection (10)* ensures that under this clause “assistance” can include advocacy (as defined in clause 41(1)) undertaken on behalf of the individual.

Clause 15: Representation for criminal proceedings

132. Clause 15 identifies the circumstances and conditions under which representation for the purposes of criminal proceedings is to be made available.
133. *Subsection (1)* provides that representation is to be available if the Director or, as the case may be, a court has determined, provisionally or otherwise, that the individual is a specified individual in relation to the proceedings (see *subsection (6)*) and qualifies for representation.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

134. *Subsection (2)* requires representation for the purposes of criminal proceedings to be made available on appeal to the Crown Court to private prosecutors whom the Director or court has determined, provisionally or otherwise, qualify for such representation.
135. *Subsection (3)* provides that where an individual qualifies for representation for the purposes of criminal proceedings, representation is also to be made available for the purposes of any related bail proceedings as well as any preliminary or incidental proceedings. *Subsection (4)* enables the Lord Chancellor in secondary legislation to specify whether proceedings are or are not preliminary or incidental for this purpose and also to make exceptions to subsection (3). Under the current regulations made under the Access to Justice Act 1999, for example, proceedings dealing with an individual for non-compliance with a Crown Court order are not to be regarded as incidental.
136. *Subsection (5)* provides that regulations under *subsection (4)(b)* making exceptions from subsection (3) may make provision by reference to proceedings that take place more than a specific period of time before or after the main proceedings. This would allow, for example, a period of time to be specified after which the original determination on representation would not cover advice on an appeal or after which a new determination would be needed for the purposes of applying to vary or appeal an order made at the conclusion of the proceedings.

Clause 16: Qualifying for representation

137. Clause 16 makes provision about how the Director or a court must make determinations about whether an individual qualifies for representation for the purposes of criminal proceedings.
138. *Subsection (1)* requires the Director or a court to determine (whether provisionally or otherwise) whether an individual qualifies for representation by applying the means testing provisions (clause 20) and the interests of justice test provided for in *subsection (2)*.
139. *Subsection (2)* sets out the factors that are to be considered in assessing whether an individual meets the interests of justice. These mirror the existing provision at paragraph 5 of Schedule 3 to the Access to Justice Act 1999. *Subsection (3)* enables the Lord Chancellor to add to or vary these factors. The Lord Chancellor may also make regulations specifying circumstances in which the interests of justice will be considered to be met (*subsection (4)*).

Clause 17: Determinations by Director

140. Clause 17 makes provision about the power of the Director to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.
141. *Subsection (1)* provides that the Director may determine whether an individual is eligible for representation for criminal proceedings unless the court is authorised to do so under clause 18. This reverses the default position in the Access to Justice Act 1999 where the decision as to whether to grant legal aid is for the court unless the LSC is given the power to make the

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

decision. However, over recent years, most decision-making powers have transferred in practice to the LSC and there are now only limited circumstances in which the court can make a determination.

142. *Subsection (2)* requires the Director, in the determination, to specify the criminal proceedings in respect of which the individual qualifies for representation. *Subsection (3)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (4) to (7)* make further provision about the procedure for determinations under this clause.
143. *Subsection (4)* provides that the regulations may include provision about the form and content of applications and determinations and provision that an application or determination must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of determinations. Provision may also be made about the review of a decision by the Director that the individual does not qualify, or no longer qualifies, for representation on the grounds that the interests of justice are not met.
144. *Subsection (5)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Bill, for example, to provide information or to make a payment under clause 22.
145. *Subsection (6)* provides that in cases where representation is refused or withdrawn on the grounds that the interests of justice do not require it, the individual has a right of appeal to a court, tribunal or other person prescribed by regulations. The right of appeal is subject to exceptions specified in regulations under *subsection (7)*.
146. *Subsection (8)* provides that this clause does not authorise the Director to make a provisional determination, and as such any reference to a determination in this clause does not include a provisional determination. Clause 19 makes provision about provisional determinations.

Clause 18: Determinations by court

147. Clause 18 makes provision about the power of a court to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.
148. *Subsection (1)* enables the Lord Chancellor to make regulations providing for a court to determine whether an individual qualifies for representation. Under the current provisions made under the Access to Justice Act 1999, the Crown Court may grant a representation order for contempt proceedings, for proceedings that arise from an alleged failure to comply with an

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

order of the Crown Court where it appears to the court that there is no time to instruct a solicitor and for proceedings where the individual is brought before the court following the issue of a bench warrant. The High Court and the Court of Appeal (Criminal Division) may grant a representation order for proceedings before those courts and the Supreme Court.

149. *Subsection (2)* enables regulations to make provision about the procedure for determinations, including the form of the application to the court and the form of the determination of the court, provision that applications and determinations may or must be made and withdrawn in writing, by telephone or by other prescribed means, and provision about time limits and circumstances in which a determination may or must be withdrawn.
150. *Subsection (3)* ensures that the circumstances in which a determination may or must be withdrawn may relate to whether an individual has complied with requirements imposed on them under Part 1, for example, a requirement to provide documents or to make a payment under clause 22.

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

151. *Subsection (6)* provides that this clause does not authorise the court to make a provisional determination, and as such any reference to a determination in this clause does not include a provisional determination. Clause 19 makes provision about provisional determinations.

Clause 19: Provisional determinations

152. Clause 19 makes provision about the power of the Director or a court to make a provisional determination about whether an individual qualifies for representation in certain cases. This reflects paragraph 1A of Schedule 3 to the Access to Justice Act 1999.
153. *Subsection (1)* enables the Lord Chancellor to make regulations to allow the Director or a court to make a provisional determination about whether an individual qualifies for representation where the individual is involved in an investigation which may result in criminal proceedings, the determination is for the purposes of criminal proceedings that may result from that investigation and other specified conditions are met. A provisional grant of a representation order is currently permitted in investigations where the prosecution has initiated plea discussions under the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud.
154. *Subsection (2)* provides that the regulations may make provision about the stage of an investigation when a provisional determination may be made, provision about when the provisional determination becomes a full determination and ceases to be provisional, and provision about the withdrawal of a provisional determination.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

Financial resources

Clause 20: Financial resources

155. Clause 20 relates to financial eligibility for legal aid services. In the Access to Justice Act 1999 separate provision is made in respect of financial eligibility for different types of legal aid (in section 7, in respect of civil legal aid and in paragraph 3B of Schedule 3, in respect of criminal legal aid in the form of representation). This clause contains provisions on financial eligibility that are applicable to both civil and criminal legal aid.
156. *Subsection (1)* specifies the basic rule, applicable to both civil and criminal aid, that legal aid will only be granted to a person who is determined to be financially eligible for the services. As under the Access to Justice Act 1999, the financial eligibility rules will be contained in regulations made by the Lord Chancellor (see *subsection (2)*). The basic rule in *subsection (1)* applies to decisions on granting civil legal aid and decisions on granting criminal legal aid for representation in criminal proceedings. It also applies to decisions on granting criminal legal aid for advice and assistance for individuals in custody and advice and assistance for criminal proceedings, if regulations provide for that (see the definition of a “relevant determination” in *subsection (8)*).
157. *Subsection (2)(b)* makes clear that regulations may provide for exceptions from the basic rule, so that a person may receive certain services regardless of their financial means.
158. *Subsections (3) and (4)* enable regulations to provide that a person is to be treated as having or not having particular financial resources, including providing that an individual is to be treated as having financial resources of a person of a specified description. This allows, for example, for regulations on financial eligibility to provide that the resources of the partner of a legal aid applicant are to be treated as the resources of the applicant.
159. *Subsections (5) and (6)* enable regulations to make provision about making and withdrawing financial eligibility determinations. *Subsection (6)* is a non-exhaustive list of matters that such regulations may contain, including provision requiring information and documents to be provided and provision establishing procedures for the review of financial eligibility determinations.

Clause 21: Information about financial resources

160. Clause 21 provides a gateway for the disclosure of information to the Director (or other prescribed person) by the Secretary of State (in practice, the Secretary of State for Work and Pensions), the Commissioners for Her Majesty’s Revenue and Customs (“the Commissioners”), the Department for Social Development in Northern Ireland or the Department of Finance and Personnel in Northern Ireland (a “relevant Northern Ireland Department”).
161. *Subsection (1)* enables the Director (or other prescribed person) to make a request for certain information to the Secretary of State, a relevant Northern Ireland Department or the Commissioners. *Subsection (2)* provides that such a request may only be made for the

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

purpose of facilitating a determination about an individual's means, that is, for the purpose of finding out whether they are financially eligible for legal aid.

162. *Subsection (3)* lists the categories of information which may be requested from the Secretary of State or the relevant Northern Ireland Department. It includes a power to add further categories of information by secondary legislation.
163. *Subsection (4)* sets out the categories of information which may be requested from the Commissioners. It includes a power to add further categories of information by secondary legislation, with the Commissioners' consent (see *subsection (6)*).
164. *Subsection (7)* provides that the Secretary of State, the relevant Northern Ireland Department and the Commissioners may disclose to the Director (or other prescribed person) information specified in an information request made under this clause.

Contributions and costs

Clause 22: Payment for services

165. Clause 22 concerns payments for services by legally aided persons. The clause largely reflects powers in sections 10, 17 and 17A of the Access to Justice Act 1999 and brings together provisions on payments for services into a single provision applicable (for the most part) to both civil and criminal legal aid.
166. *Subsection (1)* sets out the basic rule that an individual who receives legal aid can only be required to make a payment in connection with the provision of the services where regulations require them to do so. Any regulations made under subsection (1) must provide for repayment to the individual of any amount paid by the individual that exceeds the amount required to be paid by regulations under this clause and clause 23 (see *subsection (11)*).
167. *Subsection (2)* is a non-exhaustive list of ways in which regulations made under this clause can require payments from individuals. Regulations can, in prescribed circumstances, require payment of the cost of the services, a contribution in respect of those costs or an amount in respect of administration costs.
168. *Subsection (3)* permits regulations to provide that, in civil disputes only, legally aided persons may be required to make a payment of an amount which exceeds the costs of the services provided. This allows for a so-called 'Supplementary Legal Aid Scheme' whereby a percentage of certain damages obtained by a successful legally-aided claimant may be required to be paid to a prescribed person, such as the Lord Chancellor. The response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales* confirmed the Government's intention to create such a scheme. There is an equivalent provision at section 10(2)(c) of the Access to Justice 1999.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

169. *Subsection (4)* permits regulations made under this clause to include provision about how the costs of services made available to a legally-aided person are to be determined. This reproduces provisions currently found in sections 10(6)(b), 17(3)(c) and 17A(2)(b) of the Access to Justice Act 1999.
170. *Subsections (5), (8) and (9)* make further provisions about the contents of regulations that may be made under this clause. Regulations may, for example, provide for liability to pay to arise on a determination by a prescribed person (as is currently the case for criminal contributions and orders to pay costs) and for the variation or withdrawal of a determination about liability to make a payment. Regulations may also make provision for payment by periodical payments or lump sums out of income or capital and for procedural matters, such as when payment is to be made and to whom.
171. *Subsections (6) and (7)* make provision in identical terms to clause 20(3) and (4), explained at paragraph 152 above.
172. *Subsection (10)* permits regulations to provide that a legally-aided person can be required to pay interest on loans, payments required to be made after the provision of the relevant services and overdue payments. Similar provision is currently made in section 10(4) and section 17(2)(d) of the Access to Justice Act 1999.

Clause 23: Enforcement

173. Clause 23 permits regulations to provide for the enforcement of a requirement to make a payment imposed by regulations under clause 22. The regulations can include provision for the recovery of the costs of enforcement from the individual (*subsection (2)*) and can require documents and information to be provided (*subsection (4)*).
174. Under *subsection (3)* regulations will be able to provide that overdue sums are recoverable summarily as a civil debt, that is to say through magistrates' courts in accordance with the Magistrates' Courts Act 1980. The regulations will also be able to provide that overdue sums are recoverable, if the county court or High Court so orders, as if they were payable under an order of the High Court or county court in accordance with rule 70.5 of the Civil Procedure Rules, thereby making it unnecessary to begin fresh proceedings in respect of the debt. These provisions are similar to the regulation-making powers relating to criminal legal aid in sections 17(4) and 17A(2A) of the Access to Justice Act 1999 (as inserted by the Coroners and Justice Act 2009).
175. *Subsection (5)* introduces Schedule 2.

Schedule 2: Criminal legal aid: motor vehicle orders

176. Schedule 2 enables regulations to be made to authorise a court to make motor vehicle orders as a form of enforcement action in relation to criminal legal aid. "Motor vehicle orders" consist of clamping orders and vehicle sale orders. A clamping order is an order that a motor

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

vehicle be fitted with an immobilisation device. Under a vehicle sale order, a motor vehicle which has been fitted with an immobilization device in accordance with enforcement regulations may be sold and the proceeds of sale may be applied in paying the overdue sum. Schedule 2 includes further detailed provision regarding the content of regulations about motor vehicle orders, including procedural matters and requirements that must be met before a court may make an order. Schedule 2 is based on provisions in section 17(2A) to (2E) of, and Schedule 3A to, the Access to Justice Act 1999 (as inserted by the Coroners and Justice Act 2009).

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

177. *Subsection (1)* provides for a statutory charge to arise on any property recovered or preserved by an individual in receipt of civil legal aid, including costs payable to the individual, whether the property or costs are recovered, preserved or payable following legal proceedings or as part of a compromise or settlement of a dispute. Such a charge currently arises under section 10(7) of the Access to Justice Act 1999.
178. *Subsection (2)* describes the amounts of money to which the statutory charge relates. These are the amounts spent by the Lord Chancellor in securing the provision of the legal aid services and any other amounts payable by the individual by virtue of clauses 22 and 23. As under the Access to Justice Act 1999, regulations relating to the statutory charge can provide for circumstances in which the charge does not apply, provide for the charge to be in favour of the Lord Chancellor or the service provider and provide for the enforcement of the charge (*subsections (3) and (4)*).
179. *Subsection (5)* permits regulations made for the purpose of enforcing the statutory charge to require amounts of money awarded or payable to the legally-aided person to be paid to the Lord Chancellor or the service provider and to make provision about matters such as the timing and manner of payment, about how such monies are to be dealt with and about the enforcement of the requirement to pay.

Clause 25: Costs in civil proceedings

180. Clause 25 relates to costs in civil proceedings where a party is legally-aided and substantially reproduces provisions currently found in section 11 of the Access to Justice Act 1999.
181. *Subsection (1)* limits the costs that can be awarded against a person receiving civil legal aid to the amount (if any) that is reasonable given the financial resources of both parties and their conduct during the case.
182. *Subsection (3)* provides that this protection may be disapplied by regulations.
183. Subject to the restriction in subsection (1), regulations may be made under this clause about costs in proceedings where a person is in receipt of civil legal aid. Such regulations may, among other things, specify the principles that are to be applied in determining the amount of

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

any costs awarded for or against a party receiving civil legal aid, limit the circumstances in which a costs order may be enforced against the person receiving civil legal aid and make provision about when a court can require the Lord Chancellor to pay any costs incurred by the opponent of the legally-aided party (*subsections (5) and (6)*).

Providers of services etc

Clause 26: Choice of provider of services etc

184. Clause 26 makes provision about an individual's choice of provider of criminal and civil legal aid.
185. *Subsections (1) and (2)* provide that the Lord Chancellor's duty under clause 1(1) does not include a duty to secure that legal aid is provided by the means selected by the individual. For example, in certain cases, the Lord Chancellor may arrange for some services to be provided only by telephone or by other electronic means.
186. *Subsection (3)* provides that the Lord Chancellor's duty under clause 1(1) does not include a duty to secure that legal aid is provided by a person selected by an individual, except as provided in *subsections (4) to (10)*. For example, in civil cases, as at present, the intention is that an individual must select a person with whom the Lord Chancellor has entered into a contract or other arrangement (for example, provision of services by telephone or by other electronic means) for the provision of those services.
187. In relation to representation for criminal proceedings, *subsection (4) and (5)* provide that an individual may select a legal representative of their own choice and that choice will be respected, subject to regulations made under *subsection (6)*. Those regulations may limit choice in the ways referred to in *subsection (6)*. For example, the regulations may limit the choice to a specified group of providers or may limit the number of legal representatives who can act for any individual at any one time. They may also restrict the right of the individual to appoint a new legal representative in place of one previously chosen.
188. Similar powers exist in section 15 of the Access to Justice Act 1999 in relation to a right to representation. Under that section provision has been made, for example, limiting an individual's choice to providers who hold a contract with the LSC to provide legal services and about the circumstances in which an individual may be represented by Queen's Counsel or by more than one junior advocate, and limitations have been placed on an individual's right to transfer a representation order to a new provider.
189. Clause 26 does not prevent regulations restricting an individual's choice to a person employed by the Lord Chancellor (unlike section 15(4) of the Access to Justice Act 1999).

Clause 27: Position of providers of services

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

191. *Subsection (1)* provides that, unless regulations state otherwise, the provision of legal aid to an individual does not affect the relationship between the individual and the provider of the services, including any lawyer-client privilege.
192. *Subsection (2)* provides that providers of legal aid may not seek remuneration (or a “top up” payment) from their clients in addition to that provided under the legal aid scheme, unless the Lord Chancellor authorises them to do so.
193. *Subsection (3)* provides that regulations may allow for a provider to be entitled to be paid for work done up to the time when a determination that a person qualifies for legal aid is withdrawn.

Clause 28: Code of conduct

194. Clause 28 makes provision about a code of conduct to be observed by certain types of persons when providing legal aid.
195. *Subsection (1)* provides that the Lord Chancellor must publish a code of conduct to be followed by civil servants and by employees of any body set up by the Lord Chancellor to provide legal aid, such as a body like the Public Defender Service that has been established by the LSC.
196. *Subsection (2)* provides that the code is to include the same range of duties currently listed at section 16(2) of the Access to Justice Act 1999, namely duties to avoid discrimination, duties to protect the interests of the individuals for whom services are provided, duties to the courts and tribunals, duties to avoid conflicts of interest, duties of confidentiality and duties to act in accordance with professional rules.
197. *Subsection (4)* provides that the persons to whom the code applies are not subject to the direction of the Lord Chancellor when they provide services. This is to ensure their independence in providing such services.

Clause 29: Position of other parties, courts and tribunals

198. Clause 29 makes provision similar to section 22(4), (5) and (6) of the Access to Justice Act 1999.
199. *Subsection (1)* provides that unless regulations provide otherwise, the fact that legal aid is provided to an individual does not affect the rights of any third party or the principles governing the exercise of a court’s or tribunal’s discretion.
200. *Subsections (2) and (3)* enable regulations to make provision about court or tribunal procedures in cases involving legal aid services.

Supplementary

Clause 30 and Schedule 3: Legal aid for legal persons

201. Clause 30 gives effect to Schedule 3.

Schedule 3: Legal aid for legal persons

202. Schedule 3 provides for the possibility that civil and criminal legal aid may be made available to a legal person, that is a legal entity other than an individual, for example bodies corporate. All determinations in relation to legal aid for legal persons will be made by the Director.

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

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

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

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

207. *Paragraph 5* makes provision about representation for the purposes of criminal proceedings for legal persons. In order for such representation to be made available, the legal person must be a description of legal person specified in relation to those proceedings or the proceedings must involve resisting an appeal to the Crown Court in a private prosecution case. The conditions for representation for criminal proceedings being made available are: *first* (*paragraph 5(2)(a)*), that the Director has made (and not withdrawn) an exceptional case determination, and *second* (*paragraph 5(2)(b)*), that the Director has determined (provisionally or otherwise) that the legal person qualifies for representation in accordance with Part 1 of the Bill. *Paragraph 5(5)* requires the Director to make an exceptional case determination in accordance with the interests of justice. *Paragraph 5(6)* requires the Director to make the determination that a legal person qualifies for representation in accordance with the means testing provisions (clause 20) and in accordance with the interests of justice. *Paragraph 5(12)* provides that the Lord Chancellor may make regulations to prescribe the circumstances in which making representation available to a legal person for the purpose of criminal proceedings is to be taken as being in the interests of justice.
208. *Paragraph 5(3)* provides that where a legal person qualifies for representation, that representation will cover any preliminary or incidental proceedings and the effect of *sub-paragraph (4)* is that regulations made by the Lord Chancellor under clause 15(4) and (5) about whether proceedings are or are not to be regarded as preliminary or incidental apply in relation to legal persons unless those regulations provide otherwise.
209. *Paragraph 5(7)* applies the provisions in clause 17(2) to (7) about procedures for the making and withdrawal of determinations made by the Director under paragraph 5(2).
210. *Paragraph 5(8)* provides that the Director may not make a provisional determination under paragraph 5(2)(b) that the legal person qualifies for representation in accordance with Part 1 of the Bill unless regulations made under paragraph 5(9) provide for this.
211. *Paragraph 5(9)* enables the Lord Chancellor to make regulations authorising the Director to make a provisional determination that a legal person qualifies for representation for the purposes of criminal proceedings in the circumstances described in sub-paragraph (9)(a) to (c). *Paragraph 5(10)* applies subsections (2) and (3) of clause 19 to regulations made under paragraph 5(9).
212. *Paragraphs 6, 7 and 8* ensure that the means testing provisions (clause 20) and provisions about contributions and costs (clauses 22, 23, 24 and 25 and Schedule 2) apply for the purposes of determinations about whether a legal person qualifies for legal aid. *Paragraph 9* ensures that clause 26 (choice of provider of services etc), clause 27 (position of providers of services), clause 28 (code of conduct) and clause 29 (position of other parties, courts and tribunals) apply in relation to services are provided to a legal person under Part 1 of the Bill. *Paragraph 10* ensures that clauses 33 (restriction on disclosure of other information), clause 34 (exceptions from restrictions under clause 33) and clause 40 (orders, regulations and

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

directions) apply in the context of legal aid for legal persons as if references to an individual included a legal person.

Clause 31: Foreign law

213. Clause 31 concerns the availability of legal aid services in relation to foreign law. This clause reflects the current provision about legal aid in relation to foreign law at section 19 of the Access to Justice Act 1999.
214. *Subsection (1)* restricts the applicability of the civil legal services made available under the Bill to the law of England and Wales only, except where the Bill specifies otherwise, where foreign law is relevant to proceedings in England and Wales, or where the Lord Chancellor specifies otherwise by order. *Subsection (2)* makes similar provision in relation to criminal legal aid.
215. *Subsection (3)* limits the Lord Chancellor's ability to make an order under *subsections (1) and (2)*.

Clause 32: Restriction on disclosure of information about financial resources

216. Clause 32 provides for the protection of information obtained under the information gateway in clause 21. It makes provision similar to the provision in paragraphs 6 to 8 of Schedule 3 to the Access to Justice Act 1999.
217. *Subsections (1) and (2)* provide that a person who receives information under clause 21 or under this clause may only disclose or use that information if it is necessary or expedient to do so in connection with determining financial eligibility for legal aid.
218. *Subsection (3)* qualifies *subsection (2)* by providing for limited circumstances in which the information may be used for purposes other than assessing financial eligibility. Disclosure is permitted if it would be in accordance with an enactment or in accordance with a court order, if it is for the purposes of the investigation or prosecution of an offence or suspected offence or if it is for the purposes of proceedings before a court, including instituting such proceedings. Disclosure is also permitted if the information has already been lawfully disclosed to the public.
219. *Subsection (4)* provides that disclosure or use of information contrary to this clause is a criminal offence and specifies the maximum penalties. The penalty for the offence on conviction on indictment will be imprisonment for a term not exceeding two years or a fine (or both). The penalty for the offence on summary conviction, in England and Wales, will be imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (currently £5,000) (or both) and, in Northern Ireland, will be imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both). *Subsection (7)* provides in relation to the summary penalty in England and Wales that for an offence committed before the commencement of section 154(1) of the Criminal Justice Act

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

2003 the reference in subsection (4)(b)(i) to 12 months has effect as if it were a reference to 6 months.

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

Clause 33: Restriction on disclosure of other information

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

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

223. Subject to the exceptions in clause 34, *subsection (2)* prevents such information from being disclosed. *Subsection (3)* makes disclosure contrary to this clause a criminal offence and sets out the maximum penalties for that offence. The penalty for the offence will be, on summary conviction, a fine not exceeding level 4 on the standard scale, which is currently £2,500.

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

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

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

Clause 34: Exceptions from restriction under section 33

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

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

229. *Subsection (2)* provides for an exception relating to disclosure of information where disclosure would be in accordance with the law of England and Wales, as well as when

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

ordered by a court or for the purposes of court proceedings. This subsection also creates an exception relating to disclosure of information for the purposes of proceedings before a court, including instituting such proceedings, for the purpose of a criminal investigation and for the purpose of allowing a tribunal to properly exercise its disciplinary functions. This subsection also provides an exception where information has previously been lawfully disclosed to the public.

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

231. *Subsection (4)* provides an exception where an individual consents to the release of information pertaining to them. *Subsection (4)* also provides that if the information was provided by someone other than the individual to whom it relates the person who provided the information must also consent to its disclosure.

232. *Subsections (5) and (6)* ensure that disclosure of information covered by clause 33 is not prevented by that clause, provided that the restricted period of 100 years has passed, that disclosure is made by a person who is a public authority for the purposes of the Freedom of Information Act 2000, and that the information is not held on behalf of another person.

Clause 35: Misrepresentation

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

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

Clause 36: Status of the Director and Lord Chancellor

235. Clause 36 makes provision to provide clarity on the status of both the Director of Legal Aid Casework and the Lord Chancellor when exercising specific functions.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

236. Clause 4(1) of the Bill requires the Lord Chancellor to designate a civil servant as the Director of Legal Aid Casework.
237. *Subsection (1)* of clause 36 ensures that the Director is to carry out the functions of the statutory office on behalf of the Crown and *subsection (2)* ensures that service as the Director is in the civil service of the State.
238. *Subsection (3)* provides that the Lord Chancellor is to be treated as a corporation sole for purposes relating to property (and interests in property) under Part 1 of the Bill, and for all other purposes relating to the Lord Chancellor's functions in connection with legal aid and other functions under Part 1. This clarifies the position in relation to the Lord Chancellor's ability to hold an interest in land for these purposes and so applies to those charges (statutory or otherwise) which transfer from the LSC to the Lord Chancellor pursuant to Schedule 4 of the Bill and those statutory charges that will arise pursuant to clause 24 of the Bill.
239. *Subsection (4)* confers on the Lord Chancellor a statutory power to authorise persons to execute instruments conveying property and interests in property held by the Lord Chancellor in connection with legal aid or other functions under Part 1.
240. *Subsection (5)* provides that such an instrument executed by or on behalf of the Lord Chancellor is to be received in evidence and, unless the contrary is proved, to be treated as having been so executed.

Clause 37: Abolition of Legal Services Commission

241. Clause 37 abolishes the LSC. The LSC was established under section 1(1) of the Access to Justice Act 1999. Following the transfer of legal aid functions to the Lord Chancellor under clause 1, it is intended that an Executive Agency will be created within the Ministry of Justice to administer legal aid.
242. *Subsections (3) and (4)* set out provisions for the production of a report and statement of accounts for the final period up to the day before the LSC ceases to exist.

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

243. Schedule 4 provides for employees of the LSC to become civil servants and for the transfer of property, assets and liabilities held in the name of the LSC to the Lord Chancellor or to the Secretary of State.
244. LSC employees are currently public sector employees rather than civil servants. *Paragraph 1* of Schedule 4 provides that, when the new arrangements for legal aid come into force, LSC employees become civil servants on their existing terms and conditions (save as to pensions and severance). It makes provision to ensure that the transfer does not break the continuity of their employment.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

245. *Paragraph 4* enables the Lord Chancellor to make a scheme transferring the LSC's rights and liabilities in respect of occupational pension schemes or compensation schemes to the Lord Chancellor or the Secretary of State.
246. *Subparagraph (7)* provides that a transfer scheme may apply legislation relating to compensation schemes and occupational schemes with modifications, so far as is necessary for giving effect to the scheme.
247. *Subparagraph (8)* provides that the transfer scheme may amend or otherwise modify a compensation scheme.
248. When employees of the LSC become civil servants there will be no active members of the (currently two) LSC occupational pension schemes. *Paragraph 5* provides the Lord Chancellor with a power to make a scheme to merge the LSC occupational pension schemes. The power includes provision for the winding up of an LSC occupational pension scheme. A merger must not to any extent deprive members of the LSC occupational pension schemes, or other beneficiaries under those schemes, of rights accrued before the merger takes effect.
249. *Paragraph 6* transfers interests in land held in the name of the LSC to the Secretary of State for Communities and Local Government who holds freeholds and leaseholds on behalf of other government departments. Charges on land are specifically excluded from this paragraph because those charges on property in connection with civil proceedings are to transfer to the Lord Chancellor pursuant to paragraph 7.
250. *Paragraph 7* transfers other property, rights, powers, duties and liabilities of the LSC to the Lord Chancellor. Therefore, for example, by operation of law, contracts (in the name of the LSC) are novated to the Lord Chancellor, including contracts made for the provision of legal aid services.
251. *Paragraph 11* allows the Lord Chancellor to make by statutory instrument, consequential, incidental, supplementary or transitional provision in connection with the transfers effected by or under Schedule 4.

Clause 38 and Schedule 5: Consequential amendments

252. Clause 38 gives effect to Schedule 5. Schedule 5 makes various amendments and repeals which are consequential on the changes to legal aid made by Part 1. There are, for example, a number of amendments to delete references to the LSC in other legislation, such as in Schedule 1 to the Public Records Act 1958 (paragraph 1 of Schedule 5) and in Schedule 2 to the Parliamentary Commissioner Act 1967 (paragraph 2 of Schedule 5). There are also, for example, a number of amendments to replace references to the Community Legal Service and the Criminal Defence Service, such as in the Solicitors Act 1974 (paragraphs 7 to 9 of Schedule 5) and in the Prosecution of Offences Act 1985 (paragraphs 22 to 25 of Schedule 5).

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

Clause 39 and Schedule 6: Northern Ireland: information about financial resources

253. Clause 39 and Schedule 6 provide a gateway for the disclosure of information to the chief executive of the Northern Ireland Legal Services Commission (or other prescribed person) by the Secretary of State (in practice, the Secretary of State for Work and Pensions), the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"), the Department for Social Development in Northern Ireland or the Department of Finance and Personnel in Northern Ireland (the "relevant Northern Ireland Departments"). It also provides restrictions on the disclosure of that information. These provisions closely mirror the provisions in clauses 21 and 32 that relate to information requests by the Director (or other prescribed persons).
254. *Paragraph 1(1)* of the Schedule enables the chief executive (or other prescribed person) to make a request for certain information to the Secretary of State, a relevant Northern Ireland Department or the Commissioners. *Paragraph 1(2)* provides that such a request may only be made for the purpose of facilitating a determination about an individual's financial eligibility for legal aid under the Northern Ireland legislation that governs the provision of legal aid.
255. *Paragraph 1(3)* lists the categories of information which may be requested from the Secretary of State or the relevant Northern Ireland Departments. It includes a power to add further categories of information by secondary legislation.
256. *Paragraph 1(4)* lists the categories of information which may be requested from the Commissioners. It includes a power to add further categories of information by secondary legislation, with the Commissioners' consent (see *paragraph 1(6)*).
257. *Paragraph 1(7)* provides that the Secretary of State, the relevant Northern Ireland Departments and the Commissioners may disclose to the chief executive (or other prescribed person) information specified in an information request made under this Schedule.
258. *Paragraph 2* of the Schedule provides for the protection of information obtained under the information gateway in paragraph 1. *Paragraph 2(1) and (2)* provide that a person who receives information under paragraph 1 of this Schedule may only disclose or use that information if it is necessary or expedient to do so in connection with determining financial eligibility for legal aid.
259. *Paragraph 2(3)* qualifies *paragraph 2(2)* by providing for limited circumstances in which the information may be used for purposes other than assessing financial eligibility. Disclosure is permitted if it would be in accordance with an enactment or in accordance with a court order, if it is for the purposes of the investigation or prosecution of an offence or suspected offence or if it for the purposes of proceedings before a court, including instituting such proceedings. Disclosure is also permitted if the information has already been lawfully disclosed to the public.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

260. *Paragraph 2(4)* provides that disclosure or use of information contrary to this clause is a criminal offence and specifies the maximum penalties. The penalty for the offence will be, on conviction on indictment, imprisonment for a term not exceeding two years or a fine (or both) and, on summary conviction in England and Wales, imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), and in Northern Ireland to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (currently £5,000), or both.
261. *Paragraph 2(5)* provides a statutory defence to the criminal offence detailed in *paragraph 2(4)* where the person charged with the offence reasonably believed that the disclosure or use was lawful.
262. *Paragraph 2(7)* clarifies, in relation to the summary penalty in England and Wales for an offence under this paragraph committed before the commencement of section 154(1) of the Criminal Justice Act 2003, that the reference to 12 months imprisonment has effect as if it were a reference to 6 months.
263. *Paragraph 3* of the Schedule enables the Department for Justice in Northern Ireland to make consequential, supplementary, incidental or transitional provision by regulations in relation to the provisions of this Schedule. *Paragraph 4* makes provision about the powers to make regulations under the Schedule. Those powers are conferred on the Department for Justice in Northern Ireland. Under *paragraph 4(4)* the first regulations under paragraph 1 and any regulations under paragraph 3 that amend or repeal Northern Ireland legislation will be subject to the affirmative resolution procedure but otherwise regulations under the Schedule are subject to the negative resolution procedure.

Clause 40: Orders, regulations and directions

264. *Subsections (1) to (3)* of clause 40 make further provision about the exercise of powers under Part 1 to make orders, regulations and directions. For example, they provide that such instruments may make different provision for different geographic areas and that they may make transitory provision. They may also make different provision for the purpose of proceedings before different courts and tribunals, for particular classes of individual or for individuals selected by reference to particular criteria or on a sampling basis. This provides flexibility and will enable provisions to be piloted.

Clause 41: Interpretation

265. Clause 41 provides definitions of terms used in Part 1.

Part 2: Litigation funding and costs

Payments for legal services in civil cases

Clause 43: Conditional fee agreements: success fees

266. A conditional fee agreement (CFA) is a private funding agreement between a lawyer and a client under which the lawyer agrees to represent the client on a ‘no win, no fee’ basis. Under the agreement, the lawyer does not generally receive a fee from the client if the case is lost¹¹. However, if the case is won, the lawyers’ costs (the ‘base costs’) are generally recoverable from the losing party. In these cases, the lawyer can charge an uplift on these base costs, which is currently recoverable from the losing party. This uplift is known as the ‘success fee’. The maximum success fee that may be charged under a CFA is prescribed by secondary legislation. In all cases, the current maximum uplift that may be charged is 100% of the base costs.
267. Clause 43 amends sections 58 and 58A of the Courts and Legal Services Act 1990, which currently make provision as regards the regulation of CFAs and the recoverability of success fees. The effect of the amendments is that a success fee under a CFA will no longer be recovered from a losing party in any proceedings. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will now be subject to further regulation.
268. *Subsection (2)* inserts new subsections (4A) and (4B) into section 58. New subsection (4A) provides that CFAs which provide for a success fee and relate to proceedings prescribed by the Lord Chancellor must comply with certain additional conditions in order to be enforceable. New subsection (4B) sets out those conditions. They require the CFA to cap the success fee at a percentage of certain damages awarded to the client if they win. The cap and the kinds of damages to which it applies are to be prescribed by the Lord Chancellor. These provisions will be of particular importance in personal injury claims, for example, where it is proposed to exclude damages for future care and loss from the calculation of any success fee.
269. *Subsection (3)* amends subsection (5) of section 58A, the effect of which is to require the Lord Chancellor to consult with designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate before making an order under new subsections (4A) and (4B).
270. By virtue of *subsection (5)*, orders made under new subsections (4A) and (4B) will be subject to the affirmative resolution procedure.

¹¹ A CFA can also be arranged on a ‘no win, low fee’ basis.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

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

Clause 44: Damages-based agreements

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

273. Clause 44 amends section 58AA of the Courts and Legal Services Act 1990 (inserted by section 154 of the Coroners and Justice Act 2009), which currently provides that DBAs are enforceable only when they relate to employment matters. The effect of the amendments is to enable the use of DBAs in most civil litigation by persons providing advocacy services, litigation services or claims management services.

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

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

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

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

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

Clause 45: Recovery of insurance premiums by way of costs

279. After the Event (ATE) insurance can be taken out by parties in a CFA funded case to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose. Under the current arrangements, ATE insurance premiums are recoverable from the losing party. Currently, the recovery of such insurance premiums by way of costs is provided for by section 29 of the Access to Justice Act 1999.
280. Clause 45 repeals section 29 and makes new provision relating to the recoverability of insurance premiums from a losing party. The effect of the new provision is to provide that the cost of any insurance policy taken out by a party to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose cannot be recovered from a losing party except in certain limited circumstances.
281. *Subsection (1)* inserts a new section 58C into the Courts and Legal Services Act 1990. The effect of section 58C is to limit the recoverability of insurance premiums to certain clinical negligence proceedings and only allow recovery of the premium to the extent that it relates to the costs of an expert report or reports (section 58C(1) and (2)). This exception reflects concerns that expert reports in clinical negligence cases can often be very expensive. New section 58C(2) and (3) enables the Lord Chancellor to make regulations to prescribe the circumstances in which the premium would be recoverable and the maximum amount of the premium that may be recovered. The maximum amount may, in particular, be prescribed by specifying a percentage of the relevant part of the premium or an amount calculated in a prescribed manner (section 58C(4)).

Clause 46: Recovery where body undertakes to meet costs liabilities

282. Certain bodies, such as trade unions and other membership organisations, often provide legal services to their members as a benefit of membership. Section 30 of the Access to Justice Act 1999 allows bodies that are approved by the Lord Chancellor to recover from a losing party the cost of insuring themselves against the risk of paying costs to another party in the event of losing a claim. The effect of clause 46 is to prevent the recovery of these insurance premiums from a losing party.
283. *Subsection (1)* repeals section 30 of the 1999 Act. Although similar in effect to clause 45, clause 46 does not provide for any exceptions to non-recoverability, since the circumstances which require specific provisions relating to expert reports in clinical negligence cases do not arise.

Clause 47: Divorce etc proceedings: orders for payment in respect of legal services

284. Part II of the Matrimonial Causes Act 1973 ("the 1973 Act") makes provision (mirrored for civil partnerships by Schedule 5 to the Civil Partnership Act 2004 ("the 2004 Act")) for the court's powers to make orders "for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation". The orders include orders that one party to the marriage makes periodical payments to the other or for a child of the family; or that one

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

party pays a lump sum to the other or for a child of the family. It is not possible to make an *interim* order for a lump sum, or periodical payments, by one party to the marriage to the other. Section 22, however, makes provision for *maintenance pending suit*, where the court may at any time in the proceedings make an order for one party to make to the other “such periodical payments for his or her maintenance as the court thinks reasonable”, and case law has developed in which the court has included an element to enable that other party to fund that party’s costs of pursuing the proceedings where he or she has insufficient immediately available resources to do so.¹²

285. Clause 47 amends the 1973 Act to confer a more general power, not limited to maintenance pending suit, for a court in divorce, nullity of marriage or judicial separation proceedings to order payment by one party to the other for the purpose of securing legal services.
286. *Subsection (1)* amends section 22 of the 1973 Act to provide that the court cannot use its existing powers to use maintenance pending suit to cover payment for legal services, so that such payment will be covered by the new power alone.
287. *Subsection (2)* inserts into the 1973 Act a new section 22ZA, which sets out the court’s power and the conditions for its exercise as well as the terms on which any order may be made. Subsections (1) and (2) of the new section make provision about the scope of the power and its purpose: the power may be exercised in proceedings for divorce, nullity of marriage or judicial separation (including ancillary relief proceedings), and is a power to make an order requiring one party to pay to the other (referred to as the applicant) an amount to enable the other to obtain legal services for the purposes of the proceedings.
288. Subsection (3) of the new section contains the test for making an order, which requires the court to be satisfied that without this money the applicant would not otherwise reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of them. This, by virtue of subsection (4) of the new section, includes being satisfied that the applicant could not obtain a loan or secure legal services with the promise of payment on conclusion of the proceedings and division of the assets.
289. Subsection (5) of the new section provides for flexibility in making an order. The court does not have to assess the likely need for legal services for the entire proceedings and make an order for a payment to cover that (although that is possible), but may order payment to cover specified services, services in a specified period or for a specified part of the proceedings, or a combination (“specified” being explained in subsection (11) of the new section as meaning specified by the court). Coupled with the ability to make more than one order, this enables the court, for example, to make an order for payment for services limited to addressing a

¹² The leading case, which gives the history of the development of the case law in this respect and restates the principles governing the making of such orders, is the Court of Appeal case of *Currey v Currey* [2006] EWCA Civ 1338

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

specific issue or issues in the proceedings at an initial stage and to review the position at the conclusion of that stage.

290. Subsections (6) to (8) of the new section provide for additional flexibility, enabling the court to order payment to be made in instalments or for it (or any part of it) to be deferred, and to vary an order if there has been a material change of circumstances. Subsection (9) of the new section provides for the paying party to have credit for a payment made pursuant to an order under the section in that the amount paid will be set off, in the event of an order for costs as between the parties, against any costs which the applicant might be able to recover.
291. Subsection (10) of the new section defines “legal services” in a broad and flexible way which will cover disbursements as well as pure legal advice, so that, for example, if the court were satisfied that an initial report is necessary, it could order payment of an appropriate amount to cover the cost of that report as part of the legal services.

Clause 48: Divorce etc proceedings: matters to be considered by court making legal services order

292. Clause 48 inserts into the 1973 Act a new section 22ZB, which provides for the matters the court must consider when deciding whether to make (or vary) an order under the new section 22ZA and the terms of any order so made or varied.
293. Subsection (1) of the new section 22ZB lists the matters to which the court must have regard. These include the overall financial position of both parties (as to which *subsection (2)* of the new section makes supplementary provision about the meaning of “earning capacity” of a party), what the main proceedings are about, whether the party who is being asked to pay already has legal representation, the behaviour of the applicant in the proceedings and the extent to which the party who is being asked to pay is reasonably able to do so (as to which *subsection (3)* of the new section requires the court to have regard in particular to whether the order is likely to cause undue hardship to, or prevent obtaining of legal services on that party’s own account by, the paying party).
294. Subsection (4) of the new section provides for the Lord Chancellor to have power to amend the list of factors in subsection (1), and subsections (5) and (6) require such amendment to be by way of statutory instrument subject to affirmative resolution procedure. Subsection (7) of the new section provides for the term “legal services” in this new section to have the same meaning as in the new section 22ZA.

Clause 49: Divorce etc proceedings: orders for sale of property

295. Clause 49 amends section 24A of the Matrimonial Causes Act 1973 so that the court’s power to order the sale of property in order to give effect to certain types of order extends also to the new type of order under the new section 22ZA. ‘Property’ could be assets such as a holiday home, shares or other illiquid assets.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

Clause 50: Dissolution etc proceedings: orders for payment in respect of legal services

Clause 51: Dissolution etc proceedings: matters to be considered by court making legal services order

Clause 52: Dissolution etc proceedings: orders for sale of property

296. Clauses 50 to 52 make provision in respect of civil partnership proceedings which mirrors that in clauses 47 to 49.

Offers to settle

Clause 53: Payment of additional amount to successful claimant

297. The costs sanctions against a defendant for failing to accept a claimant's offer to settle generally amount to considerably less than the sanctions against a claimant for failing to beat a defendant's offer to settle. Consequently, there is less incentive for a defendant to accept a reasonable offer from the claimant than for a claimant to accept a reasonable offer by the defendant.
298. Clause 53 enables rules of court to be made to permit a court to order an additional amount to be paid to a claimant by a defendant who does not accept a claimant's offer to settle where the court gives judgment for the claimant that is at least as advantageous as an offer the claimant made to settle the claim. It also confers power by order to provide that rules of court may provide that in non-monetary claims a defendant may be required to pay an amount to a claimant where the court gives judgment in favour of the claimant which is at least as advantageous as an offer the claimant made to settle the claim. These provisions will be in addition to the current sanctions that the court may order and which are available under Part 36 of the Civil Procedure Rules (CPR) (namely the payment of interest on damages, interest on costs and the payment of costs on an indemnity rather than a standard basis).
299. *Subsection (1)* makes provision for rules of court to be made in respect of monetary claims so that courts may order a defendant to pay an additional sum to a claimant where the court awards the claimant a benefit the value of which is at least as advantageous as an offer the claimant made to settle the claim, which the claimant has made in accordance with Part 36 CPR. *Subsection (2)* provides that rules made under *subsection (1)* may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle.
300. The effect of *subsection (3)* is to enable the Lord Chancellor to prescribe, as a percentage of the value of the benefit awarded to the claimant, the maximum additional sum that the court may order. The Lord Chancellor may prescribe different percentage values for different values of claim (by virtue of *subsection (10)*).
301. *Subsection (4)* enables the Lord Chancellor to provide, by order, that rules of court may be made to enable a court to make an order in non-monetary claims (or mixed non-monetary and monetary claims) requiring a defendant to pay an amount to a claimant where the court gives judgment in favour of the claimant which is at least as advantageous as an offer the claimant made to settle the claim.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

302. *Subsection (5)* provides that in claims to which *subsection (4)* applies, an order made by the Lord Chancellor must provide for the amount payable to be calculated in one or more of three specified ways, namely by reference to costs ordered to be paid to the claimant, or any amount of money that is awarded to the claimant in the proceedings, or the value of any non-monetary benefit awarded to the claimant.
303. *Subsection (6)* additionally requires that any order made under *subsection (4)* must provide that rules of court made under the order may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle, and may provide that such rules may make provision as to the calculation of the value of any non-monetary benefit awarded to a claimant.
304. *Subsection (7)* provides that conditions prescribed by the Lord Chancellor which must be satisfied before an additional amount can be ordered to be paid may, in particular, relate to the nature of the claim, the amount of money awarded to the claimant and the value of the non-monetary benefit awarded to the claimant. The effect of subsections (8) and (9) is that any order made by the Lord Chancellor under this clause is subject to the negative resolution procedure.
305. *Subsection (10)* provides that rules of court made under clause 51 may make different provision in relation to different cases.
306. *Subsection (11)* defines “civil proceedings”, for the purposes of this clause as proceedings to which rules of court made under the Civil Procedure Act 1997 apply.

Referral fees

Clause 54: Rules against referral fees

307. Clause 54 prohibits the payment and receipt by “regulated persons” of referral fees in respect of claims for personal injury and death. “Regulated person” is defined in clause 57 and includes claims management companies (“CMCs”), barristers and solicitors, as well as descriptions of authorised persons under the Financial Services and Markets Act 2000 (such as insurers) if specified in regulations by the Treasury. The prohibition extends to the receipt of a referral fee by a regulated person from a party, who, although not a regulated person, provides services to the regulated person’s client in connection with their claim, for example a doctor who provides a medical report at the request of a solicitor and who pays the solicitor a fee for the referral. It also enables the Lord Chancellor to make regulations to extend the ban to other types of claim and legal services (defined in *subsection (6)*).
308. As regards the meaning of “referral”, the effect of *subsection (5)* is to treat a referral as the provision by a person other than the client of information that a regulated person authorised to provide legal services would need to make an offer to the client to provide legal services.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

309. *Subsection (8)* provides that a referral fee can be any form of consideration (which would include, for example, an offer by a solicitor to take on other work at a reduced rate or for no payment at all), other than normal hospitality.

Clause 55: Effect of the rules against referral fees

310. Clause 55 requires relevant regulators to have arrangements in place to monitor and enforce the prohibition on the payment or receipt of referral fees. It also permits regulators to make rules and to use existing powers to enable them to monitor and enforce the prohibition. Under this clause, some payments by or to a regulated person may be treated as a referral fee, unless the regulated person can show that the payment was for the provision of a particular service or another reason, and not for the referral – this might include, for example, the payment by a solicitor to a CMC for the obtaining of a medical report prior to the referral of a claim. The Lord Chancellor may make regulations specifying the maximum amount that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

311. The provisions in clause 55 referred to above do not apply where the Financial Services Authority (FSA), which is responsible for the regulation of insurers, is the relevant regulator and, in respect of whom, clause 56 makes similar provision. However, *subsection (5)*, which provides that a breach of the prohibition does not make a person guilty of an offence and does not give rise to a right of action for breach of statutory duty, and *subsection (6)*, which provides that a contract to make or pay for a referral or arrangement in breach of the prohibition is unenforceable, apply to all regulated persons.

Clause 56: Regulation by the FSA

312. Clause 56 enables the Treasury to make regulations which will enable the Financial Services Authority to monitor and enforce the prohibition on payment and receipt of referral fees in respect of those it regulates. As clause 55 allows regulators to use existing powers to enforce the prohibition, so clause 56 allows the Treasury to make regulations enabling the FSA to use existing provisions in the Financial Services and Markets Act 2000¹³ for the same purpose. In addition, the regulations may make provisions similar to those under clause 55 which require regulated persons to show that a particular payment is not a referral fee and to specify maximum amounts that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

Clause 57: Regulators and regulated persons

313. Clause 57 lists both the “regulators” who are required to monitor and enforce the prohibition on the payment and receipt of referral fees in respect of personal injury claims (namely the FSA, the Claims Management Regulator (CMR), the General Council of the Bar and the Law Society or any other regulatory body specified in regulations by the Lord Chancellor) and the “regulated persons” who are subject to the prohibition (namely CMCs, barristers and

¹³ 2000 c.8

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

solicitors, and insurers (see the note to clause 54 above) and any person specified by the Lord Chancellor).

314. In addition, in respect of any other type of claim or the provision of legal services to which the prohibition might be extended by regulations under clause 54(4)(b), clause 57, *at subsection (2)*, lists those regulators who could be required to monitor and enforce the prohibition. Again the relevant regulators include both the FSA and the CMR, but *subsection (2)* also recognises that, in extending the prohibition, other providers of legal services, who are required to be regulated by other regulatory bodies. The subsection has been drafted to ensure that all potential regulated persons and regulators, who are, in fact, identified in Part 3 of the Legal Services Act 2007¹⁴, can be made subject to the provisions in clauses 54 and 55 should the need arise. Further, *subsection (2)* ensures that Alternative Business Structures (see Part 5 of that Act) can also be specified, by the Lord Chancellor, as regulated persons and be made subject to the prohibition as and when it becomes necessary to do so.

Clause 58: Referral fees: regulations

315. Clause 58 provides that any regulations made under clauses 54 to 57 will be made by statutory instrument, subject to the affirmative procedure.

Costs in criminal cases

Clause 59 and Schedules 7 and 8: Costs in criminal cases

316. *Subsection (1)* gives effect to Schedule 7, which amends the Prosecution of Offences Act 1985 (POA 1985) by limiting the costs, including legal costs (that is, lawyers' fees, charges and disbursements, including expert witness costs) that may be awarded as part of a "defendant's costs order" (DCO). Schedule 7 also amends the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003 by limiting the payment of legal costs in certain proceedings.
317. *Subsection (2)* gives effect to Schedule 8, which amends the Court Martial Appeals Act 1968 by making changes to the costs that may be awarded to successful appellants and others in the Court Martial Appeal Court and on appeal from that Court.

Schedule 7: Costs in criminal cases

318. Section 16 of the POA 1985 enables courts in England and Wales to order the payment of amounts in respect of costs to be paid out of central funds (that is, out of money provided by Parliament) in certain circumstances. Section 16(6) provides that the amount awarded is to be an amount reasonably sufficient to compensate the person concerned for costs properly incurred. *Paragraph 2* of Schedule 7 inserts new subsections (6A) to (6D) into section 16 of the POA 1985. New subsection (6A) provides that, where the court considers it appropriate, it may reduce the amount awarded to the accused; for example, the court may do so because the

¹⁴ 2007 c.29

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

accused has been convicted of some offences but acquitted of others. New subsections (6C) and (6D) clarify the existing procedure by which the court makes a costs order in favour of an acquitted defendant or successful appellant. New subsection (6B) provides that orders made by the court under subsections (6) and (6A) have effect subject to new section 16A and regulations made by the Lord Chancellor under new section 20(1A)(d). The effect of section 16A is to limit the circumstances in which a defendant's costs order can include amounts in respect of legal costs. Regulations under section 20(1A)(d) may have the effect that the amount awarded is an amount that is less than an amount which the court considers is reasonably sufficient to compensate the person for the costs incurred.

319. *Paragraph 3* of Schedule 7 inserts a new section 16A in the POA 1985. New section 16A(1) provides that a DCO may not include an amount in respect of legal costs, subject to the following provisions of that section. Section 16A(2) and (3) provide that such an amount can be awarded if the accused is an individual, as opposed to a company or other body, and the order is made (a) in the magistrates' court, (b) on appeal to the Crown Court against a magistrates' court conviction or sentence, or (c) in the Court of Appeal in limited circumstances relating to a defendant who has been found not guilty by reason of insanity, or has been found unfit to stand trial, or having been found unfit to stand trial, has been found to have done the act or made the omission alleged against him.
320. New section 16A(4) provides that a DCO made by the High Court or Court of Appeal can include an amount in respect of legal costs in relation to the costs of an individual defendant in proceedings in the court below, where those proceedings were either in a magistrates' court or were proceedings on appeal to the Crown Court against a magistrates' court conviction or sentence (as those courts would have been able to award legal costs in those proceedings).
321. Section 16A(5) provides that a DCO can include an amount in respect of legal costs incurred in proceedings in the Supreme Court.
322. Section 16A(6) provides that the Lord Chancellor may make regulations that alter the availability of legal costs by adding, modifying or removing an exception to the availability of legal costs. The Lord Chancellor's regulations may provide for an exception to arise where a determination has been made by a person specified in the regulations. This would allow the Lord Chancellor to prescribe that legal costs are not to be available in respect of cases that do not pass the interests of justice test.
323. Section 16A(7) provides that regulations under subsection (6) may not remove or limit the Supreme Court's power to award legal costs incurred in proceedings before it.
324. New section 16A(8) provides that where a court makes a DCO that includes legal costs, the order must contain a statement to this effect.

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

325. New section 16A(9) provides that amounts awarded by a court in respect of legal costs, other than legal costs incurred in proceedings before the Supreme Court, may not exceed an amount specified in regulations by the Lord Chancellor.
326. New section 16A(10) explains what is meant by “legal costs”.
327. *Paragraph 4* of Schedule 7 inserts new subsections (2A), (2B) and (2C) into section 17 of the POA 1985. These subsections are the same as new subsections (6A), (6C) and (6D) of section 16 discussed in paragraph 315 above and apply in respect of private prosecutors. They clarify the procedure to be followed where a court considers that a private prosecutor should recover a sum in respect of his or her costs.
328. *Paragraph 5* of Schedule 7 inserts a new subsection (3ZA) into section 19 of the POA 1985. Section 19(3) provides that the Lord Chancellor may make regulations in respect of the costs of witnesses, and other persons attending court, such as an interpreter, or a person appointed to put the case for the defence where the defendant is unfit to be tried, or is prevented from cross-examining a witness in person. New subsection (3ZA) provides that the requirement that regulations made under section 19(3) make provision for the payment of an amount that the court considers reasonably necessary to compensate the person concerned is subject to regulations under section 20(1A)(d).
329. *Paragraph 5* also inserts new subsections (4A), (4B) and (4C) into section 19 of the POA 1985. They provide that an order made in favour of an appellant in the Court of Appeal who is not in custody may not require the payment of an amount in respect of legal costs unless regulations provide otherwise. Any such order is subject to regulations made by the Lord Chancellor under section 20(1A)(d), which may have the effect that the amount awarded is an amount that is less than an amount which the court considers is reasonably sufficient to compensate the person for the costs incurred.
330. *Paragraph 6* of Schedule 7 inserts a new subsection (1A) into section 20 of the POA 1985. New subsection (1A) provides that the Lord Chancellor may make regulations in respect of amounts that may be paid in pursuance of a costs order. Subsection 20(1A)(a) provides that such regulations can specify rates or scales or make other provision as to the calculation of the amounts to be paid. It is intended that regulations will provide for the payment of amounts in respect of legal costs that are broadly equivalent to legal aid rates.
331. New subsection (1A)(b) provides that regulations may make provision as to the circumstances in which amounts can be paid or ordered to be paid. New subsection 20(1A)(c) provides that regulations may provide that the amounts required to be paid by a costs order are to be calculated having regard to regulations under paragraphs (a) and (b). This is intended to enable courts to summarily assess the amount to be awarded, using the amounts set out in the regulations as guidance. New subsection (1A)(d) provides that regulations may require the amount of such orders to be fixed in accordance with such regulations. This is likely to be relevant when the court, instead of summarily assessing the amount of the order, directs that

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

the sum be assessed by a determining officer. The amount that results from the application of the regulations does not need to be reasonably sufficient or necessary to compensate the recipient, except in respect of costs incurred in proceedings in the Supreme Court and in the case of costs orders made under section 17 of the POA 1985. New subsection (1A)(e) provides for the regulations to make provision providing for appeals against the amounts determined to be paid.

332. *Paragraph 8* of Schedule 7 amends section 29 of the POA 1985 to make the powers to make regulations under sections 16A(6) and 19(4B) subject to the affirmative resolution procedure. Those powers can be used to alter the circumstances in which amounts in respect of legal costs may be awarded by a court.
333. *Paragraph 9* of Schedule 7 amends section 36 of the Criminal Justice Act 1972, which relates to references by the Attorney General on a point of law following acquittal on indictment. It provides that the court's power to order the payment of costs out of central funds is subject to regulations made under section 20(1A)(d) of the POA 1985 (which is applied for the purposes of this section). It also provides that orders may not be made for the payment out of central funds of amounts in respect of legal costs incurred in proceedings on the reference in the Court of Appeal. Clause 13(f) of the Bill provides that proceedings on a point of law following acquittal on indictment are "criminal proceedings" for the purposes of legal aid.
334. *Paragraph 11* of Schedule 7 amends Schedule 3 to the Criminal Justice Act 1988, which relates to references by the Attorney General to the Court of Appeal or Supreme Court in relation to a sentence of the Crown Court that appears to be unduly lenient. It provides that, in England and Wales, the court's power to order the payment of costs out of central funds is subject to regulations made under section 20(1A)(d) of the POA 1985 (which is applied for the purposes of this section). It also provides that orders may not be made for the payment out of central funds of amounts in respect of legal costs incurred in proceedings in the Court of Appeal. Clause 13(b) of the Bill provides that proceedings for dealing with an individual convicted of an offence, which includes references under the 1988 Act, are "criminal proceedings" for the purposes of legal aid. Paragraph 11 also contains consequential provisions to preserve the existing arrangements in relation to costs for Northern Ireland.
335. *Paragraph 13* amends section 61 of the Extradition Act 2003 (costs where discharge ordered) by inserting new subsections (5A) and (5B). New subsection (5A) provides that, in England and Wales, an order for costs is to be made in accordance with new sections 62A and 62B. New subsection (5B) provides that an order for costs in Scotland and Northern Ireland under subsection (5) is to be determined in accordance with subsections (6) to (9) so that the existing arrangements are preserved for those jurisdictions.
336. *Paragraph 14* omits subsections (1) and (2) of section 62 of the Extradition Act 2003. Subsection (1) and (2) provide that, in respect of England and Wales, subsections (1) and (3) of section 20 of the POA 1985 apply in relation to section 61 of the Extradition Act 2003 as they apply to Part 2 of the POA 1985.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

337. *Paragraph 15* inserts new sections 62A and 62B into the Extradition Act 2003. New section 62A(1) to (5) makes provision equivalent to sections 16(6) to 16(6D) of the POA 1985 (i.e. provision as to the amount to be awarded pursuant to an order for costs and the calculation of that amount). New subsection (6) of section 62A provides that regulations made under section 20(1A) to (1C) and (3) of the POA 1985 (regulations as to amounts ordered to be paid out of central funds) apply for the purposes of orders under section 61 as they apply for the purposes of orders under section 16 of the POA 1985. New section 62B provides that, in England and Wales, an order under section 61(5) may not include an amount in respect of legal costs unless those legal costs were incurred in the magistrates' court or the Supreme Court. The Lord Chancellor may, by regulations, make provision about exceptions from the prohibition against the award of legal costs, but such regulations cannot affect the Supreme Court's power to award an amount in respect of legal costs incurred in proceedings before it.
338. *Paragraph 16* makes amendments of section 134 of the Extradition Act 2003 (costs where discharge ordered) equivalent to the amendments of section 61 of that Act.
339. *Paragraphs 20 to 22* provide that the amendments to the POA 1985, the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003 do not affect a person's entitlement to costs in respect of proceedings and references commenced prior to commencement of the relevant provisions.

Schedule 8: Costs in criminal cases: service courts

340. Schedule 8 makes similar provisions in relation to the legal costs of an appellant in the Court Martial Appeal Court as to civilian courts in Schedule 7. It also removes the restriction on successful appellants against sentence receiving costs (see *paragraph 2(2)*).

Part 3: Sentencing and punishment of offenders

Chapter 1: Sentencing

General

Clause 60: Court's duty to consider compensation order

341. Clause 60 amends section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 and strengthens the obligation on the court to consider ordering a person convicted of an offence to pay compensation.
342. The clause inserts a new subsection (2A) in section 130, which places the court under an express duty to consider making a compensation order in any case where it is empowered to do so under this section. Compensation may be ordered for any loss or damage, personal injury or bereavement, or to make payments for funeral.
343. *Subsection (2)* inserts a similar provision into the Armed Forces Act 2006.

Clause 61: Duty to give reasons for and to explain effect of sentence

344. Clause 61 replaces the existing section 174 of the 2003 Act with a new version of that section retaining a general duty to explain a sentence and reducing the specific requirements on the court.
345. The substituted version of section 174 retains, in subsection (2) the general duty on a court to explain in open court and in ordinary language the court's reasons for deciding on a sentence. The substituted section 174 also retains the general duty, in subsection (3) to explain to an offender the effect of the sentence and the implications of the offender not complying with the sentence.
346. *Subsection (4)* makes corresponding amendments to the Armed Forces Act 2006.
347. The substituted section 174 goes on to set out, in *subsections (6) to (8)*, a revised and reduced list of the particular duties on courts to explain aspects of a sentence. These duties include, in *subsection (6)*, identifying relevant sentencing guidelines and explaining how they were applied or why they were not applied. In subsection (7) there is a duty to explain the impact on the sentence of a reduction for a guilty plea. In subsection (8) a court must explain, in giving a juvenile a discretionary custodial sentence, why a non-custodial sentence could not be justified, and in making a youth rehabilitation order with intensive supervision and surveillance or with fostering, why the order is appropriate.
348. The substituted section 174 removes specific duties to explain the court's consideration of the thresholds for imposing a custodial sentence or community order. The revised section 174 also removes the particular exception from the general duty to explain a sentence where the sentence is fixed by law (mandatory minimum sentences). These considerations are now covered by the general duty on courts contained in subsections (2) and (3) of the substituted section 174.

Community orders

Clause 62: Duration of community order

349. Clause 62 makes provision about when a community order comes to an end.
350. Currently a community order must specify a date by which all the requirements in the order must have been complied with. This date may not be more than three years after the date of the order. However, there is no express provision about when the order itself comes to an end.
351. *Subsections (1) and (2)* amend section 177(5) of the 2003 Act and insert new subsections (5A) and (5B). These amendments provide that a community order comes to an end on the date specified under section 177(5). (This is subject to specific provision in relation to an unpaid work requirement, where the order continues in force until the requirement is complied with.) Where an order imposes two or more requirements, a court may specify end

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

dates for each of those requirements, and where it does so, the last of those end dates must be the same as the date specified under section 177(5) (that is, the date at which the order comes to an end).

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

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

Clause 63: Breach of community order

354. Clause 63 amends Schedule 8 to the 2003 Act, which makes provision about breach of a requirement imposed as part of a community order and a court's powers in relation to such a breach.

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

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

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

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

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

360. *Subsection (5)* inserts a new provision giving the Secretary of State a power by order (subject to the negative Parliamentary procedure) to amend the maximum amount of a fine which may be imposed by the magistrates' court or Crown Court in relation to a breach of a community order. The power may only be exercised if it appears to the Secretary of State that there has been a change in the value of money. The power replicates the power of the courts in relation

to breach of a youth rehabilitation order (see paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008).

Suspended sentence orders

Clause 64 and Schedule 9: Changes to powers to make suspended sentence order

361. Clause 64 amends provisions relating to suspended sentences. Currently a court cannot suspend prison sentences that are longer than 12 months. The courts are also currently required to attach at least one “community requirement” to a suspended sentence even if they consider that no community requirement is necessary in the circumstances. (Community requirements are available to address issues of offender behaviour through treatment programmes such as alcohol or drug addiction and poor cognitive skills.)
362. *Subsection (1)* amends section 189 of the 2003 Act to enable courts to suspend longer sentences of imprisonment namely those between 14 days and two years. The amended clause also provides the court with discretion as to whether or not to impose community requirements. The clause retains the current position whereby the sentence of imprisonment will not take effect unless the offender fails to comply with a community requirement or is convicted of a further offence during the period of suspension.
363. *Subsection (2)* provides that, where a court imposes consecutive sentences, the power to make a suspended sentence order is limited to cases where the sentence does not exceed two years in total.
364. *Subsections (3) and (4)* clarify that the provisions relating to the length of supervision periods (the period during which the offender is subject to one or more community requirements) apply only to those orders with community requirements.
365. *Subsection (6)* gives effect to Schedule 9, which makes consequential and transitional provision (see below).
366. *Subsection (7)* provides that the new provisions apply to offences committed before, and after, the clause comes into force where the offender is sentenced after the clause comes into force.

Schedule 9: Changes to powers to make suspended sentence orders: consequential and transitory provision

367. *Paragraphs 1 to 12* of Schedule 9 make various amendments which are consequential on the changes to powers to make suspended sentence orders introduced by clause 64, in particular to ensure requirements that are only appropriate for suspended sentences with community requirements do not apply where they would be inappropriate or unnecessary for suspended sentence without community requirements.
368. *Paragraph 13* of Schedule 9 contains a transitory provision to apply the new provisions to detention in young offender institutions, since pending the bringing into force of section 61 of

the Criminal Justice and Court Services Act 2000 (which will abolish a sentence of detention in a young offender institution), such a sentence is still possible.

Clause 65: Fine for breach of suspended sentence order

369. At present the court has no power to impose a fine for breach of a suspended sentence order. Clause 65 inserts a new provision into paragraph 8 of Schedule 12 to the 2003 Act. This will enable the court to impose a fine of up to £2,500 for breach of a suspended sentence order where it decides not to give effect to the custodial sentence.
370. A suspended sentence order is breached where an offender fails to comply with any community requirement or is convicted of another offence during the period for which the sentence is suspended. In determining the level of the fine the court must take account of the offender's means or, in the absence of such information, make such determination as it sees fit. Any fine is enforced as it would be had it been imposed on conviction
371. *Subsection (3)* inserts a new provision giving the Secretary of State a power by order (subject to the negative Parliamentary procedure) to amend the maximum amount of a fine which may be imposed by the magistrates' court or Crown Court in relation to a breach of a suspended sentence order. The power may only be exercised if it appears to the Secretary of State that there has been a change in the value of money. The power replicates the power of the courts in relation to breach of a youth rehabilitation order (see paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008). It also replicates a power conferred by clause 56(5) in the Bill in relation to a fine for breach of a community order.

Requirements under community orders and suspended sentence orders

Clause 66: Programme requirement

372. Clause 66 amends section 202 of the 2003 Act which makes provision in relation to "programme requirements". These may be imposed as part of a community order or a suspended sentence order with a view to addressing particular aspects of offender behaviour such as treatment of alcohol or drug addiction and poor cognitive skills.
373. *Subsection (2)* amends section 202(1) of the 2003 Act by reducing the number of matters the court must specify when imposing a programme requirement. It removes the requirement for a court to specify (a) the particular accredited programme in which the offender must participate, and (b) the place at which the offender must participate in an accredited programme. It retains the requirement for a court to specify the number of days on which the offender must take part in an accredited programme. By the amendments to section 202(6) of the 2003 Act, it will be for the responsible officer to determine those matters.
374. *Subsection (3)* repeals section 202(4) and (5) of the 2003 Act, which specify a number of conditions that have to be met before a court may impose a programme requirement. These conditions currently require a court to include only certain accredited programmes, and prevent the court from including a programme requirement if compliance with that requirement would involve the co-operation of someone other than the offender and the

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

responsible officer, unless that person has consented. The effect of *subsection (3)* is that those conditions will no longer apply.

Clause 67: Curfew requirement

375. Clause 67 amends section 204 of the 2003 Act, which makes provision in relation to curfew requirements.
376. *Subsection (2)* amends section 204(2) by increasing the maximum period in any day for which the court may impose a curfew requirement from twelve to sixteen hours.
377. *Subsection (3)* amends section 204(3) by increasing the maximum period for which a curfew requirement may be imposed from six to twelve months from the date on which the community order is made.
378. It remains the case that, before imposing a curfew requirement, the court must obtain and consider the effect that the curfew might have on other people living at the curfew address. Compliance with a curfew requirement is normally monitored electronically by the offender wearing a 'tag'.

Clause 68: Foreign travel prohibition requirement

379. Clause 68 amends section 177 of the 2003 Act to enable a court to impose a prohibition on foreign travel as a requirement in a community order or suspended sentence order. The effect of the new requirement is to prohibit travel to a country or countries outside the British Islands (the United Kingdom, the Channel Islands and the Isle of Man).
380. Currently courts can already impose a number of requirements that restrict offenders' movements in some way. These include curfews, residence requirements, and exclusion requirements. However, there is no requirement which gives courts an express power to prohibit an offender from travelling outside the British Islands.

Clause 69: Mental health treatment requirement

381. Clause 69 amends section 207 of the 2003 Act which makes provision about mental health treatment requirements in community orders or suspended sentence orders.
382. Currently, a court cannot make a mental health treatment requirement unless it is satisfied on the evidence of a registered medical practitioner approved for the purposes of section 12 of the Mental Health Act 1983 that the mental condition of the offender requires treatment and may be susceptible to it, and other disposals under the Mental Health Act 1983 are not warranted.
383. Clause 69 removes the condition that a court can only impose a mental health treatment requirement on the evidence of a registered mental health practitioner approved for the

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

purposes of section 12. It remains the case that the court may not include a mental health treatment requirement unless the offender has expressed willingness to comply with it.

Clause 70: Drug rehabilitation requirement

384. Clause 70 amends section 209 of the 2003 Act, which makes provision in relation to drug rehabilitation requirements.

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

Clause 71: Alcohol treatment requirement

386. Clause 71 amends section 212 of the 2003 Act, which makes provision in relation to alcohol treatment requirements.

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

Clause 72: Overseas community orders and service community orders

388. Clause 72 makes amendments to provisions of the Armed Forces Act 2006 relating to both service and overseas community orders which can be made by service courts. These amendments flow from changes made to the Criminal Justice Act 2003 by Chapter 1 of Part 3 of the Bill.

389. *Subsections (2) and (3)* provide that the foreign travel prohibition requirement introduced by clause 68 of the Bill is not available for inclusion as a requirement in an overseas community order.

390. *Subsection (4)* makes provision which applies in the Services context the Bill provisions about the duration of community orders made by civilian courts. *Subsections (6) and (8)* make a change to the provisions about overseas and service community orders that is consequential on clause 62(5).

391. *Subsections (5) and (9)* make provision in relation to the imposition of fines for breaches of overseas community orders and service community orders.

392. *Subsection (10)* makes provision which makes a change in the service context which results from the provisions in the Bill to disapply the minimum term of a drug rehabilitation requirement.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

393. As with other amendments made to armed forces legislation, this clause is designed to ensure that sentencing law and practice of service courts is, where practicable, aligned with the law and practice of civilian courts in England and Wales.

Youth sentences

Clause 73: Referral orders for young offenders

394. Clause 73 amends sections 16 and 17 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000), which set out the circumstances in which the court has the power to give a referral order to an offender under the age of 18.

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

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

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

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

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

400. The purpose and effect of this is to widen the powers of a youth or magistrates' court to deal with offenders where they have pleaded guilty to their first offence (or where they are before the court for more than one offence, at least one of these offences). As a result of this

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

amendment, where the exceptions in 16(1)(a) and (b) do not apply, the court will no longer have to choose between making a referral order or absolutely discharging the offender: it will now be able to choose to conditionally discharge the offender instead.

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

Clause 74: Breach of detention and training order

402. A detention and training order (DTO) is a custodial sentence for young offenders aged between 12 and 17 created by sections 100 to 107 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000). In broad terms, the offender spends the first half of the specified period in custody (detention and training) and the second half in the community subject to various requirements and under the supervision of the youth offending team.
403. *Subsections (2) to (7)* amend section 104 of the PCC(S)A 2000 to extend the powers of the court to punish an offender who has breached their DTO by failing to comply with the supervision requirements imposed on them
404. *Subsection (2)* retains the power of the court to impose a period of detention in punishment for the breach. It also creates a new power for the court to impose an additional period of supervision.
405. *Subsection (3)* inserts new subsections (3A) to (3D), which make further provision about the periods of supervision or detention, into section 104:
- new subsection (3A) sets the maximum period for which the court may impose supervision or detention as a punishment for breach. This is to be the shorter of 3 months or the period beginning with the date of the failure to comply with the requirement and the last day of the term of the DTO.
 - new subsection (3B) stipulates how that period is to be determined if the failure to comply with a requirement took place over two or more days.
 - new subsection (3C) is especially important as it provides that the court may impose a period of supervision or detention for breach even after the term of the DTO has finished. This means that those subject to a DTO will not be able to avoid being given a further

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

period of detention or supervision by delaying their breach hearings until after the term of their DTO expires as has happened following the case of *H v Doncaster Youth Court, Doncaster Youth Offending Service*¹⁵ where the court had held that a further period of detention could only be imposed from the date on which the court made a finding that the offender had failed to comply with supervision requirements, rather than from the actual failure to comply, and only up to the end of the original DTO period.

- new subsection (3D) provides that where the court imposes a period of detention or supervision for breach, it takes immediate effect and can overlap with a period of supervision under the DTO.
406. *Subsection (4)* inserts new section 104(4A) into the PCC(S)A 2000. This provides that where an offender is over 18 when a court orders a further period of detention in respect of a breach of a DTO, the offender will be sent to prison. This subsection needs to be read with clause 74(8) of the Bill which provides that an offender aged between 18 and 21 will not be sent to prison under section 104(4A) until such time as section 61 of the Criminal Justice and Court Services Act 2000 is commenced (and the sentence of detention in a young offenders institution is abolished). Until that time 18 to 21 year olds will be sent to youth detention accommodation, which includes young offender institutions (see section 107 of the PCC(S)A 2000).
407. *Subsection (6)* extends the right of appeal to the Crown Court that currently exists where an offender is given a further period of detention for breach of a DTO to the new power to impose an additional period of supervision.
408. *Subsection (7)* inserts new sections 104A and 104B into the PCC(S)A 2000. New section 104A applies certain provision in the PCC(S)A 2000 relating to DTOs to orders under section 104(3)(aa) that an offender serve a further period of supervision, with the necessary modifications:
- section 104A(1) and (2) applies section 103 (which provides for how a period of supervision under a DTO operates);
 - section 104A(3) to (5) applies section 104 (which deals with breach of DTO supervision requirements) and section 105 (which makes provision for when an offender commits an offence when subject to supervision).
409. In broad terms, the further period of supervision works in a similar way to the period of supervision under a DTO. In particular, requirements can be imposed on the offender under section 103 of the PCC(S)A 2000, as applied, and enforced under section 104 of that, again as

¹⁵ [2008] EWHC 3463

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

applied. And, if the offender commits an imprisonable offence while subject to a further period of supervision, then the offender can be detained in youth detention accommodation under section 105, as applied.

410. The fact that a court can deal with an offender who breaches requirements imposed in respect of a further period of supervision in the same way that it can deal with someone who has breached the supervision requirements of a DTO, means that there could be a series of orders under section 104(3)(aa). If an offender breaches a DTO and is given a further of supervision which the offender then also breaches, the court can once again respond by imposing further supervision (or detention or a fine). And if requirements attached to that further period of supervision are also then breached, another period of supervision could be ordered in respect that breach and so on. This continues to be the case until the offender completes the order of the court without breaching it.
411. New section 104B provides for the interaction between the new power to impose periods of detention beyond the end of the original DTO and other sentences. Subsections (1) to (4) provide for the interaction between a period of further detention and a DTO. New subsection 104B(5) provides a power for the Secretary of State to make regulations to provide for the interaction between a period of detention imposed for breach and custodial sentences other than a DTO.
412. A further period of detention can be imposed for breach after the term of the DTO has ended. It can also be imposed in respect of the breach of a requirement attached to a period of further supervision under section 104(3)(aa), which may itself have been imposed after the end of the DTO. It is therefore possible for a period of detention to be imposed under section 104(3)(a) after the offender has turned 18 or even 21. For this reason it is necessary to set out for the courts how the breach period will interact with adult sentences.
413. *Subsection (11)* applies the provision made by the clause to any breach of a DTO that occurs after commencement.

Clause 75: Youth rehabilitation order: curfew requirement

414. Clause 75 mirrors the amendments to the curfew requirement for community orders in clause 67 of the Bill by increasing the maximum number of hours in a day for which a curfew can be imposed from twelve to sixteen hours a day and the length of time from six to twelve months.

Clause 76: Youth rehabilitation order: mental health treatment requirement

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

416. Clause 76 amends paragraph 20 of Schedule 1 to the 2008 Act to make provision for mental health treatment requirements in youth rehabilitation orders and mirror the amendments to mental health treatment requirements in clause 62 for adults by removing the requirement for evidence from a medical practitioner approved for the purposes of section 12 of the Mental Health Act 1983. It remains the case that the court can not include a mental treatment requirement unless the youth has expressed a willingness to comply with it.

Clause 77: Youth rehabilitation order: duration

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

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

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

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

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

Clause 78: Youth rehabilitation order: fine for breach

422. Clause 78 provides for the fine available to a court to deal with breach of a youth rehabilitation order under Schedule 2 to the 2008 Act to be increased to a maximum amount

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

of £2,500. Currently the maximum fine in both the magistrates' courts and the Crown Court is £250 if the offender is aged under 14, or £1,000 in any other case.

Fines

Clause 79: Removal of limit on certain fines on conviction by magistrates' court

423. Clause 79 removes limits on fines of £5,000 or more (however that amount is expressed) on conviction by the magistrates' court. The clause applies to fines set out in primary and secondary legislation. The clause also modifies powers to create offences which are punishable on summary conviction by a fine with a limit of £5,000 or more, so that they are punishable by a fine of any amount. The clause gives the Secretary of State a power to disapply the removal of limits and to set alternative limits, subject to certain restrictions. The clause applies to sentences on summary conviction, i.e. on conviction in a magistrates' court for an offence which is triable only summarily or triable either way (see *subsection (14)*).
424. *Subsection (1)* provides that relevant offences which are punishable on summary conviction by fines of £5,000 or more (however that sum is expressed), are punishable by a fine of any amount. Where the maximum amount of a fine which may be imposed on summary conviction is £5,000, that sum is expressed in different provisions in different ways. In some cases the amount is expressed as the specific figure of £5,000. In some cases it is expressed as 'an amount not exceeding the prescribed sum,' or 'the statutory maximum,' or 'level 5 on the standard scale.' In each case the amount is £5,000. This subsection applies in respect of each of those formulations, and any other formulation which has the same effect.
425. *Subsection (2)* provides that where a relevant power could be exercised to create an offence punishable on summary conviction by a fine of £5,000 or more, the power may be exercised to create an offence punishable by a fine of any amount.
426. *Subsection (3)* provides that an offence or power is relevant if it is contained in an Act or secondary legislation immediately before subsection (1) of this clause comes into force. It is a relevant offence or power whether or not it is in force at that time.
427. *Subsection (4)* sets out a series of restrictions on the provisions in subsections (1) and (2). These restrictions relate to fines for offences committed before the day on which subsection (1) of this clause comes into force, fines imposed on a person under 18, and fines imposed by a Crown Court following committal for sentence from the magistrates' court, where the Crown Court is exercising its own sentencing jurisdiction.
428. *Subsection (5)* gives the Secretary of State powers by regulations to disapply subsection (1) or (2) and powers to make alternative provision for increasing the amount of the fine.
429. *Subsections (6) to (8)* deal with the situation where a fine is expressed as a proportion of £5,000 (however expressed). For instance, some offences under the Companies Act 2006

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

contain offences punishable by a fine of an amount per day not exceeding 10% of the statutory maximum. The Secretary of State may make regulations to specify or describe a higher amount than £5,000 for these purposes

430. *Subsection (8)* sets out the same restrictions in this regard as those in subsection (4).
431. *Subsections (9) and (10)* make further provision about the scope of the powers to make regulations in this clause.
432. *Subsections (11) and (12)* provide that regulations made under this section are to be made using the affirmative resolution procedure.
433. *Subsection (13)* makes particular provision to deal with the possibility that the power under the Criminal Justice Act 1982 to raise the sum specified as level 5 on the standard scale to reflect increases in the value of money may be exercised before the day on which subsection (1) of this clause comes into force. It provides that, if that happens, references in this clause to £5,000 have effect as if they were references to the new sum.

Clause 80: Power to increase certain other fines on conviction by magistrates' court

434. Clause 80 makes provision in relation to fines or maximum fines of fixed amounts which are less than £5,000. (Such fines are not affected by clause 79(1) or (2). Nor are they affected by the powers in clause 81, which only relate to amounts expressed as levels 1 to 4 on the standard scale.)
435. *Subsections (1) and (2)* provide that the Secretary of State may make regulations in respect of relevant offences which are punishable by a fine of a fixed amount (i.e. a sum set out as a figure in the legislation) of less than £5,000. The regulations may specify or describe a higher amount in place of the original amount.
436. *Subsections (3) and (4)* provide that the Secretary of State may make regulations in respect of powers to create offences which are punishable by a fine of a fixed amount (i.e. a sum set out as a figure in the legislation) of less than £5,000. The regulations may specify or describe a higher amount in place of the original amount.
437. *Subsection (5)* provides that the amount which may be specified or described may not exceed the greater of £5,000 or the sum specified as level 4 on the standard scale. (Clause 81 gives the Secretary of State powers to amend levels 1 to 4 on the standard scale.)
438. *Subsection (6)* sets out a series of restrictions on the powers in this clause. These restrictions relate to fines for offences committed before the day on which clause 79(1) comes into force, fines imposed on a person under 18, and fines imposed by a Crown Court following committal for sentence from the magistrates' court, where the Crown Court is exercising its own sentencing jurisdiction.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

439. *Subsections (7) and (8)* make further provision about the scope of the powers to make regulations in this clause.
440. *Subsections (9) and (10)* provide that regulations made under this section are to be made using the affirmative resolution procedure.
441. *Subsection (11)* makes particular provision to deal with the possibility that the power under the Criminal Justice Act 1982 to raise the sum specified as level 5 on the standard scale to reflect increases in the value of money may be exercised before the day on which clause 79(1) comes into force. It provides that, if that happens, references in this clause to £5,000 have effect as if they were references to the new sum.

Clause 81: Power to amend standard scale of fines for summary offences

442. Clause 81 gives the Secretary of State power by order to increase the sums specified as levels 1 to 4 on the standard scale of fines for summary offences.
443. *Subsection (1)* provides that the Secretary of State may by order increase the sums specified as levels 1 to 4 on the standard scale. Level 1 is currently £200, level 2 is £500, level 3 is £1,000 and level 4 is £2,500.
444. *Subsection (2)* prevents the Secretary of State from increasing the sums in a way which alters the ratio of the levels to each other.
445. *Subsections (5) and (6)* provide that orders made under this section are to be made using the affirmative resolution procedure.
446. *Subsection (7)* provides that an order increasing the sums does not affect fines for offences committed before the order comes into force.

Repeal of uncommenced provisions

Clause 82 and Schedule 10: Repeal of sections 181 to 188 of the Criminal Justice Act 2003: consequential amendments

447. Clause 82(1) repeals those sections of the 2003 Act which would have introduced custody plus and intermittent custody orders for sentences of less than 12 months (sections 181 to 188). Those provisions have never been commenced. Sentences of less than 12 months are now to be brought within Chapter 6 of Part 12 of the 2003 Act: see clause 103. Schedule 10 makes amendments which are consequential on the repeal of sections 181 to 188.

Chapter 2: Bail etc

Clause 83 and Schedule 11: Amendment of bail enactments

448. Clause 83 gives effect to Schedule 11 which amends the Bail Act 1976 (the 1976 Act) and other legislation concerning bail.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

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

Schedule 11: Amendment of enactments relating to bail

450. Schedule 11 amends the 1976 Act so that certain of the exceptions to the presumption that bail should be granted to a defendant will not apply where there is no real prospect that the defendant will be sentenced to a custodial sentence (“the no real prospect test”). This new test (which increases the availability of bail) is limited to non-extradition proceedings and to adult defendants who have not been convicted.

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

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

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

454. *Paragraphs 10 and 22* amend Parts 1 and 1A of Schedule 1 to the 1976 Act. These Parts deal with those cases in which the person is accused or convicted of an indictable or a summary offence which is punishable with imprisonment. The effect of the amendments is that certain exceptions to the right to bail do not apply where there is no real prospect of a custodial sentence and the matter relates to non-extradition proceedings and to adult defendants who have not been convicted.

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

456. *Paragraphs 24 to 27* amend Part 2 of Schedule 1 to the 1976 Act, which deals with cases in which a person is accused or convicted of a non-imprisonable offence. The effect of the amendments is to make certain existing exceptions to the right to bail applicable only where the defendant is under the age of 18 or has been convicted of the offence. This has the same effect as the “no real prospect” test in Parts 1 and 1A of Schedule 1 which disapplies certain exceptions to the right to bail.

Chapter 3: Remands of children otherwise than on bail

Remands

Clause 84: Remands of children otherwise than on bail

457. Clause 84 is concerned with a child who has not been granted bail and who either (a) has been charged with or convicted of an offence and is awaiting trial or sentence or (b) is the subject of extradition proceedings.

458. *Subsection (3)* provides that the court must remand that child to local authority accommodation unless one of the sets of conditions set out in Clauses 81-84 is met. (Clauses 91 and 92 provide two sets of conditions one set of which must be met for a child charged with or convicted of a criminal offence and clauses 93 and 94 provide equivalent alternate sets of conditions for children concerned in extradition proceedings).

459. *Subsection (6)* defines a child as a person under the age of 18. This has the effect of applying these provisions to all under 18s who are before the court in the above circumstances. Currently, 17 year olds are remanded to prison either under section 27 of the Criminal Justice Act 1948 in the case of those charged with or convicted of an offence or the Extradition Act 2003 for those involved in extradition proceedings.

Clause 85: Remands to local authority accommodation

460. Clause 85 sets out the practical effect of and arrangements for a remand to local authority accommodation.

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

Clause 86: Conditions etc on remands to local authority accommodation

462. Clause 86 provides that a court may impose conditions on a child who it has remanded to local authority accommodation. These conditions are the same as the court may apply to a child who is remanded on bail pursuant to section 3 of the Bail Act 1976. Clause 86 also provides that the court may impose requirements on the designated local authority to secure compliance with any of the conditions imposed on the child.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

463. *Subsection (2)* additionally allows the court to order that compliance with any requirements imposed under subsection (1) be secured by means of electronic monitoring. In the case of children who are charged with or convicted of an offence the conditions imposed in clause 87 must be met. These are same as those which apply to electronic monitoring imposed pursuant to section 3A Bail Act 1976. In the case of children concerned in extradition proceedings, the conditions in clause 78 must be met.

Clause 87: Requirements for electronic monitoring

464. Clause 87 applies in cases other than extradition cases and sets out five requirements that must be satisfied before a court may impose electronic monitoring on a child remanded to local authority care pursuant to clause 84.

Clause 88: Requirements for electronic monitoring: extradition cases

465. Clause 88 provides for a modified version of the five requirements in clause 87 in respect of children concerned in extradition proceedings. The effect of the requirements is the broadly the same as for clause 87 but the drafting reflects the fact that the child is subject to extradition proceedings.

Clause 89: Further provisions about electronic monitoring

466. Clause 89 provides that when imposing a condition of electronic monitoring the court must make a person responsible for the monitoring and that they must be of a description specified by the Secretary of State.

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

Clause 90: Liability to arrest for breaking conditions of remand

468. Clause 90 confers a power for a constable to arrest without a warrant a child who the constable has reasonable grounds for suspecting has breached any of the conditions imposed under clause 86. It also imposes a duty on the constable to bring the child before a court as soon as reasonably practicable and in any event within 24 hours.

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

Remands to youth detention accommodation

470. A child can be only be remanded to youth detention accommodation under the provisions of this chapter if at least one of four sets of conditions set out in clauses 91, 92, 93 or 94 is met.

Clause 91: First set of conditions for a remand to youth detention accommodation

471. Clause 91 applies to a child charged with or convicted of an offence and describes the first set of conditions that if met would allow the court to remand the child to youth detention accommodation. This set of conditions includes a requirement relating to the seriousness of the offence which must be either a violent or sexual offence or one that is punishable if committed by an adult with a sentence of imprisonment of fourteen years or more.

Clause 92: Second set of conditions for a remand to youth detention accommodation

472. Clause 92 defines an alternative set of conditions that would enable the court to remand a child charged or convicted of an offence to youth detention accommodation. This set of conditions focuses on the behaviour of the offender while on remand. It applies if the child faces a realistic prospect of receiving a custodial sentence. In these circumstances, if they have or are alleged to have committed an offence while on remand in custody and have a recent history of absconding while on remand, or, alternatively, the offence forms part of a recent history of committing imprisonable offences while on remand (on bail or in custody) then they may be remanded securely pursuant to this clause.

Clause 93: First set of conditions for a remand to youth detention accommodation: extradition cases

473. Clause 93 sets out in an equivalent set of conditions to those in Clause 91, this time for a child in an extradition case.

Clause 94: Second set of conditions for a remand to youth detention accommodation: extradition cases

474. Clause 94 sets out an equivalent set of conditions to those in Clause 92, this time for a child in an extradition case.

Clause 95: Remands to youth detention accommodation

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

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

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

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

Supplementary

Clause 96: Arrangements for remands

478. Clause 96 gives the Secretary of State the power to make arrangements for accommodation in a secure children's home for those children who are subject to a remand to youth detention accommodation. Existing legislation enables the Secretary of State to make arrangements for remands to secure training centres and young offender institutions.
479. *Subsection (2)* gives the Secretary of State the power to make regulations (subject to the negative resolution procedure in Parliament) enabling the Secretary of State or a provider of youth detention accommodation to recover the costs of youth detention accommodation from designated local authorities. It also gives the power to recover associated costs, such as those for providing transport for the child from the court to the chosen form of accommodation.
480. Conversely, *subsection (7)* gives the Secretary of State the power to make payments to a local authority for the purpose of enabling it to exercise its functions in respect of children who are remanded to local authority accommodation.

Clause 97: Looked after child status

481. Clause 97(1) provides that any child remanded to youth detention accommodation is to be treated as looked after by the designated authority.
482. *Subsection (2)* gives the Secretary of State the power to apply with modifications or not apply, any legislation (including an Act or Measure of the National Assembly of Wales) to a child who is treated as looked after by virtue of being remanded under this Chapter (children who are remanded to local authority accommodation are treated as looked after by virtue of provisions in the Children Act 1989). Any regulations made under this section may make different provision for different cases and may include supplementary, incidental, transitional, transitory or saving provision. Regulations must be made by statutory instrument subject to negative resolution in Parliament.

Clause 98 and Schedule 12: Minor and consequential amendments

483. Clause 98 gives effect to Schedule 12 which makes various amendments and repeals which are consequential on the new scheme for remands of children otherwise than on bail introduced by Chapter 3 of Part 3.
484. In general these are very straightforward and involve replacing references to sections of the Children and Young Persons Act 1969 or repealing legislation that created powers and duties associated with remand under that Act. Of note however are:
- *Paragraphs 1 to 3* which amend the Criminal Justice Act 1948. This previously required 17 year olds to be remanded to prison. Under the Bill they will be remanded to local authority accommodation or youth detention accommodation.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

- *Paragraph 10* which amends section 32 of the Children and Young Persons Act 1969. It has the effect of providing that where a child is remanded to local authority accommodation and they abscond, if found they will be escorted back to local authority accommodation and the cost will be met by that local authority. Where the child is remanded in youth detention accommodation they will be escorted back to youth detention accommodation at the cost of the Secretary of State.
- *Paragraph 13* which inserts a reference to this Bill into the Local Authority Social Services Act 1970. The effect of this is to include the functions carried out by local authorities in relation to children remanded to local authority accommodation under the Bill in the definition of social services functions for the purposes of the Local Authority Social Services Act 1970. This, in turn, brings children who are remanded to local authority accommodation under the Bill into the definition of a ‘looked after child’ set out in section 22 Children Act 1989. In this way a child who is remanded to local authority accommodation under the Bill becomes a “looked after child” within the meaning of the Children Act 1989.

Clause 99: Interpretation of Chapter 3

485. Clause 99 provides definitions of terms used in Chapter 3.

Chapter 4: Release on licence etc

Calculation of days to be served

Clause 100: Crediting of periods of remand in custody

486. Clause 100 replaces section 240 of the 2003 Act with a new section 240ZA, dealing with the crediting of time spent on remand in custody against any subsequent sentence of imprisonment or detention. Under section 240 the court directs the amount of remand time to be counted towards a prisoner’s sentence. The insertion of section 240ZA provides for such time, instead, to be calculated and applied administratively. All time that meets the criteria of the provision will be counted to reduce a subsequent sentence. There is no longer discretion to disapply any such time.
487. *Subsection (4)* of new section 240ZA prevents time spent on remand from counting if the prisoner is also serving another sentence or is otherwise detained in connection with another matter (*subsection (10)* lists the types of detention which count for this purpose).
488. *Subsection (5)* of new section 240ZA prevents the same remand time counting several times against two or more sentences (whether or not they are served consecutively or concurrently).
489. *Subsection (6)* of new section 240ZA prevents remand time shortening any recall under section 255B where the maximum length of the recall is 28 days. (The possibility of a 28 day fixed recall period was introduced by the Criminal Justice and Immigration Act 2008 (“the

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

2008 Act”) which provides that lower risk prisoners who are suitable for such a recall must be released automatically at the end of that period.)

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

Clause 101: Crediting of periods of remand on bail

491. Clause 101 amends section 240A of the 2003 Act which gives the court power to direct that time spent remanded on bail subject to electronic monitoring (“tagged bail”) counts towards any subsequent sentence imposed, provided that that sentence is imposed for the same offence for which the defendant was remanded or a related offence. Two days successfully completed on tagged bail count as one day of the sentence. The new provisions set out how the time to be credited has to be calculated.
492. *Subsection (3)* inserts new subsections (3) to (3B) into section 240A. These set out the stages of the calculation. Under Step 1 the first day is counted even if the electronic monitor is not put in place until late that day. However, the last day is not counted if the offender spends the last part of that day in custody: that day will count towards the sentence served.
493. Step 2 prevents credit for tagged bail counting towards a subsequent sentence where during such time on bail the offender was also subject to an electronically monitored curfew requirement in connection with any other sentence (which includes being released on home detention curfew (“HDC”)) or temporarily released from prison in relation to another sentence.
494. Under Step 3 days where the offender breached the conditions of the release on bail are not to be counted.
495. Step 4 provides that each day spent on tagged bail effectively counts as half a day against the sentence. If such a calculation results in a number of days that include a half day, that half day can be counted as a whole day under Step 5.
496. New subsection (3A) prevents the same remand time counting several times against two or more sentences (whether or not they are to be served consecutively or concurrently).
497. New subsection (3B) prevents remand time shortening any recall under section 255B where the maximum length of the recall is 28 days (that is, where a prisoner receives the type of ‘fixed term recall’ introduced by the 2008 Act which provides for automatic release at the end of that 28 day period).

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

Clause 102 and Schedule 13: Amendments consequential on sections 100 and 101

498. Clause 102 makes amendments consequential on clauses 100 and 101, mainly amending the references to the repealed section 240 of the 2003 Act so as refer to section 240ZA instead.
499. *Subsection (8)* amends section 243 of the 2003 Act in relation to persons extradited to the United Kingdom. For those persons who qualify under section 243 of the 2003 Act, the changes provide for all days remanded in custody in another jurisdiction while awaiting extradition to the United Kingdom to be counted against a subsequent sentence imposed.
500. *Subsection (12)* gives effect to Schedule 17 which replicates in the Armed Forces Act 2006 the effect of the provisions in clause 100 for the crediting of remand time towards a subsequent sentence. This ensures the same provisions are applied in respect of sentences imposed under Armed Forces legislation.

Release

Clause 103 and Schedule 14: Prisoners serving less than 12 months

501. Clause 93 provides for prisoners serving sentences of less than 12 months to be released unconditionally at the half way point. It does so by inserting a new section 243A. This replicates the corresponding provision in the Criminal Justice Act 1991. In effect, it replaces the provisions for release of those serving sentences of less than 12 months (section 181: custody plus) originally provided for in the 2003 Act.
502. Clause 103 introduces Schedule 14 which provides for the consequential amendments in relation to the new section 243A of the 2003 Act to ensure that the new provision works with the existing release and recall scheme in Chapter 6 of Part 12 of the 2003 Act.
503. *Paragraph 10* of the Schedule provides that consecutive sentences which add up to 12 months or more are to be treated as a single sentence of 12 months or more. This means that where a sentence of less than 12 months is served consecutively with another sentence and either (i) the other sentence is 12 months or more, or (ii) the two sentences add up to 12 months or more, then release for the sentence of less than 12 months would be on licence for the remainder of the sentence. However, where consecutive sentences add up to less than 12 months, release will be unconditional.
504. Sentences of less than 12 months were previously all dealt with under the Criminal Justice Act 1991 (by virtue of transitional provisions, this remained the case even after the 2003 Act was brought into force). Paragraph 13 of the Schedule removes those transitional provisions, so that from the commencement of Chapter 4 such sentences are dealt with under the 2003 Act.

Clause 104: Restrictions on early release subject to curfew

505. Clause 104 amends section 246 of the 2003 Act which provides for early release on home detention curfew (“HDC”), which includes electronic monitoring. The amendments exclude a

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

number of categories of prisoner from the HDC scheme. They will prevent anyone serving a sentence of four years or more from being eligible for the scheme. They also make ineligible those previously released and recalled under the scheme for breach of licence conditions (during a previous or current sentence). Also excluded will be those previously returned to prison under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 for committing a further offence before the expiry of a previous sentence. These changes bring the 2003 Act scheme in line with the scheme under the Criminal Justice Act 1991, so that the statutory provisions for HDC will be the same for all prisoners.

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

Further release after recall

Clause 105: Cancellation of revocation of licence

507. Clause 105 amends section 254 of the 2003 Act to provide that when prisoners have been recalled erroneously (for example, as a result of incorrect information about the breach), a licence revocation may be cancelled. This will apply even after the Parole Board have considered the recall and made a decision on release.

Clause 106: Further release after recall

508. Clause 106 replaces section 255A to 255D of the 2003 Act, which provide for the release of prisoners after recall, with new sections 255A to 255C. There are two different recall schemes under these provisions. Under section 255B prisoners, if not released executively or by the Parole Board within 28 days, are released at the completion of 28 days detention. Under section 255C prisoners are subject to detention to the end of their sentence unless released executively or by the Parole Board. Section 255A identifies which scheme will apply to a prisoner and sets out the criteria for suitability for automatic release. Recalled prisoners serving extended sentences and those not suitable for automatic release will be dealt with under section 255C.

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

- The combination of the previous section 255C and 255D allows for the executive release of recalled extended sentence prisoners.
- The re-writing of section 255B removes previous restrictions on automatic release for certain categories of prisoner so that such prisoners may be considered for automatic release if they are assessed as sufficiently low risk and suitable.
- New sections 255B(6) and (7) and 255C(6) and (7) prevent prisoners recalled during their HDC period from being re-released prior to their automatic release date unless satisfactory arrangements for further HDC electronic monitoring can be put in place.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

These are prisoners who have been released on HDC under section 246 and recalled under section 254.

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

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

Other provisions about release

Clause 107: Supervision of young offenders after release

511. Clause 107 amends the 2003 Act to include a provision – section 256B – for the supervision of young adult prisoners released from a sentence of Detention in a Young Offenders’ Institution (DYOI) – available for 18 to 20 year olds. This will ensure that prisoners released from a DYOI sentence of less than 12 months will receive 3 months’ supervision. This provision recasts a similar provision in section 65 of the Criminal Justice Act 1991, which was repealed by the 2003 Act. Such supervision can include specific requirements relating to drug testing and electronic monitoring.

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

Clause 108: Miscellaneous amendments relating to release and recall

513. Clause 108 makes amendments to the 2003 Act.

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

515. *Subsections (5) to (7)* amend sections 260 and 261 of the 2003 Act; these amendments are consequential on the fact that extended sentence prisoners can be removed from prison in order to be removed from the United Kingdom.

Subsection (8) corrects a drafting error in section 263 of the 2003 Act, which should refer to “section 246” rather than “section 244”.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

Subsection (9) clarifies the previous drafting and practice under the 2003 Act in relation to the duration of the licence period for prisoners released from concurrent sentences. Release cannot take place until the latest release point of all the sentences and is on a licence expiring on the latest end date of all the sentences. No change of policy is being made.

Clause 109: Repeal of uncommenced provisions

516. Clause 109 removes various provisions which have not been commenced. Some of these are provisions of the 2003 Act. Some of them are amendments of that Act or Part 2 of the Criminal Justice Act 1991 (which also relates to release and recall).

Life sentence prisoners

Clause 110: Removal of prisoners from the United Kingdom

517. Clause 110 inserts two new sections into the Crime (Sentences) Act 1997 to provide a power for the Secretary of State to remove from the UK foreign national prisoners who are serving indeterminate sentences once they have served the minimum term (“tariff”) set by the court. The Secretary of State may remove such a prisoner whether or not the Parole Board has directed the prisoner’s release. Provision is also made for prisoners who are removed under this power and subsequently return to the UK to be detained in pursuance of their sentence.
518. New section 32A sets out the criteria for removal and the powers of the Secretary of State to remove a prisoner. This provision applies to those who are removed from prison (whether before initial release or after recall at any time). Subsection (4) allows for release by the Parole Board or compassionate release to apply to the prisoner up until the actual removal from the UK. Subsection (5) imports the definition for a person liable to removal from section 259 of the 2003 Act as it applies for determinate sentence prisoners.
519. New section 32B applies where, after removal, the offender returns. If not initially released by the Parole Board before removal then the offender will be treated as if he had not previously been released. If the Parole Board directed release prior to the removal then the offender will be treated as if recalled for breach of licence. Where the sentence is a life sentence, this will apply at any time until death. Where the sentence is an indeterminate sentence for public protection, then it will apply at any time until the licence ceases to have effect under section 31A.

Application and transitional provision

Clause 111: Application and transitional etc provision

520. Clause 111 gives effect to Schedule 15 (see below).

Schedule 15: Application of sections 100 to 110 and transitional and transitory provision

521. Schedule 15 contains provision for the application and commencement of the release and recall clauses. This provision sets out whether the commencement of the clause affects those being sentenced, those recalled or those yet to be initially released after sentence.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

522. *Paragraph 4* of Schedule 15 makes it clear that the changes to eligibility for early release on HDC will not affect those who are already released on the scheme prior to the commencement of the changes to section 246 of the 2003 Act.

Restatement of earlier enactments and transitional provisions

Clause 112: Power to restate earlier enactments and existing transitional provisions

523. Clause 112 contains an order-making power which provides for the savings of the 1991 Act, and of the Criminal Justice Act 1967, and associated transitional and saving provision, to be transposed and restated in the 2003 Act. This will enable all releases to be governed by the 2003 Act. The provision operates by expanding the commencement provision in the 2003 Act (the power conferred by section 336 of that Act) to allow for restatement and amendment of provisions which are to be repealed in full under that Act. The affirmative Parliamentary procedure will apply to exercise of the power.

Chapter 5: Dangerous Offenders

Clause 113 Abolition of certain sentences for dangerous offenders

524. Clause 113 removes provisions in sections 225 and 226 of the 2003 Act which provide for sentences of imprisonment for public protection and detention for public protection (the equivalent sentence for persons under 18).
525. It leaves in place those provisions in section 225 and section 226 which require life imprisonment to be imposed where the offence for which an offender is convicted carries a maximum term of life imprisonment and the court considers the seriousness of the offence justifies a life sentence.
526. Clause 113 also removes sections 227 and 228 of the 2003 Act which provide for extended sentences for certain violent or sexual offences (listed in Schedule 15 to that Act).

Clause 114 and Schedules 16 and 17: Life sentence for second listed offence

527. Clause 114 inserts a new section 224A (life sentence for second listed offence) into the 2003 Act, together with a new Schedule 15B.
528. New section 224A provides that a court must impose a life sentence on a person aged 18 or over who is convicted of an offence listed in Part 1 of Schedule 15B of that Act which is serious enough to justify a sentence of imprisonment of 10 years or more, if that person has *previously* been convicted of an offence listed in any Part of Schedule 15B and was sentenced to imprisonment for life or for a period of 10 years or more in respect of that previous offence. Parts 2 to 4 of new Schedule 15B include offences under legislation which is no longer applicable, offences in other UK jurisdictions and those of other member States, as well as offences under service law.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

529. However, the court is not obliged to impose a life sentence where it is of the opinion that there are particular circumstances which relate to the offence, the previous offence or the offender which would make it unjust to do so in all the circumstances.

530. Clause 114 introduces Schedules 16 and 17. Schedule 16 adds Schedule 15B to the 2003 Act (listed offences) and Schedule 17 makes consequential and transitory provision in respect of the clause.

New section 224A

531. Subsection (1) of new section 224A sets out the conditions under which the new mandatory life sentence can be imposed. The offender must be an adult when convicted, and the present offence must be listed in Part 1 of Schedule 15B and committed after the coming into force of section 224A. A seriousness condition and a previous offence condition must also be met (see below).

532. Subsection (2) of new section 224A gives the court a discretion not to impose the life sentence where it is of the opinion that there are particular circumstances which relate to the offence, the previous offence or the offender, which would make it unjust to do so in all the circumstances.

533. Subsection (3) of new section 224A sets out the seriousness condition. The present offence must be serious enough to justify the imposition of a sentence of imprisonment of 10 years or more.

534. Subsection (4) of new section 224A sets out the previous offence condition. The offender must have been previously convicted of an offence listed in any Part of Schedule 15B, and on conviction must have received a relevant life sentence or a relevant determinate sentence.

535. Subsection (5) of new section 224A sets out what is meant by a relevant life sentence. A relevant life sentence is one where the offender was not eligible for release during the first 5 years of the sentence (not taking into account any period spent on remand or bail). The term 'life sentence' in subsection (5) includes a sentence of imprisonment or detention for public protection (see subsection (10), which refers to the definition of 'life sentence' in section 34 of the Crime (Sentences) Act 1997).

536. Subsections (6) and (7) of new section 224A set out when an extended sentence is relevant. (An extended sentence is a sentence of imprisonment or detention for a determinate period for the purposes of this legislation.) An extended sentence is relevant if the custodial term was 10 years or more, i.e. the offender would have been released after 5 years or more.

537. Subsection (8) of new section 224A provides that any other determinate sentence of imprisonment or detention of 10 years or more is a relevant sentence.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

538. Subsection (9) of new section 224A ensures that any reduction of a sentence for the purpose of taking account of time spent on remand, either in custody or on bail, is to be disregarded when considering whether the previous offence condition has been met. It may be that in some jurisdictions time spent on remand is or may be applied to reduce the length of the sentence.
539. Subsection (10) of new section 224A defines “extended sentence” and “life sentence.” The definitions include equivalent sentences imposed under the law of Scotland, Northern Ireland and other member States of the European Union.
540. “Sentence of imprisonment or detention” is defined to include any custodial term imposed for an offence.
541. Subsection (11) of new section 224A provides that offences which are eligible for the new mandatory life sentence are not to be regarded as offences for which the sentence is fixed by law. Among other things, this obliges the court to follow any relevant sentencing legislation when determining the sentence, if it decides that to impose the mandatory life sentence would be unjust.

Subsections (2) and (3) of clause 114

542. Subsection (2) of clause 114 introduces Schedule 16, which inserts new Schedule 15B into the 2003 Act. Schedule 15B sets out particularly serious sexual and violent offences which are relevant for the purposes of (a) the new life sentence requirements in new section 224A, (b) the extended sentence provisions under new section 226A (see clause 115) and (c) the release arrangements under new section 246A for persons serving extended sentences under new sections 226A and 226B (see clause 116). Schedule 15B contains the offences which are in Schedule 15A (which is to be repealed) Schedule 15A is relevant for the purposes of indeterminate sentences for public protection and extended sentences under section 227. Schedule 15B also contains a number of child sex offences and terrorism offences, and the offence of causing or allowing the death of a child or vulnerable adult (under section 5 of the Domestic Violence, Crime and Victims Act 2004).
543. Subsection (3) of clause 114 brings Schedule 17 into force. Schedule 17 makes consequential and transitory provisions in respect of new section 224A.

Clause 115 and Schedule 18: New extended sentences

544. Clause 115 inserts new sections 226A and 226B in the 2003 Act. Those sections create new extended sentences for adults and persons under 18 respectively. The sentences may be imposed in respect of the sexual and violent offences listed in Schedule 15 to the Criminal Justice Act 2003 (referred to as “specified offences”) where certain conditions are met. For both sentences, the court must consider that the offender presents a substantial risk of causing serious harm through re-offending.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

545. For adults, two further conditions apply as alternatives. Either the court must consider that the current offence is serious enough to merit a determinate sentence of 4 years, or at the time the present offence was committed the offender must have previously been convicted of an offence listed in new Schedule 15B.
546. The second of these alternative conditions does not apply in respect of persons under 18.
547. Where these conditions are made out, the court may impose an extended period for which the offender is to be subject to a licence (an ‘extension period’) of up to 5 years for a violent offence and up to 8 years for a sexual offence. Schedule 15 lists violent and sexual offences separately. Specific provision is made about the release on licence of persons serving sentences under these new sections - see clause 116 below.
548. *Subsection (1)* inserts new sections 226A (extended sentence for certain violent or sexual offences: persons 18 or over) and 226B (extended sentence for certain violent or sexual offences: persons under 18) into the 2003 Act.

New section 226A

549. Subsection (1) of new section 226A provides that the new section applies where (a) the offender commits a specified offence and is aged 18 or over on conviction; (b) the court considers that the offender presents a significant risk to members of the public of serious harm through the commission by the offender of further specified offences; (c) the court is not obliged to impose a life sentence because of the seriousness of the offence by virtue of sections 224A (life sentence for second listed offence) or 225(2) (life sentence for dangerous offenders); and (d) either condition A or condition B is met.
550. The ‘significant risk’ test in subsection (1)(b) is the same as the test for indeterminate sentences for public protection.
551. Subsection (2) of new section 226A sets out condition A, which is that when the current offence was committed the offender had a previous conviction for an offence listed in Schedule 15B.
552. Subsection (3) of new section 226A sets out condition B, which is that the current offence is serious enough that, if the court imposed an extended sentence under this section, it would specify an appropriate custodial term of at least 4 years.
553. Subsection (5) of new section 226A sets out the structure of the new extended sentence. It consists of the appropriate custodial term followed by an extension period, which is a further period during which the offender is to be subject to a licence.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

554. Subsection (6) of new section 226A provides that the court must determine the custodial term in accordance with section 153(2) of the 2003 Act (provision for length of discretionary custodial sentences).
555. Subsection (7) of new section 226A stipulates that the extension period must be a period of such length as the court considers necessary to protect the public from serious harm caused by the offender's commission of further offences listed in Schedule 15.
556. Subsection (8) of new section 226A applies maximum extension periods of 5 years for a violent offence and 8 years for a sexual offence.
557. Subsection (9) of new section 226A stipulates that the appropriate custodial term and the extension period must not together exceed the maximum term for the offence.

New section 226B

558. New section 226B makes similar provision to new section 226A, in respect of persons aged under 18. It contains no equivalent to condition A (see new section 226A(2)).

Clause 115(2)

559. *Subsection (2)* brings Schedule 18 into force. Schedule 18 makes consequential and transitory provisions in respect of the new extended sentences.

Clause 116 and Schedule 19: New extended sentences: release on licence

560. Clause 116 sets out the release arrangements for the new extended sentence (see new sections 226A and 226B, inserted by clause 115). The release arrangements are differentiated by seriousness of offending. Offenders who have committed an offence listed in Schedule 15B, or who have committed any Schedule 15 offence where the seriousness of the offending merits a custodial term of 10 years or more, will be considered for release on licence by the Parole Board once the offender has served two-thirds of the appropriate custodial term, and will be released automatically at the end of the appropriate custodial term if the Parole Board has not already directed release. Offenders who have not committed a Schedule 15B offence but have committed a Schedule 15 offence meriting an appropriate custodial term of less than 10 years will be released automatically after two-thirds point of the appropriate custodial term.
561. The clause also provides for the Parole Board to apply the same release test for the new extended sentence as it currently applies to indeterminate sentences for public protection and life sentences (see section 28 of the Crime (Sentences) Act 1997).
562. *Subsection (2)* amends section 244 of the 2003 Act to exclude the new extended sentence from the automatic release provisions that apply to other determinate sentences.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

563. *Subsection (3)* of the new clause inserts a new section 246A in the 2003 Act (release on licence of prisoners serving extended sentence under section 226A or 226B).

New section 246A

564. Subsection (1) of new section 246A provides that the section applies to a prisoner (“P”) who is serving an extended sentence under new section 226A or 226B. It applies to both adults and juveniles.

565. Subsection (2) of new section 246A provides that the Secretary of State must automatically release the prisoner after the requisite custodial period has been served. The requisite custodial period is defined in subsection (8) as two-thirds of the appropriate custodial term. But subsection (2) does not apply where the prisoner’s appropriate custodial term is 10 years or more and/or the prisoner’s sentence was imposed in respect of an offence listed in Part 1 of Schedule 15B.

566. Subsection (3) of new section 246A provides that where the prisoner’s appropriate custodial term is 10 years or more and/or the prisoner’s sentence was imposed in respect of an offence listed in Part 1 of Schedule 15B, the Secretary of State must release the prisoner on licence in accordance with subsections (4) to (7) of the new section which provide for eligibility for release by the Parole Board at two-thirds point. There is no automatic release until the appropriate custodial term is completed.

567. Subsection (4) of new section 246A provides that the Secretary of State must refer P’s case to the Parole Board when the two-thirds point of the appropriate custodial term has been reached. Where the Parole Board declines to direct P’s release, the Secretary of State must refer his case to the Parole Board for further consideration at least every 2 years.

568. Subsection (5) of new section 246A provides that the Secretary of State must release the prisoner in accordance with a direction from the Parole Board, provided that the prisoner has reached the two-thirds point of the appropriate custodial term.

569. Sub-section (6) of section 246A sets out the test to be applied by the Parole Board when considering whether to direct a prisoners’ release. The test replicates the release test currently applied by the Parole Board to indeterminate sentences for public protection and life prisoners (see section 28 of the Crime (Sentences) Act 1997).

570. Subsection (7) of new section 246A provides for the automatic release of P at the end of the appropriate custodial term where P has not previously been released automatically or released on a direction by the Parole Board. Where P has previously been released and recalled to custody the automatic release provision at the end of the appropriate custodial term will not apply (and P’s further release will be dealt with under section 255C).

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

571. Subsection (8) of new section 246A provides that the “appropriate custodial term” means the term imposed by the court as the custodial element of the new extended sentence. This is the sentence imposed by the court excluding the extended licence period. This subsection further defines the “requisite custodial period” as two-thirds of the appropriate custodial term, where a single sentence is imposed. Where a prisoner is serving consecutive or concurrent sentences the requisite custodial term is calculated in accordance with the aggregation of the sentences under sections 263(2) and 264(2).

Clause 116(4)

572. *Sub-section (4)* brings Schedule 19 into force. Schedule 19 makes consequential amendments to the release and recall provisions in Chapter 6 of Part 12 of the 2003 Act. The majority of these amendments are to add references to the new release provision in new section 246A to the appropriate provisions of Chapter 6 of Part 12 of the 2003 Act so where appropriate provisions under that Chapter also apply to prisoners released under the new arrangements (for example to allow licences to be set for such offenders and for them to be recalled once released).

Schedule 19: Release of new extended prisoners: consequential provision

573. *Paragraph 5(3)* (new section 250(5A)) provides for the Parole Board to set licence conditions where P is initially released by the Parole Board. Where the prisoner is released automatically the Secretary of State sets the conditions.

574. *Paragraph 7(2)* (new section 260(2A)) provides for the removal of P from prison for the purposes of deportation where P has passed the two thirds point of the sentence but the Parole Board have not directed release.

575. *Paragraph 7(4)* (inserting the new subsection (7)(za) in section 260) provides for early removal to apply 270 days prior to the two-thirds point for the new extended sentence, rather than 270 days prior to the half way point as for other determinate sentences.

576. *Paragraph 8(3)* (new section 261(6)(za)) provides for a prisoner who returns to the jurisdiction during the currency of the sentence, after being removed under section 260, to be liable to serve the period to the two-thirds point that was not served prior to removal.

577. *Paragraph 10(2)* ensures that when aggregating consecutive sentences the two-thirds point of the new extended sentence is appropriately calculated.

Clause 117: Power to change test for release on licence of certain prisoners

578. Clause 117 gives the Secretary of State a power to set a release test, or tests, that the Parole Board must apply when considering the release of prisoners serving indeterminate sentences under section 225 or 226 of the 2003 Act (IPP prisoners) and prisoners serving extended sentences imposed under section 226A or 226B of that Act.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

579. *Subsection (1)* gives the Secretary of State a power to make orders setting out when the Parole Board must direct release of prisoners serving indeterminate sentences for public protection or extended sentences. The order may set out either requirements that must be satisfied before the Parole Board directs a prisoner's release or requirements that must be satisfied for release to be refused.
580. *Subsection (2)* provides that orders can amend the legislation which sets out the release criteria for IPP prisoners and for extended sentence prisoners. Orders may also make provision for prisoners whose case is being considered by the Board at the time when a release test is amended. They may make separate provision for IPP prisoners and extended sentence prisoners. They may include consequential provision.
581. *Subsections (3) and (4)* provide that any order made under the section must be made by statutory instrument subject to the affirmative procedure.
582. *Subsection (5)* defines IPP prisoners and new extended sentence prisoners so as to include both adults and juveniles.

Chapter 6: Prisoners etc

Clause 118: Employment in prisons: deductions etc from payments to prisoners

583. Clause 118 makes amendments to the Prison Act 1952 ("the 1952 Act") in respect of the employment and payment of prisoners and persons required to be detained in remand centres, secure training centres and young offender institutions. It makes particular provision in respect of reductions in, deductions from and levies on the earnings of prisoners and persons in young offender institutions who are aged 18 or over.
584. *Subsection (1)* removes 'employment' from the existing rule-making power in section 47 of the 1952 Act. Rules about employment of prisoners and persons in young offender institutions who are aged 18 or over are to be made under the power in new section 47A inserted by *subsection (4)*
585. *Subsection (2)* amends section 47 of the 1952 Act by inserting new subsection (1A) so that the Secretary of State may continue to make rules about the employment of persons required to be detained in remand centres, in secure training centres and (where they are aged 17 years or younger (see subsection (9)(a))) young offender institutions.
586. *Subsection (4)* inserts a new section 47A into the 1952 Act. This confers a number of new powers on the Secretary to State make prison rules (to which the negative Parliamentary procedure will apply):
- about the employment of prisoners and the making of payments to prisoners in respect of work or other activities undertaken by them (or in respect of their unemployment);

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

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

587. *Subsections (7) and (8)* of clause 103 amend the Prisoners’ Earnings Act 1996 to remove its application in England and Wales. It remains applicable in Scotland.

588. *Subsection (12)* gives the Secretary of State a power to make payments in connection with measures that appear to him to be intended to rehabilitate offenders, prevent re-offending or limit the impact of crime.

589. *Subsection (13)* provides that making such payments, the Secretary of State must have regard to the amounts generated from reductions, deductions and levies made or imposed by virtue of rules under new section 47A.

Clause 119: Transfer of prisoners: prosecution of other offences

590. Clause 119 inserts new section 3A into the Repatriation of Prisoners Act 1984. New section 3A will provide prisoners transferred to England, Wales or Scotland, in accordance with international prisoner transfer arrangements, with statutory protection from prosecution in Great Britain in relation to offences committed prior to transfer taking place, except in specified circumstances.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

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

Clause 120: Transit of prisoners

592. Clause 120 inserts new sections 6A, 6B, 6C and 6D into the Repatriation of Prisoners Act 1984. These new sections will enable countries with which the UK has prisoner transfer arrangements to transfer, via an airport or port in England, Wales or Scotland, a prisoner serving a sentence of imprisonment to or from a third country, for the purpose of the serving that sentence.

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

594. New section 6C sets out the procedure to be followed where a prisoner enters the United Kingdom through one jurisdiction and exits through another. Transit may only take place in these circumstances where the relevant Minister in each jurisdiction concerned consents to transit.

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

Chapter 6: Out of court disposals

Penalty notices

Clause 121 and Schedule 20: Penalty notices for disorderly behaviour

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

597. Clause 121 gives effect to Schedule 20, which confers a new power on Chief Officers of Police to set up within their area a scheme which will allow police officers, where appropriate, to issue penalty notices with an education option. This gives recipients the opportunity to discharge their liability to be convicted of the penalty offence by paying for and completing an educational course related to the offence for which the notice was given. An educational course might, for example, seek to make individuals aware of the social and health implications of their conduct and would be designed to reduce the likelihood of further offending.
598. The Schedule also:
- ensures that a PND may not be given to a person under the age of 18;
 - removes the requirement that a police officer issuing a PND to an individual other than at a police station must be in uniform; and
 - removes the requirement that police officers in a police station may not give a PND unless they are “authorised constables”.
599. *Paragraph 3* of the Schedule amends section 2 of the 2001 Act so as to allow a constable to offer an education option to a person given a PND where an educational course scheme which relates to the offence committed has been established by the Chief Officer of the police force concerned. Recipients of a penalty notice with an education option will have the opportunity to discharge their liability to be convicted of the penalty offence by paying for and completing the course. For example, a person suspected of committing the offence of being drunk and disorderly might be offered a penalty notice with an option of paying for and completing an alcohol awareness course instead of paying the penalty amount or asking to be tried.
600. *Paragraph 3* also:
- amends section 2 of the 2001 Act so as to prevent PNDs from being given to persons aged under 18;
 - repeals section 2(6) to (9) of the 2001 Act which makes provision for the Secretary of State by order (subject to the affirmative Parliamentary procedure) to allow PNDs to be given to persons under the age of 18 but over the age of 10, and to provide for the parents of a person aged under 16 who is given a PND to be informed of the notice and to be liable to pay the penalty; and
 - confers a power on the Secretary of State to make regulations (subject to the negative Parliamentary procedure) about the revocation of PNDs.
601. *Paragraph 3* further amends section 2 of the 2001 Act so as to remove the requirement that:

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

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

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

603. New section 2A also:

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

604. *Paragraph 5* amends section 3 of the 2001 Act (which concerns the amount of the penalty and the form of the penalty notice) in particular:

- to repeal the provision allowing the Secretary of State to specify by order a different level of penalty for persons of different ages (currently £80 for persons aged 18 or over or £50 in the case of person aged under 18 – see S.I. 2002/1837);
- to confer a new power on the Secretary of State by regulations (subject to the negative Parliamentary procedure) to require a penalty notice with an education option to include, or be accompanied by, additional information to that which is provided in a PND without that option.

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

606. New subsections (6) to (8) allow for a sum equal to one and a half times the amount of the penalty to be registered as a fine for enforcement against a recipient of a PND with an education option where the recipient:
- fails within a period of 21 days beginning with the date on which the notice was given either to ask to attend an educational course, or to pay the penalty, or ask to be tried for the offence to which the notice relates; or
 - asks within that 21 period to attend a course, but then fails to pay the course fee or pays the fee but fails to attend or complete the course in accordance with regulations made under subsection (9).
607. New subsections (9) and (10) confer a number of new powers on the Secretary of State to make regulations (subject to the negative Parliamentary procedure) in order to make provision:
- as to when an offender will be treated as having attended or not attended a course;
 - allowing for extensions of time for attendance on a course (for instance where the offender is unwell) and as to who should determine requests for an extension;
 - as to the consequences of the offender failing to attend;
 - allowing for the delegation of certain determinations (for instance as to whether extensions of time for completing a course should be granted).
608. *Paragraph 7* amends section 5 of the 2001 Act so as to prevent a criminal prosecution for a penalty offence being brought against a person given a penalty notice with an education option who:
- asks during the 21 day suspended enforcement period to attend an educational course, unless that person subsequently fails to pay the fee for the course or fails to attend and complete the course; or
 - having asked to attend, then pays the fee and completes the course in accordance with regulations made under section 4(9).
609. *Paragraph 8* allows the Secretary of State to issue guidance about educational course schemes under section 6 of the 2001 Act.
610. Section 10 of the 2001 Act concerns enforcement of fines registered against a person given a penalty notice who then fails to pay the penalty amount. Subsection (5) allows a magistrates' court to set aside a fine in the interests of justice. Paragraph 10 of the Schedule inserts a new

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

subsection (7) into section 10. It confers a new power on the Secretary of State to make regulations (subject to the negative Parliamentary procedure) specifying the directions or orders the court may or must give if it sets aside a fine relating to a penalty notice with an education option.

611. *Paragraph 11* inserts a new section 10A into the 2001 Act. This sets out the Parliamentary procedures relating to any power of the Secretary of State to make orders or regulations under Chapter 1 of Part 1 of the 2001 Act, provides for them to be made by statutory instrument, and confers supplementary powers. New section 10A replaces existing provisions currently found in sections 1(4) and (5), 2(8) and (9) and 3(5) and (6), which are repealed.
612. *Paragraphs 13 and 14* make amendments consequential upon the repeal of the requirement that constables must be uniform when giving penalty notices, in particular to the Police Reform Act 2002 (which allows for community support officers, accredited persons and accredited inspectors to issue fixed penalty notices).
613. *Paragraph 15* repeals section 87 of the Anti-social Behaviour Act 2003, which amended section 2 of the 2001 Act so that PNDs could be issued to persons aged under 18 years.

Cautions

Clause 122: Conditional cautions: involvement of prosecutors

614. Clause 122 amends sections 22 to 25 of the 2003 Act. The clause enables the authorised person (usually a police officer) to make a decision to offer a conditional caution by removing the requirement that, before the authorised person can offer a conditional caution to an offender, they must refer the matter to the relevant prosecutor (usually the Crown Prosecution Service) to decide that there is sufficient evidence to charge the offender with the offence, and that a conditional caution should be given. The clause enables those decisions to be taken by the authorised person without reference to the relevant prosecutor.
615. Clause 122 also enables the authorised person to vary conditions in the conditional caution without reference to the relevant prosecutor. The other requirements for a conditional caution remain unchanged, including that the offender admits that they committed the offence and that they consent to being given a conditional caution.
616. The intention is that the Code of Practice issued under section 25 of the 2003 Act or guidance will specify those matters that should still be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to vary conditions.

Clause 123: Conditional cautions: removal etc of certain foreign offenders

617. Clause 123 amends section 22 of the 2003 Act so as to make available new types of conditions that can be attached to a conditional caution given to an offender who is a foreign national and who does not have leave to enter or remain in the United Kingdom. The object of these conditions is to bring about the departure of the foreign offender from the UK and

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

ensure that they do not return to the UK for a period. These conditions may be attached to a conditional caution, whether or not it is in addition to a condition with one or more of the existing objectives in section 22(3) of the 2003 Act (namely facilitating the rehabilitation of the offender; ensuring that the offender makes reparation for the offence; or punishing the offender).

618. This clause also defines the category of foreign offenders who could be offered such conditions as those offenders whose immigration status makes them liable for removal from the UK. This means a person who has no leave to enter or remain in the UK and in respect of whom there is a power to enforce their departure from the UK. As with all conditional cautions, the offender must admit the offence and agree to accept the conditional caution.
619. If the foreign offender does not comply with these conditions he or she may be prosecuted for the original offence.

Youth cautions

Clause 124 and Schedule 21: Youth cautions

620. Section 65 and 66 of the Crime and Disorder Act 1998 created a system of reprimands and warnings known as the Final Warning Scheme. These are out of court disposals for young offenders for use where prosecution is not in the public interest.
621. *Subsection (1)* of clause 124 repeals sections 65 and 66 of the Crime and Disorder Act abolishing the Final Warning Scheme.
622. *Subsection (2)* inserts new section 66ZA, which creates a new ‘youth caution’, and new section 66ZB, which sets out the effect of the new youth caution.
623. New section 66ZA does the following:
624. *New subsection (1)* sets out the circumstances in which a constable may give a young person a youth caution. They are broadly the same as those in which a warning or reprimand can currently be given. However, unlike reprimands and warnings which cannot be offered if a young person has previously been convicted of an offence or given a youth conditional caution, the new youth caution contains no such restriction. This mirrors changes made to youth conditional cautions (see clause 125).
625. *New subsection (1)(a)* provides that to issue a youth caution the constable must decide that there is sufficient evidence to charge the young person with an offence. The effect of the test is the same as for issuing a reprimand or warning but the wording has been amended for consistency with the requirement for conditional cautions and youth conditional cautions.
626. *New subsections (2) to (7)* replicate relevant provision from section 65 of the Crime and Disorder Act 1998 on reprimands and warnings. This includes provision:

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

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

627. New section 66ZB does the following.

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

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

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

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

632. *New subsection (7)* replicates section 66(5) of the Crime and Disorder Act 1998 by making provision that where a young person has received a youth caution and has failed to participate in a rehabilitation programme provided as part of that caution, this may be cited in court in

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

any subsequent criminal proceedings involving that person in the same way that a prior conviction would be

633. *Subsection (5)* of clause 124 provides that any reprimand or warning given to a person prior to the commencement of this clause will subsequently be considered a youth caution for the purposes of the Bill. For example a reprimand would be considered a first youth caution for the purposes of determining whether there was a duty on the youth offending team to assess a young person under section 66ZB(2), if they were subsequently to be given a youth caution following the commencement of the Bill.
634. *Subsections (6) and (7)* of clause 124 ensure that a referral and rehabilitation programme provided under section 66 of the Crime and Disorder Act 1998 before the commencement of this clause is to be treated as equivalent to a rehabilitation programme provided under section 66ZB of that Act.

Schedule 21: Youth cautions: consequential amendments

635. *Schedule 21* is given effect by Clause 124(3) and makes various amendments and appeals which are consequential on the repeal of reprimands and warnings under the Crime and Disorder Act 1998 and the introduction of youth cautions by clause 109.

Youth cautions

Clause 125: Youth conditional cautions: previous convictions

636. Clause 125 omits paragraph (a) from section 66A(1) of the Crime and Disorder Act 1998. That paragraph prevents a youth conditional caution from being given to a young person who has previously been convicted of an offence. This will allow a youth conditional caution to be given to a young person when they have admitted to committing an offence for which such a disposal is appropriate, even if they have been convicted of other more serious offences in the past.

Clause 126: Youth conditional cautions: references to youth offending teams

637. Clause 126 inserts a new subsection (6A) into section 66A of the Crime and Disorder Act 1998, the effect of which is to require an authorised person who gives a young person a youth conditional caution to refer that young person to the youth offending team as soon as is practicable. The purpose of this is to ensure that the youth offending team has complete records of the young person's involvement with the police and so that they can be considered for assessment to identify rehabilitative programmes. The referral under this provision will also enable the youth offending team to apply for a "parenting order" if voluntary parenting support is not engaged with (parenting orders are created by section 25 of the Anti-Social Behaviour Act 2003).

Clause 127: Youth conditional cautions: involvement of prosecutors

638. Clause 127 amends sections 66A, 66B, 66C, 66D and 66G of the Crime and Disorder Act 1998.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

639. *Subsection (2)* amends section 66A(4). It removes the requirement that the conditions attached to a youth conditional caution be specified by a relevant prosecutor. A condition that a youth attend at a specified place at specified times may still be attached to a youth conditional caution but the place and times must be specified in that condition by whoever offers the caution.
640. *Subsection (3)* amends section 66B(2). It would allow the decisions as to whether there is sufficient evidence to charge the offender and whether a youth conditional caution should be given to be made by an authorised person. At the moment these decisions have to be taken by a relevant prosecutor (usually the Crown Prosecution Service). The decision taken here is not a charging decision. It is an assessment of the evidence for the purposes of deciding whether to caution only.
641. *Subsection (4)* amends section 66C(5). It removes the requirement that a relevant prosecutor must, if payment of a financial penalty is a condition, specify the amount of the penalty, to whom it must be paid and how it may be paid. Instead, these details must be specified in the condition by whoever offers the caution.
642. *Subsection (5)* amends section 66D. It allows conditions to be varied by any relevant prosecutor or authorised person. At the moment they can only be varied by the relevant prosecutor. An authorised person will be able to vary the conditions, even where they were initially decided by a relevant prosecutor.
643. *Subsection (6)* amends section 66G of the 1998 Act, which relates to the code of practice that is issued by the Secretary of State. The amendment is consequential upon the amendment made by subsection (4)
644. The intention is that the Code of Practice introduced under section 66G of the 1998 Act or guidance will specify those matters that should be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to vary conditions.

Chapter 8: Offences

Clause 128 and Schedule 22: Offences of threatening with article with blade or point or offensive weapon in public or in school premises

645. Clause 128 creates offences relating to the aggravated use of an offensive weapon or an article with a blade or point, as defined in the offences relating to the possession of such articles under section 1 of the Prevention of Crime Act 1953 (“the 1953 Act”) and section 139 of the Criminal Justice Act 1988 (“the 1988 Act”) respectively.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

646. *Subsections (1) and (2)* of the clause insert the new offences into those Acts to become new section 1A of the 1953 Act and section 139AA of the 1988 Act. The offences are committed where a person (A) has an offensive weapon or an article with a blade or point with him or her and intentionally uses the weapon or article to threaten another (B) creating an immediate risk of serious physical harm to B.
647. A's use of the weapon must be unlawful, allowing A to raise relevant defences to the use such as self-defence, defence of others or property, and the prevention of crime. If raised, the burden of rebutting those defences will rest on the prosecution. "Serious physical harm" is defined as harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861.
648. Like the offences relating to possession of such articles, the offence must be committed in a public place or on school premises, as defined in relation to the relevant possession offences.
649. The offences under this clause will be triable either way, and subject to a maximum penalty of 4 years' imprisonment on indictment. These offences carry a minimum custodial sentence for offenders aged 16 and over. In the case of an offender aged 16 or 17 on the date on which they are convicted, the court must impose a detention and training order of at least 4 months duration. For those offenders who are over 18, the court must impose a sentence of imprisonment (or detention in a young offenders institution where the offender is aged 18-20) of 6 months. In each instance the court may depart from the specified mandatory minimum if there are particular circumstances relating to the offence or offender which would make it unjust to impose such a sentence. In the case of a 16 or 17 year old the court is required to have regard to its duties pursuant to section 44 of the Children and Young Persons Act 1933 when considering whether such circumstances arise. Section 44 imposes on the court a duty to have regard to the welfare of the child.
650. The clause also makes expressly clear that if a person is found not guilty of the new aggravated offence but it is proved that the person committed the relevant possession offence the court can return an alternative verdict of guilty to the possession offence.
651. *Subsection (3)* of clause 113 gives effect to Schedule 22 which makes minor and consequential amendments as a result of clause 128. The amendment made by paragraph 16 to section 144 of the 2003 Act will allow a court, where a person pleads guilty to the new offences created by clause 113, to reduce the sentence of imprisonment it would otherwise have passed; but it may not reduce it to below 80% of the minimum term referred to in the new section 1A(6) of the 1953 Act and the new section 139AA(8) of the 1988 Act. The amendments made by paragraphs 21 to 28 to the Armed Forces Act 2006 make equivalent provision in respect of sentencing by a service court to that made in clause 113 and Schedule 17 in respect of sentencing by a civilian court.

Clause 129 and Schedule 23: Causing serious injury by dangerous driving

652. This clause inserts new section 1A in the Road Traffic Act 1988 (RTA), and makes provision for a new criminal offence of causing serious injury by dangerous driving. The offence extends to England, Wales and Scotland.
653. The offence is committed when a person causes serious physical injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place.
654. Section 1A (2) defines “serious injury” both for the purposes of England and Wales and in Scotland. In England and Wales, “serious injury” means physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861. In Scotland, “serious injury” means “severe physical injury”. The definitions reflect concepts which are familiar in the respective jurisdictions.
655. Section 1A(3) applies the existing definition of dangerous driving in the RTA to the new offence of causing serious injury by dangerous driving. Section 1A(4) provides that the offence of causing serious injury by dangerous driving only applies to driving after the offence comes into force.
656. *Subsections (5) and (6)* create an entry in Schedule 2 to the Road Traffic Offenders Act 1988 (RTOA), making provision for the section 1A offence to be triable either way and setting out the maximum penalties available on summary conviction (in England this is 6 months’ imprisonment or a fine of £5,000, or both; in Scotland this is 12 months’ imprisonment or a fine of £10,000, or both) and on indictment (5 years or a fine or both). It also sets out that the offence will be subject to mandatory disqualification and endorsement and sets the range of penalty points available for the offence.
657. *Subsection (7)* gives effect to Schedule 23, which makes minor and consequential amendments as a result of clause 114. Paragraph 1 amends section 13A(1) of the RTA so that the new offence does not apply to motoring events authorised under regulations made by the Secretary of State under that section.
658. Paragraphs 2 to 4 amend sections 23 and 24 of the RTOA to provide for alternative verdicts. Where a person is found not guilty of culpable homicide in Scotland, or manslaughter in England and Wales, they may instead be convicted of the new offence. A person found not guilty of the new offence may in the alternative be convicted of dangerous driving (contrary to section 2 of the RTA) or careless, or inconsiderate, driving (contrary to section 3 of the RTA).
659. Paragraphs 5 and 6 amend sections 34(4) and 36(2)(b) of the RTOA to make provision in respect of disqualification. A person convicted of the new offence will be subject to a

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

minimum disqualification of two years, unless the court considers there are special reasons either not to disqualify them, or to disqualify for a shorter period. A person convicted of the new offence will be disqualified until they pass an extended driving test (section 36 of the RTOA).

660. Paragraphs 7 and 8 amend section 45(6) and, prospectively, section 45A(4) of the RTOA so that an endorsement in relation to the new offence will remain effective until four years have elapsed following conviction. Paragraph 9 inserts the new offence into Schedule 1 to the RTOA for the purpose of applying sections 11 and 12(1) of that Act relating to evidence as to driver, user or owner of a vehicle in proceedings in England and Wales.
661. Paragraph 10 amends, prospectively, paragraph 3 of Schedule 3 to the Crime (International Co-operation) Act 2003 to insert the new offence. Where a defendant is normally resident outside the UK, notice of conviction and disqualification for the new offence will be given to the authorities of a state where they are normally resident.
662. Paragraph 11 amends Schedule 2 to the Armed Forces Act 2006 to insert the new offence into that Schedule for the purpose of sections 113 and 116 of that Act. Those sections govern the reporting of serious offences to the service police force and the Director of Service Prosecutions respectively.

Clause 130: Offence of squatting in a residential building

663. This clause creates a new offence of squatting in a residential building.
664. *Subsection (1)* sets out the elements of the offence. The offence is committed when a person is in a residential building as a trespasser having entered it as such, the person knows or ought to know that they are a trespasser, and the person is living in the building or intends to live there for any period.
665. *Subsection (1)(a)* is designed to ensure that only people who enter and remain in the residential building as trespasser will be captured by the offence. It will not cover anybody who entered the building with permission of the property owner, such as a legitimate tenant.
666. *Subsection (1)(b)* states that the offence will only be committed if the defendant knew or ought to have known he or she was a trespasser.
667. *Subsection (1)(c)* provides that the trespasser must be living or intending to live in the building for any period. The offence does not apply to people who are in the residential building momentarily or have no intention of living there.
668. *Subsection (2)* is designed to ensure that the offence is not committed by a person who remains in occupation after the end of a lease or licence.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

669. ‘Residential building’ is defined in *subsection (3)*.
670. *Subsection (4)* makes it clear that a defendant who occupied a residential building with the permission (e.g. consent or licence) of a trespasser can, where appropriate, still be considered a trespasser as against the owner or lawful occupier and as such be captured by the offence.
671. The offence will be triable summarily only and will carry a maximum penalty of six months’ imprisonment, a level 5 fine or both. The maximum penalty of imprisonment will become 51 weeks if section 281(5) of the Criminal Justice Act 2003 is commenced.
672. *Subsection (7)* provides that the offence applies regardless of whether the trespasser entered the property before or after commencement of the clause. The offence will therefore apply if having entered the building as a trespasser the person commits the following elements after commencement of the clause: they are in the building as a trespasser; they know or ought to know that they are a trespasser, and they are living in the building or intend to live there.
- Clause 131: Reasonable force for the purposes of self-defence etc**
673. Clause 131 amends section 76 of the Criminal Justice and Immigration Act 2008 (‘the 2008 Act’), which provides a gloss on the common law of self-defence and the defences provided by section 3(1) of the Criminal Law Act 1967 and section 3(1) of the Criminal Law Act (Northern Ireland) 1967.
674. These amendments expand section 76 so that the law relating to self-defence and related defences is set out clearly in one place.
675. *Subsection (2)* expands the list of defences in section 76(2) of the 2008 Act to include the common law defence of defence of property.
676. *Subsection (3)* adds a new subsection (6A) to section 76 of the 2008 Act. This is designed to make clear the existing legal position that a person is not under a duty to retreat but the possibility that they could have retreated is an element in the consideration of whether the degree of force used by that person was reasonable in all the circumstances as that person believed them to be.
677. *Subsection (4)* amends subsection 76(8) of the 2008 Act to make it clear that the new subsection (6A) does not prevent other matters from being taken into consideration when the court is deciding whether the degree of force used by the defendant was reasonable in the circumstances.
678. *Subsection (5)* amends subsection (10)(a) of the 2008 Act which defines the meaning of “legitimate purpose” for the purpose of section 76 of the 2008 Act. The amendment provides that a legitimate purpose includes the defence of property under common law.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

679. The amendments to section 76 of the 2008 Act will extend to England and Wales only (the remaining provisions of section 76 of the 2008 Act will continue to apply to England, Wales and Northern Ireland).

Part 4: Final provisions

Clause 132: Power to make consequential and supplementary provision etc

680. Clause 132 gives the Lord Chancellor or Secretary of State a power to make consequential, supplementary, incidental, transitional, transitory or saving provision by regulations in relation to any provision in the Bill. Such provision may amend, repeal, revoke or otherwise modify Acts of Parliament and Acts or Measures of the National Assembly for Wales passed before or in the same Session as the Bill and instruments made under such Acts or Measures before the provision in question comes into force.

681. *Subsections (4) and (5)* provide that, where the regulations amend or repeal an Act of Parliament or an Act or Measure of the National Assembly for Wales, they will be subject to the affirmative resolution procedure. Otherwise, the regulations will be subject to the negative resolution procedure

Clause 134: Commencement

682. Clause 134 makes provision for commencement of the Bill. Part 4 of the Bill comes into force on Royal Assent. The remainder of the Bill will be commenced by order made by the Lord Chancellor or the Secretary of State.

Clause 135: Extent

683. Clause 135 sets out the extent of the provisions, details of which are set out at paragraphs 48 to 55.

Clause 136: Channel Islands, Isle of Man and British overseas territories

684. Clause 136 provides that, where the Bill amends certain Acts which may be extended to the Channel Islands, Isle of Man and British overseas territories, the amendments made by the Bill may also be extended to those jurisdictions.

FINANCIAL EFFECTS OF THE BILL

Part 1: Legal aid

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

Provision of legal aid

686. The proposed abolition of the LSC by the Bill and the creation, by the Lord Chancellor, of a new executive agency has associated costs and savings attached to it. The one-off costs from abolition are estimated to be approximately £8 million. Savings of approximately £8m-£9m

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

are expected to be achieved by the end of 2014/15 (against the 2010/11 baseline), building up to this total in previous years, and continuing at approximately this level each year beyond the end of the spending review.

Civil legal aid

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

Financial resources, contributions and costs

688. The ongoing costs of changing the eligibility for legal aid are estimated to be approximately £1 million and the resulting savings are estimated to be approximately £8 million in 2014/15.
689. The creation of a Supplementary Legal Aid Scheme (SLAS) under clause 22(3) has associated costs and savings attached to it. The one-off costs of creating a SLAS are estimated to be negligible and savings are estimated to be approximately £1 million in 2014/15.

Part 2: Litigation funding and costs

Costs in criminal cases

690. Clause 59 and Schedules 7 and 8 propose changes to the costs which, in criminal cases where the defendant is acquitted, or an appellant is successful, may be ordered to be paid out of central funds (that is, money provided by Parliament). The proposals are to restrict access to central funds to defendants who are acquitted and successful appellants who do not have access to legal aid or legal insurance and to cap central funds payments to the relevant legal aid rates, as the Lord Chancellor considers appropriate. The proposals will raise £40 million savings in cash terms in 2014/15. It is expected to take three years from the implementation date until the full savings are incurred.

Part 3: Sentencing and punishment of offenders

691. The Government estimate there to be no significant additional financial cost from these proposals. There will be small transitional costs for implementing a number of the provisions, which will be met through existing Ministry of Justice budgets. As a result of these provisions, there will be cashable savings of £70 million in the final year of the Spending Review (2014/15).

EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

692. The abolition of the LSC and the transfer of legal aid functions to the Lord Chancellor will have an effect on public sector manpower. LSC employees are currently public sector

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

employees, and will be transferred in to the civil service. As at April 2011, the LSC had approximately 1,500 staff (full time equivalents). Once fully implemented, the provisions in Part 1 of the Bill are expected to lead to a reduction in staffing of 35 full time equivalents on LSC's staffing levels as at April 2011.

693. Clause 4 provides for the designation of a civil servant as the Director of Legal Aid Casework. It is currently expected that the Chief Executive of the LSC will transfer to the civil service at the LSC's abolition and take up the role of chief executive of the executive agency that the Lord Chancellor will create to administer legal aid. It is currently expected that the chief executive of the agency would normally also be designated as the Director. The designation of the Director would not, therefore, have an effect on public sector manpower. The Bill requires the Lord Chancellor, as appropriate, to provide support to the Director by making available civil servants or other persons. It is intended that support will be provided as necessary by Ministry of Justice civil servants working in the executive agency and will therefore not have an effect on public sector manpower.
694. As a result of sentencing reform the prison population will be broadly flat over the Spending Review. Over the course of the spending review the prison estate will be reconfigured to meet to future demand for places. This may have a small impact on the number of posts required.

SUMMARY OF THE IMPACT ASSESSMENT

695. The impact assessments¹⁶ and Equality Impact Assessments for the Bill are as follows:
- a) Legal Aid
 - b) Abolition of the Legal Services Commission
 - c) Central Funds
 - d) Lord Justice Jackson reforms
 - e) Rules against referral fees
 - f) Sentencing and punishment of offenders

Legal Aid

696. The impact assessment identifies the impact of each legal aid policy when implemented together and gives a summary of the proposed changes to the legal aid system. The impacts of individual elements are set out in more detail in each of the annexes attached to the

¹⁶ All impact assessments on the Bill will be published on the Bill website at www.justice.gov.uk/publications/bills-and-acts/bills

cumulative legal aid impact assessment. The document identifies both monetised and non-monetised impacts, with the aim of understanding what the overall impact might be.

Abolition of the Legal Services Commission

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

Central Funds

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

Reforms arising from Lord Justice Jackson's report

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

Rules against referral fees

700. The impact assessment refers to the proposals on referral fees. The policy is designed to ban the payment and receipt of referral fees in personal injury cases. The provisions in the Bill allow this ban to be extended to other areas should the need arise in future. The impact assessment considers the costs and benefits of the ban on referral fees in personal injury cases on the main affected groups. Although it was not possible to quantify the costs and benefits, the impact assessment outlines the key 'non-monetised' impacts on claims management companies, lawyers, insurers and claimants. The proposals would reduce the incentives to excessive litigation especially weak or unnecessary claims, reduce the overall costs involved in personal injury cases, and hence in the process to reduce insurance premiums.

Sentencing and punishment of offenders

701. The impact assessments refer to the sentencing reform proposals as set out in the Bill. The policies are designed to make the criminal justice system more effective in punishing offenders, protecting the public and reducing reoffending. The impact assessments also consider the impact of the creation of the new criminal offences and amendments relating to the law of self-defence. Where possible, the costs and benefits of the policies have been quantified. The overall impact of the sentencing proposals will result in annual savings of

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

approximately £70m in 2014/15, due to a reduction in the demand for prison places of 2,600, which will result in a broadly flat prison population over the spending review period. We will continue to revise the impact assessments as required throughout the legislative process.

EUROPEAN CONVENTION ON HUMAN RIGHTS

702. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act). Lord McNally has made the following statement:

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

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

703. Article 6(1) of the European Convention on Human Rights (ECHR) provides that where a person’s civil rights and obligations are determined, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
704. It is the Government’s view that a decision whether a person qualifies for legal aid is not in itself a determination of that person’s civil rights and obligations within the meaning of Article 6(1) (see *X v Germany*¹⁷, *R (on the application of Allinson) v Legal Services Commission*¹⁸ and *R (on the application of Pattison) v Legal Services Commission*¹⁹). Further, where an award of services or benefits in kind is not an individual right of which the applicant can consider himself a holder but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and, if so, how the need for it should be met, it is not a ‘civil right’ (see *Tomlinson v Birmingham City Council*²⁰). Decisions on both criminal and civil legal aid will be subject to evaluative judgments: provisions on financial resources in and under clause 20, merits criteria for civil legal aid and consideration of the interests of justice for criminal legal aid.
705. Notwithstanding that view, under the Bill, neither the Lord Chancellor nor civil servants acting in the name of the Lord Chancellor will take decisions on individual legal aid cases. All decisions on individual civil legal aid cases will be taken by the Director, or by those to whom the Director delegates the Director’s functions, and decisions on individual criminal legal aid cases will be taken by the Director or by a court. Although clause 4 allows the Lord Chancellor to issue the Director with guidance and directions, subsection (4) of clause 4

¹⁷ [1967] ECHR 32.

¹⁸ [2002] EWHC 927 (Admin).

¹⁹ [2004] EWHC 364 (Admin).

²⁰ [2010] UKSC 8.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

prevents the Lord Chancellor from issuing such guidance and directions in relation to individual cases.

706. Provision is made in the Bill allowing, and in some cases requiring, the review of, and appeals against, determinations under Part 1 of the Bill. This, together with the availability of judicial review, guarantees any Article 6(1) rights to the extent they are engaged. To the extent there is any lack of independence in the initial decision making process, including review and appeal, in *R (on the application of Allinson) v Legal Services Commission*²¹, the court found that the availability of judicial review would be adequate to cure any such lack of independence. Further, the Government considers that in the light of *Tomlinson* (taken together with the earlier case law including *Bryan v UK*²², *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Region*²³, *Runa Begum v London Borough of Tower Hamlets*²⁴ and *Tsfayo v UK*²⁵) the availability of judicial review will be sufficient to remedy any lack of independence in the initial decision making process. Even if factual disputes about whether an individual qualifies for legal aid arise, it is considered that the review process combined with available appeal rights means that by the judicial review stage most of the truly factual issues would have been resolved. In particular, there is not the sort of fundamental lack of objectivity found in *Tsfayo v UK*.

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

707. It is clear from the case law that Article 6 embodies not only procedural guarantees of fairness, but also the right of access to the court itself²⁶ However, the provision of legal aid is not a pre-requisite for securing such access (indeed, in certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance will meet the requirements of Article 6²⁷) and in *McVicar v United Kingdom*²⁸ the European Court of Human Rights held that 'the question of whether or not Article 6 requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case'. The case law demonstrates that, in practice, Article 6 only requires legal aid to be provided in exceptional circumstances, where its withholding would make the assertion of a civil claim practically impossible, or would lead to an obvious unfairness in the proceedings²⁹. The question of whether legal aid is necessary for a fair hearing will depend upon factors including the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively. Legal aid funding may also be required where legal representation is

²¹ [2002] EWHC 927 (Admin).

²² [1995] 21 EHRR 342.

²³ [2001] UKHL 23.

²⁴ [2003] UKHL 5.

²⁵ [2007] ECHR 656 Application No. 60860/00.

²⁶ *Golder v United Kingdom* (1975) 1 EHRR 524.

²⁷ *Airey v Ireland*.

²⁸ (2002) 35 EHRR 22.

²⁹ *X v United Kingdom* (1984) 6 EHRR 136.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

necessary in order for a coroner to carry out an effective investigation in accordance with the procedural obligations of Article 2 ECHR.

708. Clauses 7 and 8 together with Schedule 1 set out the range of civil legal services that may be available to a qualifying individual. Schedule 1 limits the scope of civil legal aid to those areas of law identified by the Ministry of Justice as having ‘sufficient priority to justify the use of public funds’³⁰ and accordingly the exclusion of certain categories of law from the scope of civil legal aid funding has the potential to engage Article 6 in individual cases.
709. Clause 9 therefore contains provision for the granting of funding in cases excluded from scope where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual’s rights to legal aid under the Human Rights Act 1998 or any rights of the individual to the provision of legal services that are enforceable EU rights, or where the granting of funding is appropriate having regard to any risk of such a breach.

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

710. Article 6(3)(c) of the ECHR makes express provision about legal aid for those charged with a criminal offence.
711. The Government considers that clause 12 (advice and assistance for individuals in custody), clause 13 (criminal proceedings), clause 14 (advice and assistance for criminal proceedings), clause 15 (representation for criminal proceedings) and clause 19 (provisional determinations) ensure that criminal legal aid is capable of being made available in all cases where Article 6(3)(c) may require it to be made available.

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

712. Provisions about merits and means testing apply in relation to both civil and criminal legal aid.
713. Case law is clear that merits testing for civil legal aid (in those cases that determine civil rights and obligations and which are subject to the procedural guarantees of Article 6(1) ECHR) is permissible. In *X v United Kingdom*³¹ the European Court of Human Rights found that a refusal of legal aid on the basis that the claim has no reasonable prospects of success would not constitute a denial of access to the court “unless it could be shown that the decision of the administrative authority was arbitrary”. However, the courts have been reluctant to lay down generic principles about merits testing and have instead stressed the need to consider each case on its own individual facts in deciding whether legal aid is required to enable access to justice.

³⁰ Ministerial foreword, *Proposals for the Reform of Legal Aid in England and Wales*

³¹ (1984) 6 EHRR 136.

714. Determinations whether an individual qualifies for criminal legal aid must be made having regard to the interests of justice and, in relation to representation for the purposes of criminal proceedings, the interests of justice test is defined in clause 16(2). Article 6(3)(c) of the ECHR provides: “everyone charged with a criminal offence shall have the right: “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. Accordingly, regardless of the financial means of the applicant, there is no obligation on the state to provide legal aid unless it is in the interests of justice to do so. The main factors which the European Court of Human Rights has considered to be relevant to the interests of justice under Article 6(3)(c) are: the seriousness of the alleged offence and the severity of the potential sentence (for example, *Boner v UK*³² and *Benham v UK*³³; the complexity of the proceedings (for example *Granger v UK*³⁴); and the personal circumstances of the individual and their ability to make a “useful contribution” to the legal analysis without legal assistance (*Pakelli v Germany*³⁵, *Granger v UK*) and to put their case in a concrete and effective way. These factors are reflected in clause 16(2).
715. Clause 20 ensures that, in cases where means testing applies (in relation to criminal and civil legal aid), individuals may only be granted legal aid where their financial resources are such that they are eligible for legal aid. As under the current legal aid scheme, the rules on financial eligibility for legal aid will be set out in regulations and such regulations may provide that, in particular circumstances, legal aid is available regardless of a person’s means. It is clear that, in cases where the ECHR requires the provision of legal aid, it is permissible for the availability of such legal aid to be made subject to means testing. In respect of criminal legal aid, Article 6(3)(c) explicitly limits the right to free legal aid to persons who do not have sufficient means to pay for legal assistance. In respect of those cases where civil legal aid is required by the ECHR, it is clear from case law that conditions may be placed on the availability of legal aid, including means testing. For example, in *Winer v United Kingdom*³⁶, the Commission reiterated that “even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its availability involving inter alia, the financial situation of the litigant or the prospect of success in the proceedings.”

Clause 22: payment for services

716. Clause 22 ensures that individuals who receive legal aid services cannot be required to pay anything in connection with the provision of the services except where regulations provide otherwise. Regulations under clause 22 can, for example, require an individual in prescribed circumstances to pay the cost of the services, a contribution to the cost or an amount in respect of administration costs. Regulations can also provide that, in civil disputes only, individuals must make a payment in excess of the cost of the services where prescribed

³² Application No. 18711/91 Judgment of 28th October 1994.

³³ 22 EHRR 293, Application No. 19380/92 Judgment of 10th June 1996.

³⁴ 12 EHRR 469.

³⁵ Series A No 64 (1983) ECtHR.

³⁶ Application No 10817/84, (1986) 48 D.R. 154.

conditions are met (this allows for a so-called ‘Supplementary Legal Aid Scheme’, whereby a percentage of certain damages obtained by a successful legally aided person is recouped to the legal aid fund).

717. It is plain from case law that, in circumstances where the ECHR requires legal aid to be provided, it is permissible for persons in receipt of legal aid to be required to make payments in respect of it. So, for example, in the context of criminal legal aid, the *European Court of Human Rights in Morris v UK*³⁷ (recalling the case of *Croissant v. Germany*) held that there was no violation of Article 6(3)(c) where an individual was required to pay a contribution to the cost of providing legal assistance and had sufficient means to pay. Similarly, in the context of civil legal aid, case law makes clear that it is permissible for payments to be required from the legally aided person. For example, in *X v UK*³⁸, the Commission recognised that, for legal aid systems to operate effectively within limited resources, machinery is needed to select cases that should be legally aided and that such machinery often includes a requirement for a financial contribution from the legally aided person.

Clause 26: choice of provider of services

718. The effect of clause 26 is that, subject to subsections (4) to (10), the Lord Chancellor is not required to make legal aid available by a person selected by an individual. For example, choice of provider will be restricted to those with whom the Lord Chancellor has entered into arrangements about the provision of legal aid. Clause 26 also provides that the Lord Chancellor is not required to make legal aid available by the particular means selected by an individual and this may also impact on the individual’s ability to select a provider of their choice. For example, in certain cases an individual may be restricted to receiving telephone advice by a provider with whom the Lord Chancellor has an arrangement to provide such advice.
719. Article 6(3)(c) of the ECHR provides that everyone charged with a criminal offence has rights including the right “to defend himself in person or through legal assistance of his own choosing”. In *Croissant v Germany*³⁹, the European Court of Human Rights found that the right to choose one’s own representative was not absolute and that the wishes of the individual could be overridden where there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.
720. The provisions at subsections (4) to (10) of clause 26 are compatible with Article 6(3)(c). To the extent that there is a right under Article 6 to select a representative of one’s choosing in civil cases, any such right would not exceed that which applies in the context of criminal legal aid.

³⁷ Application No, 38784/97, (2002) 34 E.H.R.R. 52.

³⁸ Application No 8158/78, (1980) 21 D.R. 95.

³⁹ Application No 13611/88 judgment 25th September 1992.

Clause 30 and Schedule 3: legal aid for legal persons

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

Clauses 21, 32, 33, 34 and Schedule 6: protection of information

722. Clause 21 provides for the provision of information from the Department for Work and Pensions, that Department's counterparts in Northern Ireland and the Commissioners for Her Majesty's Revenue and Customs where the information is relevant to a decision about financial eligibility for legal aid. In addition, individuals will submit, or have submitted on their behalf, a lot of detailed personal information in relation to legal aid. Paragraph 1 of Schedule 6 makes similar provision about information sharing in relation to checking a person's financial eligibility for legal aid in Northern Ireland. Sharing and disclosure of information potentially engages Article 8 and the right to respect for privacy.
723. Clause 32 restricts the way in which information received under clause 21 may be used or disclosed, including a criminal offence for use or disclosure otherwise than as permitted by clause 32. Clause 33 prevents, subject to the exceptions in clause 34, disclosure of information provided to the Lord Chancellor, the Director, a court, a tribunal or any other person on whom functions are imposed or conferred by or under Part 1 in connection with the case of an individual seeking or receiving legal aid. Disclosure of information contrary to clause 33 is also a criminal offence. Paragraph 2 of Schedule 6 makes similar provision about information sharing in relation to checking a person's financial eligibility for legal aid in Northern Ireland. These provisions, combined with the Data Protection Act 1998, ensure compliance with Article 8.

Clause 37 and Schedule 4 – Transfer of employees and property etc of Legal Services Commission

724. Under clause 37 and Schedule 4, the terms and conditions of employment of employees of the Legal Services Commission (currently public sector employees rather than civil servants), with the exception of severance and pensions, will transfer automatically to the civil service. Severance and pension entitlements will be transferred under transfer scheme powers set out in Schedule 4. In the event that the Legal Services Commission are not able to reach agreement with the trade unions about the terms of changes to the current Legal Services Commission Severance Scheme (which are different from those of the civil service), Schedule 4 to the Bill enables the Secretary of State to amend the Legal Services Commission Severance Scheme by way of a transfer scheme (for example to achieve parity between existing civil servants and transferring Legal Services Commission staff).

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

725. Following the decision of the Administrative Court in *Public and Commercial Services Union and others v The Minister for the Civil Service* [2011] EWHC 2041 (“the PCSU case”) entitlement to severance payments, which are contingent rights, under the Legal Services Commission Severance Scheme are likely to be possessions within the meaning of Article 1 of Protocol 1 of the ECHR. The proposed changes to the Legal Services Commission Severance Scheme under Schedule 4 to the Bill are likely to amount to an interference with those possessions or rights. However, it is considered that any such interference with Article 1 Protocol 1 rights does not go beyond what would be reasonably necessary to achieve the legitimate aim of ensuring that those joining the civil service are not treated differently from existing civil servants.
726. The Legal Services Commission Severance Scheme is the product of collective bargaining and it might be argued that by removing the requirement to reach agreement with the unions by using the Bill to modify the Severance Scheme the government would nullify the collective agreement. However, following the reasoning of the court in the PCSU case, it is considered that such action is, under the case law establishing the protection of collective bargaining rights, compatible with Article 11 ECHR (right to freedom of association with others). This is because the Legal Services Commission unions remain fully active and recognised in representing their interests in negotiations. Collective bargaining continues and there will continue to be negotiation with all the unions.

Part 2: Litigation funding and costs

727. *Clause 41, 43 and 44: Payments for legal services in civil cases* The effect of clauses 41, 43 and 44 is to provide that success fees under conditional fee agreements (CFA), the cost of After the Event (ATE) insurance premiums and the costs to certain bodies which provide legal services to their membership of insuring themselves against the risk of paying costs to another party in the event of losing a claim, can no longer be recovered from a losing party in any proceedings.
728. Article 6(1) of the ECHR provides that in “the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” These clauses effectively return the recoverability of success fees and insurance premiums to the state of affairs which existed prior to 2000. They neither restrict the right of access to justice nor restrict the right of access to legal representation.
729. Nonetheless, concerns have been expressed that the effect of these clauses will be to reduce access to justice in some cases, particularly in relation to cases involving personal injuries⁴⁰.

⁴⁰ See paragraphs 69 to 71 of the Ministry’s consultation paper: “Proposals for Reform of Civil Litigation Funding and Costs in England and Wales” Cm 7947 available at <http://www.justice.gov.uk/consultations/jackson-review-151110.htm>. Implementation of Lord Justice Jackson’s Recommendations (November 2010) CP 13/10.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

However, whilst recoverable costs represent a source of funding for a winning party and may promote access to justice, such costs also represent a burden on the losing party and inhibit their access to justice⁴¹. For example, in *MGN v. UK*⁴², the Court held on the facts of the case that the requirement for the applicant to pay a success fee under a CFA to a claimant who could have funded her case privately was disproportionate. Accordingly, there had been a violation of Article 10 (right to freedom of expression). More specifically, there is a suggestion that, in respect of bodies which may insure themselves against the risk of paying costs in the event of losing a claim, the balance has shifted so far in their favour that, for some, personal injury actions have now become a source of profit⁴³. Under these provisions, it is intended that costs will become more proportionate, because defendants will no longer have to pay success fees and meet the costs of insurance premiums.

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

Clauses 54 to 58: Referral fees

731. Clauses 54 to 58 provide for the prohibition of the payment and receipt by regulated persons of referral fees in claims for personal injury or death. In addition, the Lord Chancellor may, by regulation, extend the prohibition to other types of claim and legal services as well as other providers of legal services. These clauses potentially engage Article 1 of Protocol No.1 (protection of property).
732. Article 1 of Protocol No.1 applies only to existing possessions⁴⁴. The prohibition on the payment of referral fees will not apply to any referral fee which has already been paid prior to the prohibition coming into force, nor, conversely, to any such fee which is due to be paid for a referral which was made prior to the prohibition coming into force. The payee will accordingly not be deprived of the right to payment for a referral already made, nor the payer of the right to a referral in consideration of a fee already paid, in these transitional circumstances.
733. The European Court of Human Rights has previously recognised that an established economic interest, such as the goodwill of a business, can be sufficient to establish the existence of a property right for the purposes of Article 1 of Protocol 1. However, there does not appear to be evidence to suggest that the receipt of referral fees does in fact form such an integral part of any business likely to be affected by the prohibition, and even if such evidence did appear, the prohibition is considered to be a proportionate response to the mischief identified by Lord

⁴¹ *Pankhurst v White and MIB* [2010] EWCA Civ 1445.

⁴² *MGN Limited v The United Kingdom* 18 January 2011 (Application No. 39401/04).

⁴³ See para. 4.4. p.at page 109, Ministry of Justice (2010) “: Review of Civil Litigation Costs: Final Report” available at <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports> (2010). Norwich, TSO.

⁴⁴ *Marckx v Belgium* (1979) 2 EHRR 330

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

Justice Jackson (among others) in his report *Review of Civil Litigation and Costs – Final Report*⁴⁵, in particular the effect of referral fees on the overall costs of litigation and the costs and in driving a market in which claimants are encouraged to pursue unnecessary and unmeritorious claims.

734. In addition, Article 6(1) of the convention may potentially be engaged. It provides that in “*the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time...*”. Concerns have been expressed that these clauses may have the effect of reducing access to justice in some cases, on the basis that it may become more difficult for some potential claimants to access legal services. Referral fees, however, were prohibited as a matter of regulation prior to 2004, and the prohibition effectively restores that state of affairs, with more comprehensive coverage and provision to combat evasion. The clauses do not directly restrict either the right of access to justice nor the right of access to legal representation, and any impact would be indirect and contingent on changes in business behaviour (such as a reduction in unsolicited approaches to potential claimants). It was never contended prior to 2004 that the regulatory prohibition on referral fees in operation up to that date restricted access to justice or was in any other way incompatible with Article 6(1). Any impact would be in reducing the extent to which potential claimants are approached direct, without their having had to take any action to contact a legal representative; but this impact would appear to be minimal. Claimants with personal injury claims will be well aware of their right to claim damages. Solicitors, in particular, can still make their availability to conduct personal injury litigation known through a variety of media. Charities and trades unions will still be able to refer their members to appropriate solicitors.
735. Further, as argued by respondents to Lord Justice Jackson’s consultations and explained in his final report, there is a possibility that the payment of referral fees can sometimes lead to referrals being made to the highest bidder, which runs the risk of the potential claimant being referred to a solicitor who may not be best placed to advise upon a particular matter, or who may not be based in the potential claimant’s locality, both to the detriment of the potential claimant. Prohibiting the payment and receipt of referral fees, then, would reduce these risks and so, on that basis, may in fact assist in ensuring access to justice.

Part 3 Sentencing and Punishment of Offenders

736. The Government notes that in many instances Part 3 of the Bill gives powers to the courts to make decisions in respect of offenders. The courts are public authorities for the purposes of section 6 of the Human Rights Act 1998. They are therefore required to act compatibly with the Convention rights in making such decisions.

⁴⁵ “*Review of Civil Litigation costs – Final Report*”, available at www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review

Clause 67 and 68 Community orders and suspended sentence orders increase in curfew powers and prohibition on foreign travel

737. The Bill contains two amendments to the requirements that can be attached by the Court to community orders and suspended sentence orders that have the potential to raise issues in relation to Convention rights.
738. Clause 67 extends, in respect of community orders and suspended sentence orders, the maximum period of daily curfew from 12 to 16 hours and the maximum length of a curfew requirement from 6 to 12 months. It is possible that in certain circumstances a curfew requirement might amount to detention under Article 5 (right to liberty and security). It is also possible that a curfew requirement might in certain circumstances amount to an interference with the offender's right under Article 8 (right to respect for private and family life).
739. It is for the court to impose such requirements, and, as noted above, as a public authority for the purposes of the Human Rights Act 1998 the court is obliged to act compatibly with the offender's Convention rights. It will consider the particular circumstances of the individual case and act compatibly with those rights. Any curfew requirement which amounts to detention would be imposed by a court following conviction, and as such falls within the exception set out at Article 5(1)(a) (detention after conviction by a court). In relation to Article 8, any interference will be justified under Article 8(2) as a proportionate measure in pursuit of a legitimate aim for the purposes of the Convention.
740. Clause 68 gives the court a power to impose a foreign travel prohibition requirement. Such a requirement may in some cases amount to an interference with the Convention rights, in particular Article 8 (right to respect for private and family life), for example where the offender has close family abroad or needs to travel for a specific occasion such as a funeral, and Article 1 of Protocol protocol 1 (right to property) - for example where the offender needs to travel to pursue or protect business interests. Once more, it is for the court to impose such requirements, and as a public authority for the purposes of the Human Rights Act 1998. the court is obliged to act compatibly with the offender's Convention rights. It will consider the particular circumstances of the individual case and act compatibly with those rights. Any interference with the offender's rights under Article 8 is proportionate to a legitimate aim. Any interference with the offender's rights under Article 1 of Protocol No. 1 strikes a fair balance between the offender's rights and the general interest.

Clause 75: Youth rehabilitation orders: curfew requirement

741. Clause 75 largely mirrors for youths the increase in the court's powers to impose curfews for adults made by clause 67. Similar arguments will apply in support of its view that the provisions are compatible with the Convention rights.

Clause 110: Removal of prisoners from the United Kingdom

742. Clause 110 provides that prisoners liable to removal from the UK who are subject to an indeterminate sentence may be removed at the expiry of their tariff. (The tariff is the

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as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

minimum period that must be served in custody by indeterminate sentence prisoners, i.e. life sentences and sentences of imprisonment for public protection.)

743. Different treatment of prisoners regarding release from custody potentially engages Article 5 (right to liberty and security) and Article 14 (prohibition of discrimination) However, the Government does not consider that Article 14 is contravened by these provisions as a prisoner liable to removal from the UK is not in an analogous position to either a foreign prisoner who is not so liable, or a British prisoner. In *R (Brooke) v Secretary of State for Justice*^{46, 47}, the Divisional Court rejected a discrimination challenge based on nationality. A British prisoner whom the Parole Board had judged unsuitable for early release on home detention curfew argued that foreign prisoners liable to removal who were serving determinate sentences had preferable provisions relating to their early release from prison (in order to be removed from the country) compared to British prisoners serving determinate sentences. The court held that the differential treatment arose not because of differences in nationality, but because the first class of prisoner is liable to be removed and the second is not.
744. The court went on to hold that the scheme whereby foreign prisoners liable to removal were removed from the country amounted to a distinct legal scheme from that which applied to British prisoners stating: “The two situations are not comparable ... release for the purposes of removal is to enable a different sanction from imprisonment in this country to be brought into effect”. The Government considers that this reasoning applies with equal force to the proposed scheme of removal at the expiry of the minimum term for prisoners liable to removal from the UK who are serving indeterminate sentences. Further, the Government considers that in any event any difference in treatment on the grounds of immigration status is objectively justified.

Clause 113 Abolition of certain offences for dangerous offenders and Clause 115 New Extended Sentences

745. Clause 113 of the Bill abolishes indeterminate sentences for public protection (IPP sentences) and extended sentences for certain violent or sexual offences (see sections 225 to 228 of the 2003 Act).
746. Clause 115 creates a new type of extended sentence, which is in many respects the same in effect as the existing extended sentence. However, different release provisions will apply to the new sentence. The new extended determinate sentence will be available after the commencement date of this clause, whether the offence for which the sentence is imposed was committed before or after that date.

⁴⁶ [2009] EWHC 1396 (Admin)

⁴⁷ [2009] EWHC 1396 (Admin)

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

747. The Government has considered whether these clauses breach Article 7 (no punishment without law), which prohibits the imposition on an offender of a heavier penalty than that applicable at the time at which the criminal offence was committed.
748. The Government's view is that these clauses are compatible with Article 7 rights because they relate to the administration of the sentences and do not alter the maximum penalties for the offences concerned. Subsection (9) makes clear that the effect of the new provisions cannot be to extend the length of the sentence beyond the maximum applicable at the time the offence was committed. In the Strasbourg and domestic courts licence and release provisions have been held to be administrative arrangements rather than to amount to the imposition of a penalty for the purposes of Article 7. For example in *R v Secretary of State for the Home Department ex p. Uttley* [2004] UKHL 38 and *Uttley v United Kingdom* (Application No. 3694/03, 29th November 2005) the House of Lords and the European Commission of Human Rights respectively make it clear that Article 7 relates to the maximum penalty which could have been imposed at the time the offence was committed, not the penalty actually imposed on a particular individual. See also *Csozanski v Sweden* (Application No. 22318/02, 2nd October 2003), *M v Germany* (Application 19359/04, 17th December 2009) and *Kafkaris v Cyprus* (Application No 21906/04, 12th February 2008).

Clause 114: Life sentence for second listed offence

749. Clause 114 provides that a person who commits a second particularly serious offence, must be given a life sentence unless the court is of the opinion that there are particular circumstances which relate to either of the offences or to the offender, which would make it unjust to impose such a sentence. The Government considers this is compatible with Article 5 (right to liberty and security) since the provision allows for a proper consideration by the court of the particular circumstances of the offender and allows the court to depart from the life sentence. No issue arises under article 7 as the provision only bites if the second offence is committed after commencement.

Clause 118: Employment in prisons: deductions etc from payments to prisoners

750. Clause 118 amends the Prison Act 1952 to give the Secretary of State certain powers to make rules in respect of prisoner's earnings. In some circumstances, taking property from a person by operation of statute amounts to an interference with Article 1 of Protocol 1 (protection of property).
751. However the Government considers that these provisions are compatible with the rights to peaceful enjoyment of property guaranteed by Article 1 of Protocol 1. They note that the provisions in the Bill give the Secretary of State powers to make rules. As a public authority for the purposes of the Human Rights Act 1998, the Secretary of State is obliged to act compatibly with the Convention rights, including in the making of rules.

752. Nonetheless, we have considered whether rules made under the clause are compatible with the Convention rights. The Government considers that where the ‘deduction’ is in fact a prospective reduction in the prisoner’s salary made by the Governor, there is no interference with property rights because the prisoner is only entitled to the salary as it is set. See the unreported case of *Davis*⁴⁸. Where the deduction in fact amounts to a levy on earnings which the prisoner has received (e.g. from a third party), this is likely to amount to an interference with the prisoner’s property rights. However, any such interference will be justified as it strikes a fair balance between prisoners’ rights and the general interest. New section 47A(3) and (4) of the 1952 Act (inserted by this clause) set out a non-exhaustive list of purposes for which payments deducted from prisoners may be applied, in particular protecting the victims of crime and the prevention of crime, specifically by providing funds to support the rehabilitation of offenders and to support the individual prisoner. The Government therefore considers that to the extent that any rights of prisoners are engaged, there is no breach of Article 1 of Protocol 1.

Clause 123: Conditional cautions: removal etc of certain foreign offenders

753. Clause 123 provides that a caution given to an offender who has no lawful permission to be in the UK (and is therefore liable to expulsion) may contain a condition the purpose of which is to bring about the departure of the offender from the country. This potentially engages issues relating to Article 6 (right to a fair trial) and Article 14 (prohibition on discrimination). However, the Government considers that a relevant foreign offender without permission to be in the UK is not in an analogous position to either a foreign offender who has permission to be in the UK, or a British offender and considers that the reasoning in *Brooke* referred to above in relation to clause 110 applies with equal force to this clause and accordingly any difference in treatment does not amount to a breach of Article 14.

754. Further even if there were a difference in treatment on the grounds of the status of ‘removability’ it can nonetheless be objectively justified as ensuring that those with no leave to remain in the United Kingdom are removed as early as possible. The Code of Practice on Conditional Cautions⁴⁹ contains a number of safeguards to ensure that conditional cautions are only given when the consequences are fully understood by the offender.

Clause 128: Offence of threatening with article with blade or point or offensive weapon in public on school premises.

755. Clause 128 creates new offences of using an article with a blade or point, or offensive weapon, to threaten in public or on school premises.

756. The offences also make provision that the court must impose an appropriate custodial sentence on offenders aged 16 and over who are convicted of these offences. The appropriate

⁴⁸ Unreported, Court of Appeal (Civil Division) 27 November 1991

⁴⁹ <http://www.cps.gov.uk/publications/others/conditionalcautioning04.html>

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

custodial sentence for a person aged 18 or over is imprisonment for 6 months or more. This is compatible with Article 5 ECHR (right to liberty and security), since the provision allows for a proper consideration by the court of the particular circumstances of the offender and allows the court to depart from the required sentence. In the case of offenders aged 16 or 17, in reaching its opinion on this matter, the court is required to have regard to its duty under section 44 of the Children and Young Persons Act 1933 (i.e. to have regard to the welfare of the child).

757. The Court of Appeal in *R v Rehman; R v Wood* ([2005] EWCA Crim 2056) held that section 51A of the Firearms Act 1968 (which contains a similar proviso) was compatible with Article 5.

758. It is the Government's view that this provision is compatible with Article 5, since the proviso allows for a proper consideration by the court of the particular circumstances of the offender and is therefore lawful within the meaning of Article 5(1)(a) as interpreted by the courts.

Clause 130: Offence of squatting in a residential building

759. Clause 130 creates a new offence of squatting in a residential building. The offence is committed if a person is in a residential building as a trespasser having entered it as such, the person knows or ought to know that they are a trespasser and the person is living in the building or intends to live there for any period. The offence does not apply to landlord and tenant disputes or cases where a person is holding over at the end of a lease or licence.

760. The Government considers that criminalising squatting in residential buildings amounts to a reasonable and proportionate interference with Article 8 rights in accordance with Article 8(2). Such interference will be in accordance with law and the Government considers that it is necessary, depending on the circumstances, for the prevention of disorder or crime, and most particularly, the rights and freedoms of others (their home, private and family life).

Clause 131: Reasonable force for the purpose of self defence etc.

761. Clause 131 amends section 76 of the Criminal Justice and Immigration Act 2008 ("the 2008 Act") to clarify the law in relation to self defence, defence of property and prevention of crime.

762. The amendments make two changes. First, the amendments make express provision in statute that a person can use force that is reasonable in the circumstances as they believe them to be in order to defend property. Secondly, the amendments make clear the existing legal position that there is no duty to retreat, but the possibility that a person could have retreated is an element to be taken into account when deciding whether the force used was reasonable in all the circumstances as the person believed them to be.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

763. The amendments do not change the Common Law, but that law engages Article 2 (right to life) and, arguably, Article 3 (protection from torture and inhuman and degrading treatment) and Article 8 (right to respect for private and family life).
764. The Government considers that the amendments are compatible with Article 2. Section 76 of the 2008 Act provides that a person is entitled to use such force in self-defence as is reasonable in the circumstances as they honestly believed them to be. This test has been considered in the context of lethal force by both the domestic courts and the European Court of Human Rights in the context of self-defence and defence of others. The European Court of Human Rights did not find that this test breached Article 2 in the case of *McCann v. United Kingdom* (1996) 21 E.H.R.R. 97. More recently, the court has confirmed that the domestic law is not incompatible with Article 2 in *Bubbins v United Kingdom* ((2005) 41 EHRR 24) and the admissibility decision of *Bennett v. United Kingdom* (App. no. 5527/08). These amendments import the common law and will operate in the context of the same test of reasonableness; therefore the Government considers that they are compatible with the Convention rights.
765. The use of reasonable force for the purpose of self-defence etc is very unlikely to engage Article 3 (prohibition on torture and inhuman and degrading treatment) because such force is unlikely by nature to amount to such treatment. In so far as that Article might ever be engaged (for example in the context of force used against detainees), the Government considers that the European Court of Human Rights, having found that the domestic legal test is not incompatible with Article 2, would also consider it not incompatible with Article 3 on a similar basis.
766. Article 8 (right to respect for private and family life) will be engaged in all cases where injury is caused as a result of a person acting in pursuit of one of the defences in section 76(2). The Government considers that affording private law defences, including in defence of property, on the basis of reasonable force, is a reasonable interference with Article 8(2). Depending on the circumstances, such interference is considered to be necessary in the interests of public safety, the prevention of disorder and crime, and the rights and freedoms of others. Again in the light of the fact that the European Court of Human Rights has upheld the domestic legal test in the context of Article 2, the Government is confident it would do so in the context of Article 8.

COMMENCEMENT

767. Clause 134 makes provision about commencement. The provisions of the Bill will come into force on days specified in orders made by the Lord Chancellor or the Secretary of State, with the exception of Part 4 of the Bill (final provisions) which is to come into force on Royal Assent.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

Annex A

Table of contents for Schedule 1

768. Part 1 of Schedule 1 provides descriptions in each area of law for which civil legal aid services may be made available. Each description includes any applicable conditions and refers to the exclusions in Part 2 and Part 3 that apply as well as, in some cases, making further specific exclusions.
769. The exclusion of advocacy in Part 3 applies to all of the paragraphs of Part 1 with the exception of cross-border disputes (see paragraph 39 of Part 1). In relation to connected matters (see paragraph 40 of Part 1) the exclusion in Part 3 applies subject to any additional exceptions from that exclusion that are prescribed in regulations. Part 3 is explained at paragraph 85 above.
770. The table below summarises which exclusions (other than the exclusion in Part 3) apply in relation to each paragraph of Part 1 of Schedule 1.

Part 1 –paragraph number	Part 2 and other exclusions that apply
P1 Care, supervision and protection of children	All Part 2 exclusions.
P2 Special educational needs	All Part 2 exclusions.
P3 Abuse of child or vulnerable adult	All Part 2 exclusions except: personal injury/death, assault, battery or false imprisonment, breach of statutory duty, damages claims for breach of Convention rights. Exception from exclusion in relation to negligence, but not in relation to clinical negligence. Exclusion in relation to services provided in relation to a matter arising under a family enactment (defined in paragraph 10).

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

P4 Working with children and vulnerable adults	All Part 2 exclusions.
P5 Mental health and mental capacity	All Part 2 exclusions. Exclusions in relation to creation of lasting powers of attorney and making of advance decisions under the Mental Capacity Act 2005.
P6 Community care	All Part 2 exclusions.
P7 Inherent jurisdiction of High Court in relation to children and vulnerable adults	All Part 2 exclusions.
P8 Unlawful removal of children from the UK	All Part 2 exclusions.
P9 Family homes and domestic violence	All Part 2 exclusions except assault, battery or false imprisonment and trust law.
P10 Victims of domestic violence and family matters	All Part 2 exclusions except trust law. Exclusion of services provided in relation to a claim in tort relating to domestic violence. Services that may be provided include conveyancing in some circumstances.
P11 Protection of children and family matters	All Part 2 exclusions.
P12 Mediation in family disputes	All Part 2 exclusions except trust law. Services that may be provided include conveyancing in some circumstances.
P13 Children who are parties to family proceedings	All Part 2 exclusions.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

P14 Forced marriage	All Part 2 exclusions.
P15 EU and international agreements concerning children	All Part 2 exclusions.
P16 EU and international agreements concerning maintenance	All Part 2 exclusions except trust law.
P17 Judicial review	All Part 2 exclusions except welfare benefits. Exclusion in relation to judicial reviews that do not have the potential to produce a benefit for the individual, a member of the individual's family or the environment. Exclusion in relation to immigration cases.
P18 Habeas corpus	All Part 2 exclusions.
P19 Abuse of position or powers by public authority	All Part 2 exclusions except personal injury/death, assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property, breach of statutory duty and damages claims breach of Convention rights. Exception from exclusion in relation to negligence, but not in relation to clinical negligence.
P20 Breach of Convention rights by a public authority	All Part 2 exclusions except personal injury/death, assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property, breach of statutory duty and damages claims for breach of Convention rights.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

	Exception from exclusion in relation to negligence, but not in relation to clinical negligence.
P21 Special Immigration Appeals Commission	All Part 2 exclusions.
P22 Immigration: detention	All Part 2 exclusions.
P23 Immigration: temporary admission	All Part 2 exclusions.
P24 Immigration: residence etc restrictions	All Part 2 exclusions.
P25: Immigration: victims of domestic violence and indefinite leave to remain	All Part 2 exclusions Exclusion in relation to attendance at an interview
P26 Immigration: rights to enter and remain	All Part 2 exclusions. Exclusion in relation to attendance at an interview.
P27 Immigration: accommodation for asylum seekers etc	All Part 2 exclusions.
P28 Loss of home	All Part 2 exclusions except business. Exception from those exclusions for certain applications under the Trusts of Land and Appointment of Trustees Act 1996 in connection with bankruptcy. Exception from the Part 2 exclusions for assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property and breach of statutory duty in respect of counterclaims in possession/sale proceedings and

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

	<p>unlawful eviction.</p> <p>Exclusion in relation to certain proceedings under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004</p>
P29 Homelessness	All Part 2 exclusions.
P30 Risk to health or safety in rented home	All Part 2 exclusions except damage to property and breach of statutory duty.
P31 Anti-social behaviour	All Part 2 exclusions.
P32 Protection from harassment	All Part 2 exclusions.
P33 Gang related violence	All Part 2 exclusions.
P34 Sexual offences	All Part 2 exclusions except personal injury/death, negligence, assault, battery or false imprisonment, breach of statutory duty, damages claims for breach of Convention rights.
P35 Proceeds of crime	<p>All Part 2 exclusions except business.</p> <p>Specific exclusions in connection with confiscation orders.</p>
P36 Inquests	All Part 2 exclusions except personal injury or death.
P37 Environmental pollution	All Part 2 exclusions.
P38 Equality	All Part 2 exclusions except welfare benefits.
P39 Cross-border disputes	Not subject to the exclusions in Part

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

	2.
P40 Connected matters	All Part 2 exclusions except any Part 2 exclusions prescribed in regulations.

ANNEX B

Detailed explanatory note for Part 1 of Schedule 1

Paragraph 1: Care, supervision and protection of children

771. *Paragraph 1* brings within scope civil legal services in relation to certain orders and proceedings relating to the intervention of a local authority in the care, supervision and protection of a child.
772. *Paragraph 1(1)* lists the types of cases involving care, supervision and protection of children that are to be within scope. These include where the local authority is considering commencing, or has commenced, care or supervision proceedings under Part IV of the Children Act 1989 in respect of a child, proceedings for a child assessment order or proceedings for an emergency protection order under Part V of the Children Act 1989, and adoption cases under the Adoption and Children Act 2002. So, for example, legal aid will be available for parents where a local authority is seeking to take their child into care. Under paragraph 1(1)(k) further orders or procedures relating to the care, supervision or protection of children may be prescribed for the purposes of this paragraph.
773. *Paragraph 1(2)* brings within the scope of civil legal aid services for cases related to those set out at paragraph 1(1); that is, where an order is sought as an alternative to one of those orders, or for proceedings heard together with proceedings relating to such an order. So, for example, an application for a special guardianship order in respect of a child who is the subject of a care order application by a local authority will be in scope, if the two proceedings are to be heard together or the special guardianship order is an alternative to the care order.

Paragraph 2: Special educational needs

774. *Paragraph 2(1)* brings within the scope of civil legal aid matters arising under Part 4 of the Education Act 1996. These are typically challenges relating to a local education authority's assessment of a child's special educational needs.
775. *Paragraph 2(2)* applies the exclusions in Part 2 and the advocacy exclusion in Part 3. Legal aid in the form of advocacy may be made available for appeals in the Upper Tribunal on a point of law from decisions made by the First-tier (Special Educational Needs and Disability – SEND) Tribunal or the Special Educational Needs Tribunal for Wales under Part 4 of the Education Act 1996 (see paragraph 17 of Part 3 of Schedule 1).

Paragraph 3: Abuse of child or vulnerable adult

776. This paragraph brings within the scope of civil legal aid services provided in relation to the abuse of an individual that took place when the individual was a child or vulnerable adult. Such services are within the scope of civil legal aid if they are provided to the individual concerned. They are also within the scope of civil legal aid if the individual concerned has died and the services are provided to the individual's personal representative or for the purposes of a claim under the Fatal Accidents Act 1976 for the benefit of the individual's dependants. This will include services provided in relation to claims by individuals who allege abuse in local authority care, and claims against a local authority for failure to take an individual into care. This paragraph will also include claims against the alleged perpetrator of abuse.
777. *Sub-paragraph (2)* applies the exclusions in Part 2 except in relation to personal injury or death, assault, battery or false imprisonment, breach of statutory duty, and damages claims against a public authority (within the meaning of section 6 of the Human Rights Act 1998) for breach of Convention rights (as defined in that Act).
778. *Sub-paragraphs (3) and (4)* bring into scope negligence claims apart from those which are clinical negligence claims. *Sub-paragraph (5)* applies the exclusion in Part 3. *Sub-paragraph (6)* excludes services provided in relation to a matter arising under a family enactment (as defined in paragraph 10 of Part 1 of Schedule 1).

Paragraph 4: Working with children and vulnerable adults

779. *Paragraph 4(1)(a)* brings within the scope of civil legal aid services provided in relation to the inclusion or removal of an individual from a barred list under section 2 of the Safeguarding Vulnerable Groups Act 2006. A person included in the list under section 2 is barred from regulated activity relating to children and adults. Also within the scope of civil legal aid are services provided in relation to the inclusion or removal of an individual from the lists maintained under section 81 of the Care Standards Act 2000 (individuals considered unsuitable to work with children) and section 1 of the Protection of Children Act 1999 (individuals considered unsuitable to work with vulnerable adults).
780. *Sub-paragraph (1)(b)* brings within scope services provided in relation to a disqualification order imposed under sections 28, 29 or 29A of the Criminal Justice and Court Services Act 2000, the effect of which is to bar the person against whom the order was made from working with children.
781. *Sub-paragraph (1)(c)* brings within scope services in relation to a direction under section 142 of the Education Act 2002, which prohibits an individual from teaching and related activities.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

782. *Sub-paragraph (2)* applies the exclusions in Part 2 and Part 3. Under paragraphs 14 and 15 of Part 3, advocacy available includes advocacy in proceedings in the First-tier Tribunal and appeals to the Upper Tribunal under the provisions listed in paragraph 14 of Part 3 concerning appeals and other applications relating to the above lists, orders and directions.

Paragraph 5: Mental health and mental capacity

783. *Paragraph 5(1)(a)* provides that civil legal services may be made available in relation to matters arising under the Mental Health Act 1983. These include civil procedures under which individuals may be detained in hospital for assessment or treatment for a mental disorder.

784. *Paragraph 5(1)(b)* provides that legal aid may be made available for applications by a prisoner to a Mental Health Review Tribunal under paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984.

785. *Paragraph 5(1)(c)* provides that civil legal services may be made available in relation to matters arising under the Mental Capacity Act 2005. Such services may relate to decisions of the Court of Protection made under that Act concerning the property, financial affairs and personal welfare of persons who lack capacity to take those decisions for themselves. *Paragraph 5(3)* excludes services provided in relation to the creation of lasting powers of attorney or the making of advance decisions under the Mental Capacity Act 2005, but *sub-paragraph (4)* states that this does not exclude services relating to the validity, meaning, effect or applicability of a lasting power of attorney that has been created, or an advance decision that has been made.

786. *Paragraph 5(2)* specifies that paragraph 5(1) is subject to the exclusions in Part 2 and Part 3. Advocacy available under Part 3 includes advocacy in proceedings in the First-tier Tribunal (Mental Health) and the Mental Health Review Tribunal for Wales and in appeals to the Upper Tribunal arising out of such proceedings (see paragraphs 9, 10 and 15 of Part 3). Advocacy may be made available for the purposes of proceedings in the Court of Protection to the extent that they concern certain vital interests of the individual concerned, for example, the right to life, liberty or physical safety (see paragraph 4 of Part 3 of Schedule 1).

Paragraph 6: Community care

787. This paragraph describes civil legal services provided in relation to community care services. This would include, for example, services provided in order to assist a person to obtain or challenge an assessment for adequate services, to challenge care home closures or to contest a person's involuntary removal from a home by a local authority.

788. *Paragraph 6(3)* defines community care services as services which a relevant person may provide under a number of listed enactments. Paragraph (m) of that definition allows other

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

enactments to be prescribed for the purposes of that definition. The definition of “relevant person” allows other relevant persons to be prescribed.

Paragraph 7: Inherent jurisdiction of High Court in relation to children and vulnerable adults

789. *Paragraph 7* provides that civil legal services may be made available in relation to the inherent jurisdiction of the High Court in relation to children and vulnerable adults. The High Court may exercise its inherent jurisdiction to protect children and vulnerable adults in cases that call for judicial intervention but which fall outside the relevant statutory framework. So, for example, an application for a wardship order or for an injunction to protect a person under the inherent jurisdiction of the court will be in scope.

Paragraph 8: Unlawful removal of children from the UK

790. *Paragraph 8* brings within the scope of civil legal aid services provided for an individual in relation to any of a list of specified orders and requirements where the individual is seeking to prevent the unlawful removal from the United Kingdom of a child to whom the individual is related.

791. A typical situation would be where a child resides with one parent pursuant to a residence order and there are settled arrangements for staying contact with the ‘non-resident’ parent, the child is collected by the ‘non-resident’ parent but is not returned and there is concern they may remove the child from the United Kingdom. Legal aid may be made available for the resident parent in relation to the orders or requirements to prevent the removal which are listed in sub-paragraph (1)(a) to (c).

792. *Sub-paragraph (2)* applies to this category the exclusions in Parts 2 and 3 of the Schedule. *Sub-paragraph (3)* provides that a child is “related” to an individual if the individual is the child’s parent or otherwise has parental responsibility for the child (for example, by way of a residence order). *Sub-paragraph (4)* defines a child as a person under 18, which is in line with the Children Act 1989 although only in exceptional cases would fresh orders be made, or orders varied, for those aged between 16 and 18.

Paragraph 9: Family homes and domestic violence

793. *Paragraph 9* refers to civil legal services for cases where a person is seeking protection from domestic violence.

794. *Sub-paragraphs (1) and (2)* list the types of cases that are to be within scope. They cover cases where a person is seeking a civil remedy specifically to provide protection from domestic violence, in the form of an order under Part 4 of the Family Law Act 1996 (sub-

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

paragraph (1)) or an injunction following assault, battery or false imprisonment or an injunction or other order under the inherent jurisdiction of the High Court (sub-paragraph (2)).

795. *Sub-paragraph (3)* applies the exclusions in Parts 2 and 3 of the Schedule to the services in scope under this paragraph, except for the exclusions for services provided in relation to assault, battery or false imprisonment and in relation to trust law.
796. *Sub-paragraph (4)* defines “family relationship” for the purpose of this paragraph: the definition is a broad one, based on the definition of “associated persons” in the Family Law Act 1996. *Sub-paragraph (5)* gives the Lord Chancellor a power to set out in regulations when circumstances arise out of a family relationship.

Paragraph 10: Victims of domestic violence and family matters

797. *Paragraph 10* refers to civil legal aid for victims of domestic violence in private law family cases arising out of the abusive family relationship. Only services in relation to those private law family matters will be in scope and not services for a claim in tort. For example, financial disputes or disputes about children arising from the breakdown of an abusive relationship will be in scope for victims of domestic violence, but a claim by the victim against the abuser for damages will not.
798. *Sub-paragraph (2)* applies the general exclusions in Part 2 of the Schedule to the services in scope under this paragraph, except for the exclusion for services provided in relation to trust law. *Sub-paragraph (4)* provides that the services in scope under this paragraph will include conveyancing, but only where conveyancing will give effect to a court order made in proceedings for which legal aid has been provided under Part 1 of the Bill. This means that, in these limited circumstances, the general exclusion for conveyancing set out in Part 2 of the Schedule does not apply. *Sub-paragraph (5)* applies the general exclusion in Part 3 of the Schedule.
799. *Sub-paragraph (6)* applies a specific exclusion which removes from scope under this paragraph services provided in relation to claim in tort in respect of the abuse referred to in sub-paragraph (1).
800. *Sub-paragraph (7)* defines “family relationship” for the purpose of this paragraph in the same broad way as paragraph 9(4). *Sub-paragraph (8)* provides that cases arising out of a family relationship include matters arising under a family enactment (“family enactment” for this purpose being any of those listed in sub-paragraph (9)) and gives the Lord Chancellor a power to set out in regulations when matters otherwise arise out of a family relationship. *Sub-paragraph (9)*, in addition to providing the list of family enactments, defines “abuse” (covering both physical and mental abuse) and defines “adult” and “child” as a persons aged 18 or over and under 18 respectively.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

801. It is intended that the regulations made under clause 10 will be used to ensure that funding under this paragraph is limited to cases where there is appropriately clear evidence of the need for protection. The circumstances that will be accepted as evidence are described in the response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales*⁵⁰.

Paragraph 11: Protection of children and family matters

802. *Paragraph 11* refers to civil legal services where a person is seeking in a private law family case to protect a child from abuse by applying for any of the list of orders and procedures set out in *sub-paragraph (1)* (to which, by virtue of *sub-paragraph (1)(g)*, further orders or procedures may be added by being prescribed for the purposes of this paragraph). So, for example, civil legal aid may be made available to a person who is seeking an order under section 8 of the Children Act 1989 to prevent a person who has abused a child from having contact with that child.
803. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3 of the Schedule to the services in scope under this paragraph. *Sub-paragraph (3)* defines “abuse”, “adult” and “child” in the same terms as paragraph 10(9).
804. As for services described in paragraph 10, it is intended that the regulations made under clause 10 will be used to ensure that funding for services described in this paragraph is limited to cases where there is appropriately clear evidence of the need for protection; and the circumstances that will be accepted as evidence are described in the response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales*.

Paragraph 12: Mediation in family disputes

805. *Paragraph 12* refers to civil legal aid for mediation in relation to family disputes.
806. Under *paragraph 12(1) and (2)* legal aid will be in scope both for mediation and for civil legal services provided in connection with the mediation. It is intended that the regulations made under clause 10 will be used to determine what legal services in connection with mediation will be provided as part of legal aid. The type of legal advice to be available is described in the response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales*.
807. *Sub-paragraph (3)* applies the exclusions in Parts 2 and 3 of the Schedule to the services in scope under this paragraph, except for the exclusions for services provided in relation to trust

⁵⁰ “*Proposals for the Reform of Legal Aid in England and Wales*” Cm 7967 available at:
<http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm>

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

law. *Sub-paragraph (5)* provides that the services in scope under this paragraph will include conveyancing, where conveyancing is used to give effect to arrangements made in order to resolve a family dispute in relation to which legal aid for services described in paragraph 12 has been provided under Part 1 of the Bill. This means that, in these circumstances, the general exclusion for conveyancing, set out in Part 2 of the Schedule, does not apply.

808. *Sub-paragraph (7)* defines “family dispute” and “family relationship” for the purposes of this paragraph (“family relationship” having the same broad meaning as in paragraph 9). *Sub-paragraph (8)* provides that cases arising out of a family relationship includes matters arising under a family enactment (“family enactment” having by virtue of *sub-paragraph (9)* the same meaning as in paragraph 10), and gives the Lord Chancellor a power to set out in regulations when matters otherwise arise out of a family relationship.

Paragraph 13: Children who are parties to family proceedings

809. *Paragraph 13* refers to civil legal services for children in relation to family proceedings. *Sub-paragraph (1)(a) to (c)* lists the types of instances when civil legal aid may be provided, for example where the child is, or proposes to be the applicant or respondent to the proceedings, or when the child is made a party to proceedings by the court under Rule 16.2 of the Family Procedure Rules 2010.

810. *Sub-paragraph (3)(a)* defines proceedings as family proceedings if they arise out of a family relationship, and *sub-paragraph (3)(b) and (c)* defines “family relationship” (giving it the same broad meaning as in paragraph 9) for the purpose of this paragraph. *Sub-paragraph (4)* provides that cases arising out of a family relationship include proceedings arising under a family enactment (“family enactment” having by virtue of *sub-paragraph (5)* the same meaning as in paragraph 10), and gives the Lord Chancellor a power to set out in regulations when matters arise out of a family relationship.

811. *Sub-paragraph (5)* defines a “child” as a person under the age of 18.

Paragraph 14: Forced marriage

812. *Paragraph 14* refers to civil legal services in relation to forced marriage protection orders, which are made under Part 4A of the Family Law Act 1996. In conjunction with paragraph 9 of the Schedule, this paragraph ensures that cases where an injunction or other order is sought to protect an individual from forced marriage or domestic violence will be within the scope of civil legal aid.

Paragraph 15: EU and International agreements concerning children

813. *Paragraph 15* refers to civil legal services in relation to private family law matters arising under international agreements.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

814. *Paragraph 15(1)(a)* refers to civil legal services in relation to cases where an EU court decision relating to the custody of a child is to be recognised and enforced within England and Wales. Cases are within scope for civil legal aid if following an application being made to the Lord Chancellor under the 1980 European Convention on Child Custody or the 1980 Hague Convention, or upon an application being made for recognition and enforcement under the relevant provisions of the 2003 Brussels Regulation, court proceedings are necessary.
815. *Paragraph 15(1)(b)* refers to civil legal services in relation to an application made to the Lord Chancellor under the 1980 Hague Convention in an “incoming” case in relation to a child who is or is believed to be in England and Wales. This works on the principle of returning children who have been wrongfully removed or retained to their country of habitual residence so that any issue relating to the child’s custody can be determined by the courts of the country of habitual residence.
816. *Paragraph 15(1)(c)* refers to civil legal services in relation to the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility under the 2003 Brussels Regulation (known as “Brussels IIa”). These are cases about the recognition and enforcement in a court in England and Wales of a judgment made in a Member State. The judgments concern, for example, rights of access to children, the return of a child and practical arrangements for the exercise of rights of access.
817. *Paragraph 15(3)* provides full definitions of the Conventions and Regulation referenced in this paragraph and *sub-paragraph (4)* makes provision about when an application is “made to the Lord Chancellor” for the purposes of this paragraph.

Paragraph 16: EU and international agreements concerning maintenance

818. *Paragraph 16* refers to civil legal services in relation to cases where a person is applying to the courts in England and Wales to recognise or enforce a maintenance order from outside the jurisdiction, or, in the case of the EU Maintenance Regulation, is applying from outside the jurisdiction to establish within the jurisdiction a liability to pay maintenance. This would include issues of child maintenance and a former spouse’s maintenance where an order was made outside England and Wales but the person liable to pay the maintenance resides in England or Wales. *Paragraph 16(1)* lists the EU Conventions and Regulation under which applications for recognition and enforcement may be made, with the exception of the EU Maintenance Regulation, in relation to which provision is made by *sub-paragraphs (2) and (3)*.
819. *Paragraph 6(2)* refers to civil legal aid for the establishment and enforcement of maintenance orders and other decisions on maintenance across EU borders under the EU Maintenance Regulation, where the application is made under Article 56. For example, cases will be in

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

scope where a person within the EU but outside England and Wales applies through his or her home Central Authority⁵¹, which transmits the application to the appropriate Central Authority in the United Kingdom, for a maintenance decision made in their county of residence to be recognised and enforced through the courts in England and Wales.

820. *Paragraph 16(3)* refers to civil legal aid for recognition, enforceability and enforcement of maintenance decisions in England and Wales where an individual has received legal aid or exemptions from costs or expenses in their Member State of origin. In such a case it is not necessary for the application to have been made via the Central Authority for it to be in scope.
821. *Paragraph 16(4)* applies the exclusions in Parts 2 and 3 of the Schedule to the services in scope under this paragraph, except for the exclusion for services provided in relation to trust law (since in a limited number of cases, matters of trust law may arise in establishing or enforcing a liability).
822. *Paragraph 16(5)* provides full definitions of the Conventions and Regulations referenced in this paragraph.

Paragraph 17: Judicial Review

823. *Paragraph 17(1)* brings within the scope of civil legal aid services provided in relation to judicial review. *Sub-paragraph (2)(a)* applies the exclusions in Part 2 with the exception of claims concerning welfare benefits and accordingly legal aid may be made available for a judicial review concerned with welfare benefits. *Sub-paragraph (2)(b)* also applies the exclusion in Part 3. Judicial review for the purposes of this paragraph includes any procedure in which a court, tribunal or other person mentioned in Part 3 of Schedule 1 is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review (see the definition of “judicial review” in *sub-paragraph (9)*). Applications for bail in connection with an application for judicial review are in scope by virtue of paragraph 5(1)(a) of Part 4 of Schedule 1.
824. *Sub-paragraph (3)* excludes services that may be provided in relation to judicial review that do not have the potential to produce real benefits for the applicant, for the applicant’s family or for the environment. This means that civil legal aid may not be made available for representative actions by way of judicial review. However, *sub-paragraph (4)* ensures that if services have been provided in relation to a judicial review then those services do not cease to be available if subsequently the judicial review ceases to have the potential to produce the benefit referred to in *sub-paragraph (3)*.

⁵¹ The EU Maintenance Regulation requires each Member State to have a Central Authority for the transmission of applications in relation to maintenance obligations between Member States.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

825. Subject to sub-paragraph (7), *sub-paragraph (5)* excludes services provided in relation to judicial review relating to immigration (including issues relating to rights described in paragraph 26 of Part 1 of this Schedule (immigration: rights to enter and remain)) where the same or substantially similar issues have already been the subject of judicial review or an appeal to a tribunal or court within a period of 1 year, starting on the day the previous judicial review or appeal was determined.
826. Subject to sub-paragraph (7), *sub-paragraph (6)* excludes services provided in relation to judicial review of removal directions, where the direction was given not more than a year after the later of the decision to remove the individual from the United Kingdom by way of a removal direction, the refusal of leave to appeal against such a decision or the determination or withdrawal of an appeal against such a decision.
827. *Sub-paragraph (7)* provides that sub-paragraphs (5) and (6) do not exclude services provided to an individual in relation to judicial review of a negative decision in relation to an asylum application (within the meaning of the Council Directive 2005/85/EC of 1st December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status) where there is no right of appeal to the First-tier Tribunal against the decision or in relation to judicial review of a certificate issued under section 94 or 96 of the Nationality, Immigration and Asylum Act 2002. Section 94 allows the Secretary of State to issue a certificate on a number of different grounds, such as that an asylum claim is clearly unfounded, and the certificate prevents an appeal to the First-tier Tribunal being brought while an individual is in the United Kingdom. Section 96 allows the Secretary of State to issue a certificate preventing an appeal to the First-tier Tribunal on an issue where a person has already had an opportunity to raise the issue in an earlier appeal.

Paragraph 18: Habeas corpus

828. *Paragraph 18(1)* brings within the scope of civil legal aid services in relation to an application for a writ of habeas corpus, a common law remedy enabling an individual to challenge the legality of the individual's detention. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3. Applications for bail in connection with an application for habeas corpus are in scope by virtue of paragraph 5(1)(a) of Part 4 of Schedule 1.

Paragraph 19: Abuse of position or powers by public authority

829. *Paragraph 19(1)* brings within the scope of civil legal aid services in relation to a claim against a public authority for its abuse of position or power. This is in addition to any claim for judicial review or habeas corpus.
830. *Sub-paragraph (2)* applies the exclusions in Part 2 with the exception of those relating to personal injury or death, assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property, breach of statutory duty and damages claims for breach of

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

Convention rights by a public authority. For the purposes of this paragraph, *sub-paragraph (7)* defines “public authority” as having the same meaning as in section 6 of the Human Rights Act 1998. *Sub-paragraph (4)* brings into scope negligence claims apart from those which are clinical negligence claims.

831. *Sub-paragraph (6)* provides that, in order for an act or omission by a public authority to constitute abuse of its position or powers for the purposes of this paragraph, it must be deliberate or dishonest and result in harm to a person or property that was reasonably foreseeable.

Paragraph 20: Breach of Convention rights by public authority

832. *Paragraph 20(1)* brings within the scope of civil legal aid services in relation to a claim in tort and other claims for damages in respect of an act or omission by a public authority which involved a significant breach of Convention rights.

833. *Sub-paragraph (2)(a)* applies the exclusions in Part 2 with the exception of those in relation to personal injury or death, assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property and breach of statutory duty. It also provides an exception to the general exclusion in paragraph 12 of Part 2 of claims for damages for breach of Convention rights.

834. *Sub-paragraph (4)* brings into scope services in relation to negligence claims apart from those which are clinical negligence claims.

Paragraph 21 Special Immigration Appeals Commission

835. *Paragraph 21* brings within the scope of civil legal aid services provided in relation to proceedings before the Special Immigration Appeals Commission.

836. *Sub-paragraph (2)* applies the exclusions and exceptions in Parts 2 and 3 of the Schedule. Advocacy before the Commission is within scope under paragraph 21 of Part 3. Applications for bail in connection with an appeal to the Special Immigration Appeals Commission are in scope by virtue of paragraph 5(1)(a) of Part 4 of Schedule 1.

Paragraph 22 Immigration: detention

837. *Paragraph 22* brings within the scope of civil legal aid services provided in relation to the immigration-related detention powers referred to in *sub-paragraph (1)*.

838. *Sub-paragraph (2)* applies the exclusions and exceptions in Parts 2 and 3 of the Schedule. Advocacy may be provided for certain proceedings in the First-tier Tribunal under paragraph 11 of Part 3. Applications for bail in connection with immigration-related detention are in

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

scope by virtue of paragraph 5(1)(a) of Part 4 of Schedule 1. Advocacy in the magistrates' court in proceedings in relation to bail under Schedule 2 to the Immigration Act 1971 or arrest under Schedule 2 or 3 to that Act is in scope by virtue of paragraph 8(b) of Part 3 of Schedule 1.

Paragraph 23 Immigration: temporary admission

839. *Paragraph 23* brings within the scope of civil legal aid services provided in relation to temporary admission to the United Kingdom under the provisions referred to in *sub-paragraph (1)*. Temporary admission is an alternative to detention under immigration powers.
840. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3 of the Schedule. Advocacy before the First-tier Tribunal for these cases is in scope by virtue of paragraph 11 of Part 3 of Schedule 1. Advocacy in the magistrates' court in relation to arrest under Schedule 2 to the Immigration Act 1971 is in scope by virtue of paragraph 8(b) of Part 3 of Schedule 1.

Paragraph 24 Immigration: residence etc restrictions

841. *Paragraph 24* brings within the scope of civil legal aid services in relation to restrictions imposed on an individual, such as restrictions on place of residence, under the provisions referred to in *sub-paragraph (1)*. Restrictions are an alternative to detention under immigration powers.
842. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3 of the Schedule. Advocacy before the First-tier Tribunal for these cases is in scope by virtue of paragraph 11 of Part 3 of Schedule 1. Advocacy in the magistrates' court in relation to arrest under Schedule 2 to the Immigration Act 1971 is in scope by virtue of paragraph 8(b) of Part 3 of Schedule 1.

Paragraph 25 Immigration: victims of domestic violence and indefinite leave to remain

843. *Paragraph 25(1)* brings within the scope of civil legal aid services in relation to an application for indefinite leave to remain on the grounds that an individual has been granted leave to enter or remain in the United Kingdom for a limited period as the partner of someone present or settled in the United Kingdom and the relationship has broken down due to abuse by that partner (or other associated person). This means that individuals applying for indefinite leave to remain in the United Kingdom under rules 289A to 289C of the Immigration Rules (indefinite leave to remain in the United Kingdom as the victim of domestic violence) will be within the scope of civil legal aid.
844. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3 of the Schedule. Advocacy before the First-tier Tribunal for these cases is in scope by virtue of paragraph 13 of Part 3 of Schedule 1. *Sub-paragraph (3)* provides a specific exclusion from this paragraph for

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

attendance at an interview conducted on behalf of the Secretary of State with a view to reaching a decision on the application described in sub-paragraph (1).

Paragraph 26 Immigration: rights to enter and remain

845. *Paragraph 26* brings within the scope of civil legal aid services in relation to rights to enter and to remain in the United Kingdom under the provisions referred to in *sub-paragraph (1)*. This paragraph allows legal aid to be provided for claims for asylum.
846. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3 of the Schedule. Advocacy before the First-tier Tribunal for these cases is in scope by virtue of paragraph 11 of Part 3 of Schedule 1.
847. Unless regulations provide otherwise, *sub-paragraph (3)* provides a specific exclusion from this paragraph for attendance at an interview conducted by the Secretary of State with a view to reaching a decision on a claim in respect of a right to enter or remain described in sub-paragraph (1).

Paragraph 27: Immigration: accommodation for asylum seekers

848. The consultation paper proposed removing legal aid for asylum support cases on the grounds that they were similar to welfare benefits cases (which are to be excluded under Part 2 of Schedule 1). However, respondents to the consultation pointed out that these cases concern the provision of housing for otherwise homeless asylum seekers and are thus more closely related to cases where there is a risk of homelessness, which are to be within the scope of civil legal aid.
849. In accordance with the proposals in the response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales*, paragraph 27 brings within the scope of civil legal aid services provided in relation to the Secretary of State's powers to provide or arrange for the provision of accommodation for asylum seekers and failed asylum seekers and their dependants under the legislation listed in that paragraph. This includes appeals to the First-tier Tribunal (Asylum Support) under section 103 of the Immigration and Asylum Act 1999 where they concern the refusal or withdrawal of accommodation support. This provision only includes civil legal services where the application or appeal concerns accommodation.
850. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3 of Schedule 1. Under Part 3 of Schedule 1, advocacy is not available for appeals before the First-tier Tribunal (Asylum Support).

Paragraph 28: Loss of home

851. *Paragraph 28* relates to cases where an individual is at risk of losing their home.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

852. *Paragraph 28(1)* brings within the scope of legal aid services provided to an individual in relation to court orders for sale or possession of the individual's home or eviction of the individual (or others) from the individual's home. So, for example, legal aid will be available to a person facing the potential immediate loss of their home as result of outstanding mortgage or rent arrears. Legal aid will also, for example, be available for a person who is unlawfully evicted from their home by a landlord.
853. *Paragraph 28(2)* brings within scope services provided to an individual in relation to certain bankruptcy matters. These are services provided in relation to a bankruptcy order against an individual where that person's estate includes their home and where the bankruptcy proceedings are not brought voluntarily by the person concerned (and includes services provided in relation to a statutory demand). Such proceedings are included within the scope of civil legal aid because they can result in the loss of an individual's home.
854. *Sub-paragraph (3)* applies the exclusions of Part 2 except in relation to business matters. *Sub-paragraph (5)* ensures that civil legal services are within the scope of civil legal aid where they relate to proceedings for sale or possession of an individual's home brought by the trustee in bankruptcy under section 14 of the Trusts and Land and Appointment of Trustees Act 1996 in reliance on section 335A of the Insolvency Act 1986. This will cover, for example, legal aid for the former spouse of a bankrupt whose home is at risk as a result of an application for sale brought by the trustee in bankruptcy.
855. *Sub-paragraph (6)* disapplies the Part 2 exclusions of assault, battery or false imprisonment, trespass to goods, trespass to land, damage to property and breach of statutory duty in relation to counterclaims in possession/sale proceedings and in relation to unlawful eviction. This ensures that heads of claim in tort, commonly relied upon in possession proceedings and unlawful eviction cases, are not excluded from the scope of paragraph 28. This will include, for example, unlawful eviction claims brought by non-tenant occupiers
856. *Sub-paragraph (8)* excludes certain matters that, to the extent that they are to be within the scope of civil legal aid, are covered by paragraph 10 (victims of domestic violence and family matters).
857. *Sub-paragraphs (9) to (13)* ensure that paragraph 28 does not bring within scope services provided to persons who unarguably are occupying premises as a trespasser and entered the premises as such. This ensures that legal aid is not available to people who are squatting and face proceedings for eviction.

Paragraph 29: Homelessness

858. *Paragraph 29* brings within the scope of civil legal aid services provided in relation to the provision of accommodation and assistance under Parts 6 and 7 of the Housing Act 1996 to persons who are homeless or threatened with homelessness as defined in the 1996 Act.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill as brought from the House of Commons on 3rd November 2011 [HL Bill 109]

859. This paragraph is subject to the exclusions in Parts 2 and 3 of Schedule 1.

Paragraph 30: Risk to health or safety in rented home

860. *Paragraph 30* relates to housing disrepair cases where there is a serious risk to the health or safety of the individual or a family member in occupation.

861. *Sub-paragraph (1)* brings within scope of civil legal aid services provided to a person seeking the removal or reduction of a serious risk to their (or a family member's) health and safety where the serious risk arises from a deficiency in the person's rented or leased home and the civil legal services are provided in order to ensure that the landlord acts to address the risk. Consequently, in accordance with the proposals in the response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales*, it is intended that legal aid will be available for serious disrepair cases where a person is primarily seeking to remedy the disrepair rather than claiming damages

862. This paragraph is subject to the exclusions in Part 2 of Schedule 1, except the exclusions in respect of damage to property and breach of statutory duty. It is also subject to the exclusions in Part 3 of the Schedule.

Paragraph 31 Anti-social behaviour

863. *Paragraph 31* brings within the scope of civil legal aid services provided to persons in respect of anti-social behaviour-related matters in the county court. Anti-social behaviour matters dealt with in the magistrates' court fall within the scope of criminal legal aid. *Sub-paragraph (1)* lists the relevant matters, namely orders against an individual under section 1B of the Crime and Disorder Act 1998 (county court orders relating to anti-social behaviour), related interim orders and intervention orders under sections 1D and 1G of the 1998 Act and anti-social behaviour injunctions against an individual under section 153A of the Housing Act 1996.

864. This paragraph is subject to the exclusions in Parts 2 and 3 of Schedule 1.

Paragraph 32 Protection from harassment

865. *Paragraph 32(1)* brings within the scope of civil legal aid services provided in relation to an injunction under section 3 or 3A of the Protection from Harassment Act 1997 and services provided in relation to the variation or discharge of a restraining order under section 5 or 5A of that Act. Sections 3 and 3A of the Protection from Harassment Act 1997 concern the making of injunctions to restrain conduct amounting to harassment. Section 5 of the Protection from Harassment Act 1997 enables a court on sentencing or dealing with a defendant on conviction to make a restraining order to protect a victim or other person from harassment or fear of violence. Section 5A allows a court on acquittal to make a restraining

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

order to protect a person from harassment. Services provided in relation to sections 5 and 5A are within scope only as regards an application to vary or discharge the restraining order made under those provisions, for example where a victim may feel that they may be at risk of danger or harassment from an ex-partner.

866. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3. Advocacy that may be made available under Part 3 includes advocacy in the Crown Court and a magistrates' court in relation to an application to vary or discharge a restraining order made under section 5 or 5A of the Protection from Harassment Act 1997 under, respectively, paragraph 6(a) and paragraph 8(c) of Part 3. Injunctions under sections 3 and 3A of the Protection from Harassment Act 1997 are made by the High Court or a county court and, under paragraphs 3 and 5 of Part 3, advocacy may be available for such proceedings.

Paragraph 33: Gang-related violence

867. *Paragraph 33(1)* brings within the scope of civil legal aid services provided in relation to injunctions under Part 4 of the Policing and Crime Act 2009. Under Part 4 of that Act, a court may make an injunction if it is satisfied to the civil standard of proof that the respondent has engaged in, encouraged or assisted gang-related violence and if it considers it necessary for an injunction to be granted to prevent the respondent from engaging in, encouraging or assisting gang-related violence and/or to protect the respondent from gang-related violence.
868. *Sub-paragraph (2)* applies the exclusions in Parts 2 and 3. Applications under Part 4 of the Policing and Crime Act 2009 are made to the High Court or a county court so, under paragraphs 3 and 5 of Part 3, advocacy may be available.

Paragraph 34: Sexual offences

869. *Paragraph 34(1)* brings within the scope of civil legal aid services provided in relation to a sexual offence, but only where the services are provided to the victim of the offence or, where the victim has died, to the victim's personal representative. This, for example, allows legal aid to be made available for a civil claim against the alleged perpetrator of an offence or against a person that negligently failed to prevent a sexual offence.
870. *Sub-paragraph (2)(a)* applies the exclusions in Part 2 except for those in relation to personal injury or death, negligence, assault, battery or false imprisonment, breach of statutory duty and damages claims for breach of Convention rights by a public authority. *Sub-paragraph (2)(b)* applies the exclusion in Part 3.

Paragraph 35: Proceeds of crime

871. *Paragraph 35(1)* brings within the scope of legal aid services provided to an individual in relation to the confiscation proceedings under the Proceeds of Crime Act 2002 listed in that

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

sub-paragraph. These include, for example, proceedings in relation to the discharge or variation of a disclosure order.

872. *Sub-paragraph (2)* applies the exclusions in Part 2, except in relation to business matters. Sub-paragraph (2) also applies the exclusion in Part 3 in relation to advocacy. Under paragraphs 6(b) and 8(d) of Part 3 advocacy may be made available for the purposes of proceedings in the Crown Court and a magistrates' court in relation to any of the proceedings under the Proceeds of Crime Act 2002 referred to in paragraph 35(1).
873. *Sub-paragraph (3)* excludes from the scope of civil legal aid services provided for a defendant in relation to directions under section 54(3) of the Proceeds of Crime Act 2002 about distribution of funds in the hands of a receiver or directions under section 67D of that Act about distribution of proceeds of realisation. This is because these directions relate to the application of sums at the end of the confiscation enforcement process and the procedure is primarily intended to enable third parties to have their last opportunity to claim that money or property as theirs.
874. *Sub-paragraph (4)* provides that where a confiscation order has been made against a defendant under Part 2 of the Proceeds of Crime Act 2002 and varied under section 29 of that Act (which allows for variation of confiscation orders made at a time when the defendant had absconded), services for the defendant in relation to any subsequent application for compensation under section 73 of that Act are excluded from scope.

Paragraph 36: Inquests

875. *Paragraph 36(1)* brings within the scope of civil legal aid services provided for an individual in relation to an inquest into the death of a member of the individual's family.
876. *Sub-paragraph (2)* applies the exclusions in Part 2, except in relation to personal injury or death, and applies the exclusion in Part 3.
877. *Sub-paragraph (3)* explains when an individual is a member of another individual's family for the purposes of this paragraph.

Paragraph 37: Environmental pollution

878. *Paragraph 37* refers to civil legal services provided in relation to injunctions for nuisance arising from environmental pollution, in accordance with the proposals in the response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales*. *Sub-paragraph (1)* allows the Lord Chancellor to prescribe the types of pollution of the environment that will be covered. The power may be used, for example, to prescribe pollution resulting in particular types of harm.

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Bill
as brought from the House of Commons on 3rd November 2011 [HL Bill 109]*

Paragraph 38: Equality

879. *Paragraph 38(1)* refers to civil legal services provided in relation to a contravention of the Equality Act 2010. Such services are in scope where they relate to a freestanding cause of action under the Equality Act 2010, or where an alleged contravention of the Equality Act 2010 arises in the course of other proceedings.
880. *Paragraph 38(2)(a)* exempts paragraph 38(1) from the social security benefits exclusion in Part 2. The other exclusions in Parts 2 and 3 of Schedule 1 apply to this paragraph.

Paragraph 39: Cross-border disputes

881. *Paragraph 39(1)* refers to civil legal services provided in relation to proceedings in circumstances in which the services are required to be provided under Council Directive 2002/8/EC of 27th January 2003 to improve access to justice in cross-border disputes. The Directive sets out minimum common rules relating to legal aid in disputes where the party applying for funding is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or the decision is to be enforced. Paragraph 39 is not subject to the exclusions in Part 2 or Part 3 of Schedule 1.

Paragraph 40: Connected matters

882. *Paragraph 40* confers power on the Lord Chancellor to make regulations about the circumstances in which civil legal aid may be made available for services not listed in Part 1 of Schedule 1 where they are provided in connection with the provision of services that are listed in Part 1. It may be appropriate for such services to be provided, for example, where a case raises a number of different matters, not all of which will be in scope. Regulations made under this paragraph may prescribe exceptions from the exclusions in Part 2 and Part 3 of Schedule 1.