*These notes refer to the Coroners and Justice Bill*
*as brought from the House of Commons on 25th March 2009 [HL Bill 33]*

# CORONERS AND JUSTICE BILL

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# EXPLANATORY NOTES

## INTRODUCTION

1. These explanatory notes relate to the Coroners and Justice Bill as brought from the House of Commons on 25th March 2009. They have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. 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.

3. A glossary of abbreviations and terms used in these explanatory notes is contained in Annex A to these notes.

## SUMMARY

4. The Bill is divided into 9 Parts.

5. Part 1 reforms the law in relation to coroners and to the certification and registration of deaths. It replaces the existing framework for the investigation of certain deaths by coroners in the Coroners Act 1988 (the 1988 Act); that Act was a consolidation of existing coroner legislation, dating back to the early 1900s. In replacing the 1988 Act, this Part introduces a few new concepts. There will be a Chief Coroner to lead the service, with powers to intervene in cases in specified circumstances, including presiding over an appeals process designed specifically for the coroner system. There will be a senior coroner for each coroner area (presently known as coroner districts) with the possibility of appointing area coroners and assistant coroners to assist the senior coroner for the area (in place of the existing deputy coroners and assistant deputy coroners). The 1988 Act refers almost exclusively to "inquests" as what coroners work is about. However, there is a significant amount of work that goes on which does not lead to court proceedings and which is largely unrecognised in the current Act. This work is reflected in the Bill as it imposes a duty on a senior coroner to conduct an "investigation" into a death – it also reflects that senior coroners may need to make preliminary inquiries to establish whether the death comes within his or her jurisdiction.

6. Chapter 1 of Part 1 makes provision for investigations into deaths by senior coroners and enables the Secretary of State to certify an investigation if it will concern or involve a matter that should not be made public ("protected matters"). Such certified investigations will be referred to, and conducted by, a High Court judge nominated by the Lord Chief Justice. The judge will determine whether an inquest which forms part of the investigation will be held with a jury. Chapter 2 relates to the notification of deaths to the coroner and provides for the appointment of medical examiners and for the independent scrutiny and confirmation of medical certificates of the cause of death. Chapter 3 makes further provision in respect of investigations concerning treasure. Chapter 4 makes provision for coroner areas and for the appointment of senior, area and assistant coroners and provides for their funding. Chapter 5 sets out the powers of senior coroners and offences relating to jurors, witnesses and evidence, and makes provision for payments to jurors, witnesses and others. Chapter 6 provides for the appointment of a Chief Coroner and Deputy Chief Coroners, provides for inspection of the coroners system and establishes a new appeals system in respect of certain decisions made by a senior coroner. The Chapter also enables the Chief Coroner, or a judge appointed by the Lord Chief Justice at the request of the Chief Coroner, to conduct an investigation into a person's death, instead of the senior coroner who would otherwise have jurisdiction. Chapter 7 contains other supplementary provisions, including conferring powers on the Lord Chancellor to make "Coroners regulations" in respect of coroners' investigations and for "Coroners rules" in respect of coroners' inquests to be made by the Lord Chief Justice or his nominee. This chapter also provides for the abolition of the office of coroner of the Queen's household.

7. Part 2 contains amendments to the criminal law. Chapter 1 amends the law in respect of the partial defences to murder and the offence and defence of infanticide, and simplifies the wording of the offence of assisting suicide. Chapter 2 creates a new offence of possession of prohibited images of children. Chapter 3 makes provision about conspiracies to commit offences in other parts of the UK. It also repeals section 29A of the Public Order Act 1986 which contains a saving for discussion or criticism of sexual conduct in respect of the offence of inciting hatred on grounds of sexual orientation.

8. Part 3 contains amendments relating to criminal evidence, investigations and procedure. Chapter 1 contains provisions for investigation anonymity orders. Chapter 2 re-enacts the Criminal Evidence (Witness Anonymity) Act 2008 (CEWAA) with some modifications. Chapter 3 contains provision about measures taken in court proceedings for vulnerable and intimidated witnesses. Chapter 4 contains provision about the use of live links in criminal proceedings. Chapter 5 contains other miscellaneous provisions including provision extending the Queen's evidence provisions in the Serious Organised Crime and Police Act 2005 to the Financial Services Authority (FSA) and the Department for Business, Enterprise and Regulatory Reform (BERR), and provisions about the grant of bail in cases where a defendant is charged with murder.

9. Part 4 relates to sentencing. Chapter 1 establishes the Sentencing Council for England and Wales (replacing the Sentencing Guidelines Council (SGC) and the Sentencing Advisory

Panel (SAP)) and makes provision about the Council's functions and the duties of courts to follow its guidelines. Chapter 2 contains other provisions relating to sentencing. These provide for extended driving bans for persons also given custodial sentences and amend the law relating to extended sentences for dangerous offenders.

10. Part 5 contains some further criminal justice provisions. It makes amendments relating to the Commissioner for Victims and Witnesses established under the Domestic Violence, Crime and Victims Act 2004; enables criminal offences created by regulations (under section 2(2) of the European Communities Act 1972) implementing Directive 2006/123/EC on Services in the Internal Market (the Services Directive) and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive) to have penalties exceeding those permitted by the European Communities Act 1972; amends a range of criminal procedure legislation to take account of the European Union Framework Decision 2008/675/JHA regarding the treatment in the UK of criminal offences committed elsewhere; and makes provision about the retention of knives confiscated from persons entering court and tribunal buildings.

11. Part 6 contains provisions about civil and criminal legal aid, including provision for pilot schemes in relation to civil legal aid, and provisions about the enforcement of contribution orders made in cases where criminal legal aid is granted.

12. Part 7 introduces a new civil recovery scheme through which courts can order offenders to pay amounts in respect of assets or other benefits derived by them from the exploitation of accounts about their crimes, for example, by selling their memoirs, or receiving payments for public speaking or media interviews.

13. Part 8 makes a number of amendments to the Data Protection Act 1998 (the 1998 Act), including extending the inspection and audit powers of the Information Commissioner.

14. Part 9 sets out supplementary provisions about orders and regulations, commencement, extent, repeals and so forth.

## BACKGROUND

15. The purpose of the Bill is to establish more effective, transparent and responsive justice and coroner services for victims, witnesses, bereaved families and the wider public. It seeks to achieve this by:

- updating parts of the criminal law to improve its clarity, fairness and effectiveness;

- giving vulnerable and intimidated witnesses, including in respect of gun and gang related violence, improved protection, from the early stages of the criminal justice process;

- introducing a more consistent and transparent sentencing framework;

- improving the service bereaved families receive from a reformed coroner system;

- giving those who are suddenly or unexpectedly bereaved opportunities to participate in coroners' investigations, including rights to information and access to a straightforward appeals system; and

- putting in place a unified system of death certification that includes independent scrutiny and confirmation of the causes of death given on death certificates.

16. In addition, the Bill will confer stronger inspection powers on the Information Commissioner to improve the way that data is held and used.

**Part 1 - Coroners etc**

17. The legislative changes proposed in the Bill are part of an overall package of reform aimed at addressing the weaknesses in the present coroner and death certifications systems, identified in the reports of the *Fundamental Review of Death Certification and Investigation* and the *Shipman Inquiry*, both published in 2003 (http://www.archive2.official-documents.co.uk/document/cm58/5831/5831.pdf and http://www.the-shipman-inquiry.org.uk/thirdreport.asp, respectively).

18. A draft Coroners Bill was published in June 2006 (http://www.justice.gov.uk/docs/coroners_draft.pdf) and the public consultation on it ran until September 2006. This consultation took a number of different forms, including by inviting written representations – more than 150 responses were received from a range of organisations and individuals. A summary report of the responses was published in February 2007 (http://www.dca.gov.uk/consult/coroners/cb684907b.pdf). A document setting out the changes to the proposals made in response to consultation was published in March 2008 (http://www.justice.gov.uk/docs/coroners-bill-changes.pdf).

19. The draft Coroners Bill was subject to pre-legislative scrutiny by the then Constitutional Affairs Select Committee (CASC – now the Justice Committee). CASC's report on the draft Bill was published in August 2006 (http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/902/902i.pdf). The Government responded to the CASC report in November 2006 (http://www.official-documents.gov.uk/document/cm69/6943/6943.pdf).

20. In 2008, a consultation paper on the introduction of a statutory duty for medical practitioners to report deaths to coroners was published (http://www.justice.gov.uk/docs/cp1207.pdf). The Government decided that the statutory duty to report would be placed on registered medical practitioners only, and a draft list of the type

of death to be reported was included in the response document (http://www.justice.gov.uk/docs/cp1207-response.pdf).

21. A further consultation was carried out in April 2008 regarding sensitive reporting in coroner's courts (http://www.justice.gov.uk/docs/sensitive-reporting-coroners.pdf). The Government concluded that the Press Complaints Commission Code would not be amended and that instead consideration would be given to finding ways of drawing the Code to the attention of the bereaved families. The response to the consultation was published on 14th January 2009 (http://www.justice.gov.uk/docs/sensitive-reporting-coroners-courts.pdf).

22. A consultation was carried out on a draft Charter for bereaved people who come into contact with the coroner service in June 2008 (http://www.justice.gov.uk/docs/draft-charter-bereaved.pdf). The consultation resulted in the Charter being revised, and the revised Charter was published on 14th January 2009 (http://www.justice.gov.uk/docs/charter-bereaved.pdf).

23. A consultation on *Improving the Process of Death Certification* was published by the Department of Health in July 2007 (http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_076971). The public consultation ran until October 2007 and a summary of responses was published in May 2008 (http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_084949). The Department of Health received 157 written responses to the consultation and additional feedback through meetings with national stakeholder organisations and with councillors and representatives from local communities.

24. The majority of respondents and participants in the consultative meetings recognised and acknowledged the problems with the current process of death certification described in the consultation paper and supported the proposed improvements. The main concerns raised by respondents and participants were that the new scrutiny process should not cause significant delays to funerals and that medical examiners should be able to carry out their duties with the necessary degree of independence from the NHS and other public authorities. These two concerns have been critical factors in designing the improved process and will remain so in development of regulations and guidance.

**Part 2 - Criminal Offences**

25. On 28th October 2004 the Home Secretary announced (Hansard cols 1579-1580) that the Home Office, the Department for Constitutional Affairs and the Attorney General's Office would jointly review the law on homicide, with the first stage of the review being undertaken by the Law Commission and the second stage by the Government. In November 2006, the Law Commission published a report *Murder, Manslaughter and Infanticide* (available at http://www.lawcom.gov.uk/docs/lc304.pdf) – this completed the first phase of the review. On 12th December 2007 the Ministry of Justice announced (Hansard col. 43WS) the second stage of the review, stating that having considered the Law Commission's recommendations

carefully the Government had decided to proceed on a step-by-step basis, looking first at the recommendations relating to:

- reformed partial defences to murder of provocation and diminished responsibility;
- the law on complicity in relation to homicide; and
- infanticide.

26. In July 2008, the Government published a consultation paper *Murder, Manslaughter and Infanticide: proposals for reform of the law* including draft clauses (available at http://www.justice.gov.uk/publications/cp1908.htm). The Government received 74 responses to the consultation as well as running a number of stakeholder workshops and one-to-one meetings with key stakeholders. Having considered the responses to this consultation the Government decided to proceed with reforms to the partial defences to murder of provocation and diminished responsibility and reform of the law on infanticide. The strong message from the consultation was that complicity in relation to homicide should be reviewed in the context of the wider law on complicity, and the Government accepts that there are significant benefits to this approach. The summary of responses and a statement of the Government's position was published on 14th January 2009 (http://www.justice.gov.uk/publications/consultations-with-response.htm).

27. Child psychologist Tanya Byron's report *Safer Children in a Digital World* published in March 2008 (http://www.dcsf.gov.uk/byronreview/) identified websites promoting suicide as an area where there is some confusion about the application of the law to on-line activity. It recommended that the law on harmful and inappropriate material (including suicide websites) should be investigated to see if it could usefully be clarified.

28. Following such a review, the Government announced by way of a written Ministerial Statement on 17th September 2008 (Hansard col. 142WS) that it intended to simplify the law on assisting suicide to increase public understanding and reassure people that it applies as much on the internet as it does off-line.

29. In reviewing the law, the Government took account of the Law Commission proposals in its report *Inchoate liability for assisting and encouraging crime* published in July 2006 (http://www.lawcom.gov.uk/docs/lc300.pdf) that the language of section 2 of the Suicide Act 1961 should be updated.

30. In April 2007, the Government issued a *Consultation Paper on the Possession of non-photographic visual depictions of child sexual abuse*. A summary of responses was published in May 2008 (http://www.justice.gov.uk/publications/non-photographic-depictions.htm).

**Part 3 - Criminal Procedure**

31. On 18th June 2008 the House of Lords gave judgment in *R v Davies* [2008] UKHL 36. The case concerned the use of anonymous witnesses and the judgment cast doubt on what the common law had been thought to allow. The Government introduced the Bill that became the Criminal Evidence (Witness Anonymity) Act 2008 and it received Royal Assent on 21st July 2008. The Act makes provision about evidence given by anonymous witnesses. During the passage of the Bill, it was amended so as to provide for the expiry of the power to make witness anonymity orders on 31st December 2009, subject to being extended by order. This amendment became section 14 of the Act. The Justice Secretary undertook to review the provisions of the Act and legislate anew (Hansard col. 516; 26th June 2008). Chapter 2 of Part 3 of this Bill replaces sections 1 to 9 of the CEWAA.

32. In June 2007, the Government published *Improving the criminal trial process for young witnesses: a consultation paper*. The Government response to the consultation was published in February 2009 (http://www.justice.gov.uk/publications/young-witness-consultation.htm). The proposals in this consultation paper form the basis of the proposed changes in clauses 85 to 90 to the existing provision about the special measures a court may order so as to help young witnesses give evidence.

33. In the Policing Green Paper *From the neighbourhood to the national: Policing our communities together*, published in July 2008 (http://police.homeoffice.gov.uk/police-reform/policegp/), the Government announced that it intended to remove a defendant's consent as to whether or not to attend a virtual court, where the participants are in a different location but are joined by live video link. Clauses 93 to 97 give effect to this proposal.

34. The law on admissibility of hearsay and out of court statements was comprehensively reviewed by the Law Commission in 2007 (*Evidence in criminal proceedings: hearsay and related topics*, July 2007, http://www.lawcom.gov.uk/docs/lc245.pdf). The law of evidence was also considered by Sir Robin Auld in a *Review of the Criminal Courts of England and Wales* (2001) (http://www.criminal-courts-review.org.uk/). Both recommended that the law on hearsay should be simplified and that as much relevant evidence as available should be able to be heard and considered. These recommendations were taken forward in the White Paper *Justice for all* published in July 2002 (http://www.cjsonline.gov.uk/downloads/application/pdf/CJS%20White%20Paper%20-%20Justice%20For%20All.pdf).

35. A limited exception to the hearsay rule at common law had developed in relation to sexual offences. Where a complainant gave evidence, it was possible for the court to hear evidence as to the original complaint made by the victim provided the complaint was made spontaneously and at the first reasonable opportunity. The Law Commission recommended that evidence of recent complaint should not be limited to sexual offences. The Law Commission recommendations on recent complaint and other circumstances where previous consistent statements of witnesses are admissible led to section 120 of the Criminal Justice

Act 2003 (the 2003 Act). Section 120 made a previous complaint by a victim of an alleged offence admissible subject to certain requirements, including a requirement that it was made as soon as could reasonably be expected after the conduct in question. Section 120 applies to all offences and is not limited to sexual offences.

36. The Consultation Paper *Convicting Rapists and Protecting Victims – Justice for Victims of Rape* (Spring 2006) sought views on whether the law on previous complaints as set out in section 120 of the 2003 Act should be amended (http://www.cjsonline.org/downloads/application/pdf/Rape_consultation.pdf). In particular, it asked whether the requirement for a previous complaint to have been made "as soon as could reasonably be expected after the conduct in question" should be removed. There is evidence that in cases of rape and other serious sexual offences, victims often delay telling anyone of the offence because of feelings of shame, degradation and humiliation.

37. The Government concluded in its *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (November 2007, http://www.cjsonline.gov.uk/downloads/application/pdf/Response%20to%20rape%20consultation.pdf) that the requirement for a previous complaint to have been made "as soon as could reasonably be expected after the conduct in question" should be removed and that this change should affect all offences. Making a general change is consistent with the provision as it currently stands (section 120(7) of the 2003 Act does not distinguish between types of offences) and reflects the fact there are other offences, such as those arising from domestic violence, where factors similar to those applying to sexual offences may cause victims to delay telling anyone about the offence.

38. On 17th June 2008, the Government published a consultation paper *Bail and Murder*. The Government response to the consultation was published in February 2009 (http://www.justice.gov.uk/publications/cp1108.htm).

**Part 4 – Sentencing**

39. The Sentencing Commission Working Group was set up by the Lord Chancellor and Lord Chief Justice in response to Lord Carter's review of the use of custody *Securing the Future*, December 2007. This review recommended that the Government "should establish a working group to consider the advantages, disadvantages and feasibility of a structured sentencing framework and permanent Sentencing Commission".

40. The Working Group was chaired by Lord Justice Gage and made up of 15 members including lawyers, academics, judges, criminal justice professionals and others with experience in the field. The Working Group issued a consultation document *A structured sentencing framework and Sentencing Commission* on 31st March 2008 (http://www.judiciary.gov.uk/publications_media/general/sentencing_consultation310308.htm).

41. In its report, published on 10th July 2008, the Working Group recommended an evolutionary approach building on the existing processes for issuing guidelines and merging the Sentencing Advisory Panel and Sentencing Guidelines Council into one body (http://www.justice.gov.uk/publications/sentencing-commission.htm). Chapter 1 of Part 4 implements the unanimous and majority recommendations of the report.

**Part 5 - Miscellaneous Criminal Justice Provisions**

42. Clause 127 makes provision about the implementation of the E-Commerce Directive and the Services Directive.

43. The Services Directive was adopted in December 2006 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF). The Directive seeks to facilitate the provision of services in the internal market ensuring the freedom of establishment and the freedom to provide services. Member States must implement the Directive by 28th December 2009.

44. Chapter VI of the Directive ("Administrative Cooperation") enables greater cooperation between regulatory agencies ("competent authorities") across the European Union, so that they communicate more effectively with each other in the supervision of service providers.

45. Article 30 of Chapter VI relates to situations where service providers operate in other member States on a temporary basis (that is where they are not established in that member State). Article 30(2) requires member States to ensure that their competent authorities do not refrain from taking action against service providers established in their territory on the grounds that the service has been provided or caused damage in a different member State.

46. The Government published a consultation document on the implementation of the Services Directive in November 2007 (http://www.berr.gov.uk/files/file42207.pdf). The Government Response to the consultation was published in June 2008 (http://www.berr.gov.uk/files/file46592.pdf).

47. The E-Commerce Directive was implemented generically in the UK in 2002 by the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/33). The E-Commerce Directive seeks to contribute to the proper functioning of the internal market in the field of electronic commerce by ensuring the free movement of information society services ("ISS") between the member States.

48. Article 3 of the E-Commerce Directive ("Internal Market") requires member States to regulate ISS in accordance with the country of origin rules. Article 3(1) requires each member State to ensure that the ISS provided by a service provider established on its territory comply with the national provisions applicable in the member State in question which fall

within the coordinated field. "The coordinated field" covers all requirements in national law affecting the provision of information society services.

49. Clause 128 and Schedule 15 implement the Council Framework decision (2008/675/JHA) of 24th July 2008 on taking account of convictions in the member States of the European Union in the course of new criminal proceedings (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF). member States are required to implement the Framework Decision by 2010.

**Part 7 - Criminal Memoirs etc**

50. In November 2006, the Government published a consultation paper *Making sure that crime doesn't pay: proposals for a new measure to prevent convicted criminals profiting from published accounts of their crimes* (http://www.homeoffice.gov.uk/documents/cons-ensure-crime-doesnt-pay.pdf/). The summary of responses was published on 14th January 2009 (http://www.justice.gov.uk/publications/consultations-with-response.htm).

**Part 8 - Data Protection Act 1998**

51. On 25th October 2007 the Prime Minister asked Dr. Mark Walport and Richard Thomas to conduct an independent review of the framework for the use of personal information in the public and private sectors. The Review's report was published on 11th July 2008 (http://www.justice.gov.uk/reviews/datasharing-intro.htm) and the Government response was published on 24th November 2008 (http://www.justice.gov.uk/publications/response-data-sharing-review.htm).

52. The Government published a consultation paper on 16th July 2008, *The Information Commissioner's inspection powers and funding arrangements under the Data Protection Act 1998*. A summary of the responses to the paper and the Government's response were published on 24th November 2008 (http://www.justice.gov.uk/publications/cp1508.htm).

53. In November 2007, the Prime Minister asked the Cabinet Secretary to lead a review of data handling procedures within Government. *Data Handling Procedures in Government: Final Report* was published by the Cabinet Office in June 2008 (http://www.cabinetoffice.gov.uk/reports/data_handling.aspx).

**TERRITORIAL EXTENT**

54. In the main the Bill's provisions extend to England and Wales only, but certain provisions also extend to Scotland or Northern Ireland or both (there are also some bespoke Scottish or Northern Irish provisions mirroring equivalent provisions for England and Wales). In relation to Scotland, Wales and Northern Ireland, the Bill addresses both devolved and non-devolved matters.

55. The provisions of the Bill relating to the following reserved matters extend to Scotland:

- Amending the Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976 to facilitate investigations in Scotland into the deaths of service personnel killed abroad (clause 41).

- Driving disqualification following conviction (Schedule 14);

- Implementation of the E-Commerce Directive (clause 127);

- Amendments to the 1998 Act (Part 8); and

- Amendments to (military) service law consequential upon other provisions in the Bill.

56. The Bill contains provisions that trigger the Sewel Convention. The provisions relate to the implementation of the Services Directive (clause 127) and criminal memoirs etc (Part 7). The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If amendments are made to the Bill which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

57. The provisions of the Bill relating to the following excepted or reserved matters also extend to Northern Ireland;

- The amendments to the Coroners Act (Northern Ireland) 1959 made by clause 40 and Schedule 9; and the amendments to the Regulation of Investigatory Powers Act 2000 (RIPA) made by clause 12;
- Reform of the law on murder, infanticide and suicide (Chapter 1 of Part 2);

- The new offence of possession of non-photographic images of child sex abuse (Chapter 2 of Part 2);

- The offence of conspiring in Northern Ireland to commit an offence in England and Wales or Scotland (clause 60);

- Investigation anonymity orders and witness anonymity orders (Chapters 1 and 2 of Part 3);

- Extension of the Queen's evidence powers to the FSA (clause 100);

- Driving disqualification following conviction (clause 123 and Schedule 14);

- Enabling courts to pass an indeterminate sentence for public protection for certain terrorist offences (clause 125);

- Implementation of the E-Commerce and Services Directives (clause 127);

- Implementation of the Framework Decision on the taking account of convictions of member States in the course of new criminal proceedings (clause 128 and Schedule 15);

- Provision for the seizure and retention of knives taken into court buildings (clause 131);

- Criminal memoirs etc (Part 7);

- Amendments to the 1998 Act (Part 8); and

- Amendments to (military) service law consequential upon other provisions in the Bill.

58. In relation to Wales, the Bill does not relate to devolved matters or confer functions on the Welsh Ministers, except for the following:

- Coroners – functions relating to the investigation of deaths by coroners are not devolved, but coroners are appointed and funded by local authorities. Under Schedule 2 to the Bill, the Lord Chancellor will be required to consult the Welsh Ministers before making an order to specify the coroners areas for England and Wales or subsequently alter coroner area boundaries in Wales, and before he determines which one of a group of local authorities – which form a coroner area – should act as the lead authority to liaise with coroners for various administrative purposes;

- Death certification – the Bill places a duty on Local Health Boards (LHBs) to appoint medical examiners and clause 19 gives the Welsh Ministers the power to make regulations about various matters relating to medical examiners;

- Sentencing – clause 118 places a duty on the Sentencing Council to assess the impact on prison and probation resources of policy and legislative proposals, including proposals put forward by the Welsh Assembly Government, referred to the Council by the Lord Chancellor. Where an assessment relates to a proposal of the Welsh Ministers, the Bill requires them to lay a copy of the Council's report of the assessment before the National Assembly for Wales;

## THE BILL

## COMMENTARY ON CLAUSES

### Part 1 - Coroners etc

### Chapter 1: Investigations into deaths

**Clause 1: Duty to investigate certain deaths**

59. This clause sets out the circumstances when a senior coroner will investigate a death. It mirrors the requirements of section 8(1) of the 1988 Act, except that the requirement to investigate where the death has occurred "in prison" (section 8(1)(c)) has been altered so that it applies to deaths where the deceased "died while in custody or otherwise in state detention".

60. The location of the body of the deceased will determine the senior coroner who will have a duty to investigate the death, as is currently the case under section 5(1) and 8(1) of the 1988 Act. This is to ensure that more than one coroner does not begin an investigation. Under the new system, senior coroners will, as now, be allocated to a geographical area, although later clauses in Part 1 of the Bill set out the circumstances when these boundary restrictions can be relaxed.

61. *Subsection (2)* sets out the types of death that a senior coroner must investigate. A coroner must investigate a death that he or she suspects was violent or unnatural, where for example, the deceased might have been murdered or taken his or her own life, or if the cause of death is unknown. A coroner must also investigate a death, whatever the apparent cause, if it occurred in "custody or state detention" ("state detention" is defined in clause 39(2)), such as while the deceased was detained in prison, in police custody or in an immigration detention centre, or held under mental health legislation irrespective of whether the detention was lawful or unlawful. The circumstances in which a coroner must investigate a death are broadly similar to those in section 8(1) of the 1988 Act. The requirement that a death be "sudden" has been removed. (Where other authorities have a statutory requirement to investigate particular deaths, such as the Health and Safety Executive or the Independent Police Complaints Commission, the coroner will await those authorities' reports before deciding how to proceed. This is apart from the commissioning of post-mortem examinations, where appropriate, and associated duties in relation to the body of the deceased person.)

62. *Subsection (1)* is subject to clause 2 (which makes provision for a senior coroner to request another senior coroner to conduct the investigation), clause 3 (under which the Chief Coroner may direct that an investigation be conducted by a different senior coroner from the one who would otherwise be under a duty to conduct it), clause 4 (which makes provision for an investigation to be discontinued), clause 11 (which provides for the certification of

investigations) and Schedule 8 (which makes provision for persons other than the senior coroner in the area where the body is to conduct the investigation).

63. A senior coroner's initial decision as to whether to conduct an investigation will be subject to appeal to the Chief Coroner under clause 32.

64. *Subsections (4) to (6)*, which correlate to section 15 of the 1988 Act, set out the arrangements for investigating deaths when the senior coroner thinks that a death has occurred which should be investigated but there is no body; and so the duty to investigate the death in subsection (1) does not apply. This includes circumstances such as where a body has been lost at, or swept away to, sea, or if someone is suspected to have lost their life in a fire and there are no remains, or if someone has already been legitimately cremated and information previously unavailable comes to light which the senior coroner believes should lead him or her to investigate.

65. Subsection (4) allows a senior coroner to report the details of such a death to the Chief Coroner. In effect, the coroner is seeking the Chief Coroner's permission to investigate the death and presenting evidence why he or she should do so.

66. Under subsection (5), after considering the senior coroner's report, the Chief Coroner can direct an investigation to take place. Under the 1988 Act it is the Secretary of State who could direct a coroner to conduct an inquest in the absence of a body. In the reformed system, the Chief Coroner might also decide that no investigation is necessary. If the Chief Coroner decides that action should be taken, the senior coroner directed to carry out the investigation does not have to be the same coroner that reported the death although in most circumstances it is likely that it would be. An example of a reason the Chief Coroner might have for allocating the case to a different coroner is that it might be more convenient for the bereaved relatives for the investigation to take place in an alternative area.

67. Provision is made in *subsection (7)* enabling a coroner to make whatever enquiries that are thought to be necessary in order to help the coroner decide whether the duty under subsection (1) (to conduct an investigation into a death) or the power under subsection (4) (to report a death where there is no body) arises.

**Clause 2: Request for other coroner to conduct investigation**

68. This clause gives the senior coroner the power to transfer responsibility for the investigation of a death to another coroner, where that coroner agrees. It is broadly similar to the section 14 of the 1988 Act, which allows a coroner in one district to ask a coroner of another district to assume jurisdiction to hold an inquest into the death. This clause also extends to treasure investigations by virtue of clause 21, except for subsection (4)(b), which is not relevant in that context.

69. Under *subsection (2)*, a senior coroner who agrees to conduct an investigation on behalf of another coroner must carry out that investigation as soon as possible. No other coroner can conduct the investigation. The coroner who agrees to deal with the investigation will have powers to move the body, in order to ensure a more efficient inquiry. How costs will be apportioned in transferred cases may be dealt with in regulations under clause 35.

70. This clause is subject to the provision in clause 3, by which the Chief Coroner can direct another coroner to conduct an investigation.

71. Examples of cases where the coroner may wish to ask another coroner to conduct the investigation include cases where the bereaved relatives and/or most of the witnesses in the case live in the other coroner's area; and cases where there is a major incident which spreads across more than one coroner area, and the Government believes that it is more efficient for only one coroner to lead the investigation and to be seen as the point of contact for bereaved people.

**Clause 3: Direction for other coroner to conduct investigation**

72. This clause gives the Chief Coroner the power to direct a senior coroner who is not the coroner under a duty to investigate a death under clause 1 to conduct an investigation. It is developed from section 14(2) of the 1988 Act. The Government intends that this provision will enable the Chief Coroner to take control and respond effectively to an emergency situation, or to reallocate work between coroners in the event of backlogs of work building up in a particular area. Reallocations of this type should take account of the needs of bereaved relatives for both a prompt investigation and one that remains fairly local to them. This clause also extends to treasure investigations by virtue of clause 21 (except for subsection (3)(b), which is not relevant in that context).

73. Under *subsection (2)*, a coroner who is directed by the Chief Coroner to carry out an investigation must do so. No other coroner can conduct the investigation. The coroner directed to deal with the investigation will have powers to move the body, in order to ensure a more efficient inquiry. How costs will be apportioned in transferred cases may be dealt with in regulations under clause 35.

74. The Chief Coroner may give more than one direction under clause 3. For example, if the coroner who has been directed to conduct an investigation is unable to deal with it, the Chief Coroner may direct another coroner to investigate instead.

**Clause 4: Discontinuance where cause of death revealed by post-mortem examination**

75. This clause allows a senior coroner to discontinue an investigation which was started because the cause of death was unknown. The coroner may discontinue such an investigation if a post-mortem examination under clause 16 reveals the cause of death, and the coroner thinks that it is not necessary to continue the investigation; an inquest will not therefore be required. This may be because, for example, the death is proved to be due to natural causes and there are no other circumstances associated with the death – for example it occurred in

state detention – which means that the investigation needs to continue to an inquest. The coroner may not discontinue the investigation if he or she suspects the deceased died a violent or unnatural death, or died whilst in state detention. This is developed from section 19 of the 1988 Act.

76. If a senior coroner discontinues an investigation under this clause he or she is not permitted to go on to hold an inquest into the death or make any determination. The clause includes a new requirement for the coroner to explain why an investigation has been discontinued if asked to do so. There is also provision for a fresh investigation to be conducted if, for example, new information comes to light.

**Clause 5: Matters to be ascertained**

77. This clause sets out the purpose of a senior coroner's investigation.

78. The two purposes of an investigation are: (1) to establish who the deceased was and how, when and where the deceased came by his or her death, and (2) to establish the details needed to register the death (such as the cause of death). These purposes are currently contained in rule 36(1) of the Coroners Rules 1984 ("the 1984 Rules"), and in section 11(5)(b) of the 1988 Act.

79. *Subsection (2)* requires the scope of the investigation to be widened to include an investigation of the circumstances of the death where this wider investigation is necessary to ensure compliance with the European Convention on Human Rights (ECHR), in particular Article 2. Article 2 relates to the State's responsibility to ensure that its actions do not cause the death of its citizens. The Bill does not define the precise circumstances where a coroner should conduct an Article 2 investigation. This will allow for flexibility in the future should case law determine that Article 2 inquests should extend to cover additional matters.

**Clause 6: Duty to hold inquest**

80. Clause 6 provides that the coroner must conduct an inquest as part of the investigation unless he or she has had reason to discontinue it under clause 4, following a post-mortem examination.

81. The 1988 Act is expressed in terms of a duty to "hold an inquest". This does not reflect the entirety of what coroners do. In 2007, some 230,000 deaths were reported to a coroner, and there were about 30,000 inquests. Under the Bill, the inquest will form, when relevant, the final part of the investigation process. The Government does not anticipate that the number of inquests will increase or decrease significantly in a reformed system.

**Clause 7: Whether jury required**

82. This clause sets out the circumstances in which a senior coroner is required to hold an inquest into a death with a jury. It also gives the coroner the power to decide to hold an

inquest with a jury in any case where he or she thinks it is appropriate. It is modelled on section 8(3) of the 1988 Act.

83. The general rule is that an inquest must be held without a jury. *Subsections (2) and (3)* set out the exceptions to this rule. A jury must be summoned where the deceased died while in custody or otherwise in state detention, and the death was violent or unnatural, or of unknown cause; where the death was as a result of an act or omission of a police officer or member of a service police force (defined in clause 39) in the purported execution of their duties; or where the death was caused by an accident, poisoning or disease which must be reported to a government department or inspector. This includes, for example, certain deaths at work. Although a jury is not required in any other case the coroner will be able to summon one in any case where he or she believes there is a reason for doing so.

84. The Government will in secondary legislation make further, more detailed provision about the conduct of inquests (in the Coroners rules to be made under clause 36).

85. Under clause 32 interested persons, as defined in clause 38, will be able to appeal against a coroner's decision to summon a jury or not to do so in those cases where the senior coroner has discretion.

**Clause 8: Assembling a jury**

86. This clause sets out the arrangements for summoning and swearing in a jury.

87. *Subsection (1)* sets out the numbers of jurors for a coroner's jury. There must be no fewer than six and not more than nine people. This reduces the maximum number of jurors which is currently eleven (section 8(2)(a) of the 1988 Act). While there is recognition of the need for inquests to continue with juries, the nature of the inquisitorial task they are required to undertake means they do not need to be of the same size as juries in the criminal courts.

88. The senior coroner calls people to attend for jury service by issuing a summons stating the time that they are needed and the place that they must attend *(subsection (2))*, as under present arrangements. Before beginning their responsibilities, the coroner will require jury members to swear they will make their decisions according to the evidence *(subsection (3)).*

89. *Subsection (4)* makes qualifications for jury service at a coroner's inquest the same as for the Crown Court, the High Court and the county courts, in accordance with section 1 of the Juries Act 1974. This reproduces the requirements of section 9(1) of the 1988 Act.

90. *Subsection (5)* enables the coroner to check that a juror meets the qualification requirements, in the same terms as section 9(4) of the 1988 Act.

**Clause 9: Determinations and findings by jury**

91. A jury will be initially directed by the senior coroner to reach a unanimous determination or finding. If the coroner thinks that they have deliberated for sufficient time without reaching a unanimous verdict, under *subsection (2)*, he or she may accept a determination or finding on which, if there are nine jurors, at least six of them agree, and if there are six to eight jurors, at least five of them agree. Also under *subsection (2)*, the jury spokesperson should announce publicly how many agreed. If the required number of jurors does not agree, under *subsection (3)* the coroner may summon a completely new jury and the case will be heard again.

**Clause 10: Determinations and findings to be made**

92. This clause explains what happens at the conclusion of the inquest. It sets out the possible outcomes and explains their effect.

93. *Subsection (1)(a)* requires the senior coroner – or the jury, where there is one – to make a "determination" (a short summary) at the end of the inquest as to who the deceased was, and how, when, where the deceased came by his or her death. This is broadly equivalent to current requirements, under section 11(3)(a) and (4)(a) of the 1988 Act and rule 36 of the 1984 Rules. In an Article 2 investigation, the coroner must also include a determination, or direct a jury to include a determination, as to the circumstances of the death.

94. *Subsection (1)(b)* also requires the coroner or jury to make a "finding" at the end of the inquest about the details required for registration of the death, as presently required by section 11(3)(b) and (4)(b) of the 1988 Act. This will normally be, for example, a short finding such as accident or misadventure, suicide, industrial disease, natural causes, drug related or, where no clear cause has death has been established, the finding (or verdict) will be known as "open". Increasingly, coroners make use of "narrative" findings in which they sum up in a few sentences how the person came to die.

95. *Subsection (2)* makes clear that a determination may not be worded in such a way as to appear to declare a person guilty of a criminal offence or determine civil liability.

**Clause 11: Certified investigations: investigation by judge, inquest without a jury**

96. This clause explains the procedure when an investigation into a person's death will concern or involve a matter which should not be made public.

97. *Subsection (1)* sets out that the criteria under which the Secretary of State may certify an investigation. Under these provisions, an investigation may be certified only a) if an inquest will be held as part of the investigation, b) the inquest would ordinarily be held by a senior coroner sitting with a jury (whether because the coroner must summon a jury under clause 7(2), or because he or she chooses to have a jury under clause 7(3) or because a decision on appeal requires there to be a jury), c) the investigation would concern or involve 'protected matters', and d) the Secretary of State is of the opinion that it is necessary for the inquest to be held without a jury to prevent the 'protected matters' being made public or

unlawfully disclosed. 'Protected matters' are matters that should not be made public in order to protect the interests of national security, to protect the relationship between the United Kingdom and another country, to protect the interests of preventing or detecting crime, or in order to protect the safety of a witness or other person.

98. Under *subsection (2),* a certified investigation must be conducted by a judge of the High Court, nominated by the Lord Chief Justice, rather than by a senior coroner. When conducting the investigation the judge will be sitting as a coroner and will exercise the same powers and functions as would a senior coroner.

99. Under *subsection (3),* if an investigation is certified under this section, the Secretary of State must notify the senior coroner who would ordinarily have conducted the investigation as soon as possible, in order for the senior coroner to notify as soon as possible all interested persons known to him or her that the case has been certified. The Secretary of State must also inform the High Court judge nominated to hear the case as to what the 'protected matters' are under *subsection (5).*

100. But the certification will not have effect (that is, no judge will be nominated to conduct the investigation, nor will the senior coroner's functions be removed) until 14 days from the date on which the investigation is certified or, if proceedings for judicial review are brought within that period, until the conclusion of the proceedings *(subsection (4)).*

101. The conduct of the inquest is a matter for the appointed High Court judge to decide upon. The judge may consider that the inquest can be conducted using preventative measures which will also be available to a coroner (for example, excluding the public from certain parts of the inquest, allowing witnesses not to be named or to give evidence from behind a screen, or redacting evidence). An inquest held as part of a certified investigation may be held with or without a jury *(subsection (6)).* The judge must consider whether or not the matter needs to go before the tribunal of fact in the inquest (that is, the jury if there is one, or otherwise the judge). If the matter must go before the tribunal of fact, the judge must consider whether holding the inquest without a jury is necessary to prevent the protected matter being made public during the course of the inquest (or unlawfully disclosed – section 17(1) of the Regulation of Investigatory Powers Act 2000 would prohibit intercept material from being disclosed to a jury). If the judge thinks protected matters might be made public or unlawfully disclosed if the inquest was held with a jury, then the judge will hear the inquest on his or her own.

102. Various powers short of excluding the jury are available to the judge – for example, producing a summary of the "protected matter" which may be shared with the family of the deceased or their legal representatives if the matter related to is written evidence, or by use of screens if the matter to be protected was a witness. Where the protected matter is intercept evidence and the judge considers that the evidence is relevant to the investigation, the resultant inquest will be held without a jury. If an inquest begun with a jury has to be continued without one by virtue of this provision then that jury must be discharged. Coroners'

rules may make provision for the exclusion of persons from an inquest or part of the inquest certified under clause 11.

103. Where a decision made by a High Court judge sitting as a coroner in a certified investigation gives rise to an appeal, under *subsection (7)* that appeal will be heard by the Court of Appeal rather than by the Chief Coroner (who would have heard the appeal if it was made against a senior coroner's decision). This is to ensure that the appeal is heard by a court of higher seniority than the original decision maker.

**Clause 12: Intercept evidence**

104. This clause sets out the necessary amendments to RIPA so that if an investigation is certified by the Secretary of State any material to which RIPA applies can be disclosed to the High Court judge conducting the investigation. This includes the Secretary of State disclosing material to a High Court judge in order for the High Court judge to decide whether to hold the inquest with or without a jury. The judge may also order disclosure to be made to the judge alone or also to any person appointed as independent counsel to the inquest one of whose roles will be to represent the interests of the deceased's family at the inquest. Counsel may probe and challenge the evidence on their behalf. The clause extends to Northern Ireland, where provision similar to that contained in clause 11 will have effect under Schedule 9.

**Clause 13 and Schedule 1: Duty or power to suspend or resume investigations**

105. This clause gives effect to Schedule 1 which contains provisions on suspending and resuming investigations in various situations. Schedule 1 sets out when a senior coroner must or is able to suspend and resume investigations.

***Paragraph 1: Suspension of investigation where certain criminal charges may be brought***

106. *Paragraph 1* of Schedule 1 contains provision for suspending the senior coroner's investigation in the event that it is likely that criminal proceedings will be brought in connection with the death. It is intended to avoid duplicate investigations. This is based on rules 26 and 27 of the 1984 Rules.

107. *Paragraph 1(2)* requires the senior coroner to suspend an investigation if asked to do so by a prosecuting authority because someone may be charged with a homicide offence involving the death of the deceased or an offence that is alleged to be a related offence.

108. *Paragraph 1(3)* requires the senior coroner to suspend an investigation if asked to do so by a Provost Marshal or the Director of Service Prosecutions because someone may be charged with the service equivalent of a homicide offence involving the death of the deceased or the service equivalent or a service offence that is alleged to be a related offence.

109. Under *paragraph 1(4)*, if the senior coroner has to suspend an investigation under paragraphs 1(2) or 1(3), this suspension must be for at least 28 days. The senior coroner has

the power to extend (more than once if needed) the period of the suspension if asked to do so by the person who or authority which requested the original suspension (through *paragraph 1(5)).*

110. *Paragraph 1(6)* sets out the definition of "homicide offence" and "related offence". It also explains that a "service equivalent of a homicide offence" means an offence under the Armed Forces Act 2006 corresponding to a homicide offence.

***Paragraph 2: Suspension where certain criminal proceedings are brought***

111. *Paragraph 2* of Schedule 1 sets out the arrangements for suspension of the senior coroner's investigation when criminal proceedings have been brought in connection with the death. It is developed from section 16 of the 1988 Act.

112. *Paragraph 2(2)* requires a senior coroner to suspend an investigation into a death on becoming aware either that someone has appeared or been brought before a magistrates' court charged with a homicide offence involving the death of the deceased or that they have been charged on indictment in the Crown Court with such an offence. *Paragraph 2(3)* requires a senior coroner to suspend an investigation into a death on becoming aware that someone has been charged with the service equivalent of a homicide offence involved the death of the deceased.

113. *Paragraph 2(4)* requires a senior coroner to suspend an investigation on being informed by a prosecuting authority that someone has appeared or been brought before a magistrates' court charged with a related offence (as defined in paragraph 1(6)) or has been charged on indictment in the Crown Court with such an offence and the prosecuting authority has asked the coroner to suspend his or her investigation.

114. *Paragraph 2(5)* requires a senior coroner to suspend an investigation on being informed by the Director of Service Prosecutions that a person has been charged with the service equivalent of a related offence and the Director of Service Prosecutions has asked the senior coroner to suspend his or her investigation.

115. The senior coroner need not suspend an investigation under paragraph 2(2), (3) or (4) where the prosecuting authority or the Director of Service Prosecutions (as the case may be) has no objection to the investigation continuing or where the senior coroner thinks that there is exceptional reason for not doing so *(paragraph 2(6)).*

116. *Paragraph 2(7*) makes provision for investigations which are already suspended under paragraph 1.

***Paragraph 3: Suspension pending inquiry under Inquiries Act 2005***

117. *Paragraph 3* of Schedule 1 sets out the circumstances in which a senior coroner's investigation can be suspended where there is an inquiry under the Inquiries Act 2005. It is based on section 17A of the 1988 Act.

118. *Paragraph 3(1)* requires the senior coroner to suspend an investigation into a death if requested to do so by the Lord Chancellor on the basis that there will be an inquiry under the Inquiries Act 2005 in which the cause of death is likely to be adequately investigated. The senior coroner does not have to suspend an investigation if he or she thinks there are exceptional reasons for continuing with it (paragraph 3(2)). Paragraph 3(3) makes provision for investigations which are already suspended under paragraph 1.

***Paragraph 4: General power to suspend***

119. *Paragraph 4* of Schedule 1 provides a general power for a senior coroner to suspend an investigation if he or she thinks that it would be appropriate to do so. This may be appropriate if another investigation is being conducted into the death, for example, by the Independent Police Complaints Commission, the Health and Safety Executive or an Accident Investigation Board, or if an investigation is being conducted in another jurisdiction, for example, if the death occurred abroad.

***Paragraph 5: Effect of suspension***

120. Where an investigation is suspended under paragraphs 1, 2, 3 or 4, any inquest being held as part of that investigation must also be adjourned and if it is being held with a jury, the senior coroner may discharge the jury.

***Paragraph 6: Resumption of investigation suspended under paragraph 1***

121. If the senior coroner suspends an investigation because someone may be charged with an offence, the investigation must be resumed (subject to paragraphs 2(7)(d) and 3(3)(b)) once the relevant period has expired.

***Paragraph 7: Resumption of investigation suspended under paragraph 2***

122. *Paragraph 7* of Schedule 1 sets out the arrangements for resuming investigations suspended because certain criminal proceedings have been brought.

123. Under *paragraph 7(1)* the senior coroner can resume an investigation only if he or she thinks there is sufficient reason to do so.

124. By *paragraph 7(2)*, an investigation cannot be resumed (subject to *sub-paragraph (3))* until the criminal proceedings which triggered the suspension have come to an end in the court of trial.

125. *Paragraph 7(3)* allows a senior coroner to resume an investigation before the criminal proceedings have ended where the prosecuting authority or the Director of Service Prosecutions (as the case may be) has confirmed that it has no objection to this.

126. *Paragraph 7(4)* sets out who the prosecuting authority is for the purposes of paragraph 7(3). *Paragraph 7(5)* makes clear that the outcome of a coroner's investigation resumed under this paragraph must not be inconsistent with the result of the criminal proceedings which triggered the suspension.

127. It could be that the senior coroner resumes the investigation because the criminal investigation did not find all the facts that the senior coroner is required to find or because it did not meet ECHR Article 2 obligations, for example because the defendant pleaded guilty. Indeed the effect of section 6(1) of the HRA is that the senior coroner, as a public authority, would be legally obliged to resume the investigation if this was necessary in order to secure compliance with Article 2.

***Paragraph 8: Resumption of investigation suspended under paragraph 3***

128. *Paragraph 8* of Schedule 1 sets out the arrangements for resuming investigations suspended because of an inquiry. Under *paragraph 8(1)* the senior coroner can resume an investigation only if he or she thinks that there is sufficient reason for resuming it. It cannot be resumed until after 28 days have passed since either the date that the Lord Chancellor has notified to the senior coroner as date of conclusion of the inquiry or, where the senior coroner has received no such notification, the date of publication of the findings of the inquiry.

129. *Paragraph 8(3), 8(5), 8(7) and 8(9)* are relevant where the senior coroner becomes aware during the course of the suspension of his investigation that criminal proceedings are under way of a type that would require a suspension under *paragraph 2.* Under *paragraph 8(4), 8(6), 8(8) and 8(10)* the investigation may not be resumed before such criminal proceedings have ended unless a prosecuting authority or the Director of Service Prosecutions (as the case may be) has told the senior coroner that it has no objection to the investigation being resumed.

130. Under *paragraph 8(4) to 8(10)* the investigation may not be resumed before such criminal proceedings have ended unless a prosecuting authority has told the senior coroner that it has no objection to the investigation being resumed.

131. *Paragraph 8(11)* prevents the resumed senior coroner's investigation from reaching a conclusion which is inconsistent with the outcome of the inquiry or any criminal proceedings which triggered the suspension. For example, if the outcome of an inquiry was a finding that a particular individual had committed suicide, a senior coroner's investigation cannot conclude that the particular individual was unlawfully killed.

***Paragraph 9: Resumption of investigation under paragraph 4***

132. *Paragraph 9* of Schedule 1 states that where an investigation is suspended under paragraph 4, it may be resumed at any time the senior coroner thinks there is sufficient reason for resuming the investigation.

***Paragraph 10: Supplemental***

133. *Paragraph 10(1)* of Schedule 1 requires that where a senior coroner resumes an investigation under Schedule 1, the senior coroner must resume any inquest that was adjourned under paragraph 5.

134. Where an inquest is resumed, by *paragraph 10(3)* the resumed inquest may be held with a jury if the senior coroner thinks there is sufficient reason for doing so.

135. Under *paragraph 10(4)*, if the inquest was started with a jury and then adjourned and the senior coroner decides to hold the resumed inquest with a jury, if at least 6 members of the original jury are available to serve, then they will form the jury for the resumed inquest. If not, or the original jury was discharged, a new jury is required to be summoned.

**Clause 14: Investigation in Scotland**

136. This clause makes provision for the Secretary of State or Chief Coroner to notify the Lord Advocate that he or she thinks that it may be appropriate for a death which occurred abroad to be investigated under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.

137. *Subsection (1)* provides that the clause applies to deaths outside the UK of a person specified in *subsection (2) or (3).*

138. Subsection (2) specifies the service personnel that are covered, namely members of the regular and reserve forces who, when they die, are subject to service law (which governs all members of the armed forces) under section 367 of the Armed Forces Act 2006, and are on active service, preparing for or supporting active service, or engaged in training for active service.

139. Subsection (3) adds that persons are covered if they, when they die, are not subject to service law but are, under paragraph 7 of Part 1 of Schedule 15 to the Armed Forces Act 2006 (persons designated by or on behalf of the Defence Council), civilians subject to service discipline; and are accompanying service personnel on active service.

140. *Subsection (4)* provides that, if the body (of someone defined in subsections (2) and (3)) is already in Scotland, or is expected to be brought to the UK, and the Secretary of State thinks that it may be appropriate for the death to be investigated under the 1976 Act, he or she may notify the Lord Advocate in Scotland of this. In such circumstances the Secretary of State has no role.

141. *Subsection (5)* provides that, if the body is England or Wales, and the Chief Coroner thinks that it may be appropriate for the death to be investigated under the 1976 Act, he or she may notify the Lord Advocate in Scotland of this.

142. *Subsection (6)* defines "active service". It means service in an action or operation against an enemy; an operation outside the British Islands for the protection of life or property; or the military occupation of a foreign country or territory.

**Clause 15: Investigation in England and Wales despite body being brought to Scotland**

143. There may be cases where the Lord Advocate initially decides that it would be appropriate for a Fatal Accident Inquiry to be held into the circumstances of the death but, for whatever reason, the Lord Advocate reverses this decision. In those circumstances the Lord Advocate can notify the Chief Coroner that it may be appropriate for an investigation to take place in England and Wales. An example may be that the family may have moved to England before the inquiry has taken place or other circumstances have changed which indicate that an investigation in England or Wales is more appropriate.

144. *Subsection (1)* enables the Chief Coroner to direct a senior coroner in England or Wales to conduct an investigation into a death where a body has been brought back to Scotland. The power to make such a direction if the deceased is a person who, when they died, was subject to service law under section 367 of the Armed Forces Act 2006 and was on active service, preparing for or supporting active service, or engaged in training for active service. It also covers where the deceased was a person not subject to service law but, by virtue of paragraph 7 of Schedule 15 to the 2006 Act, was a civilian subject to service discipline who was accompanying persons subject to service law who were engaged in active service. Secondly, the Lord Advocate must have been notified by the Secretary of State or the Chief Coroner that it may be appropriate for the death to be investigated under the 1976 Act. Thirdly, the body must have been brought to Scotland.

145. Fourthly, no Fatal Accident Inquiry has taken place or, if started, has not been finished. Fifthly the Lord Advocate has advised the Chief Coroner that in their view, it may be appropriate for a coroner investigation, in England or Wales, to take place. Lastly, the Chief Coroner must have reason to suspect that the duty to investigate deaths under clause 1 (which applies to deaths in England and Wales) would apply to the death, namely that the deceased died a violent or unnatural death; the cause of death being unknown; or the deceased died in custody or other state detention. If all those circumstances apply to a death the Chief Coroner may direct a coroner in England or Wales to conduct an investigation. Any coroner given such a direction must conduct an investigation into the death, subject to section 3.

**Clause 16: Post-mortem examinations**

146. This clause sets out the arrangements for ordering post-mortem examinations, and makes slightly different provision from that contained in sections 19 and 20 of the 1988 Act.

147. *Subsection (1)* gives a senior coroner power to ask a suitable practitioner to make a post-mortem examination of a body if the senior coroner is either responsible for conducting an investigation into the death or a post-mortem examination will enable the senior coroner to decide if he or she has a duty under clause 1 to conduct an investigation. This may be relevant where it is not clear whether a death occurred as a result of a notifiable disease or whether a child was stillborn – where, for example, an infant's body is found and it is not clear whether it ever had independent life. Where it is known or established that a child was stillborn, the senior coroner will have no further responsibility to carry out an investigation.

148. The term "post-mortem examination" is not defined but it will include any examination made of the deceased including non-invasive examinations, for example, using Magnetic Resonance Imaging (MRI).

149. The 1988 Act makes a distinction between post-mortem and "special" examinations (the latter are a more specific kind of post-mortem examination and would include toxicology tests to establish whether, for example, alcohol or drugs were in the bloodstream). The Bill removes this distinction, enabling the senior coroner to detail the kind of examination he or she would like the practitioner to make – for example, to ask for a particular examination of a tissue or organ which seems most relevant to the cause of death if a full post-mortem is not considered necessary *(subsection (2)).*

150. *Subsection (3)* defines a suitable practitioner as either a registered medical practitioner or where a particular form of examination is required, such as an MRI Scan, a practitioner who the Chief Coroner has designated is suitable to carry out such examinations.

151. *Subsection (4)* ensures that any medical practitioner about whom there are allegations in relation to the death is not able to carry out the examination of the body, although such a person may be represented at an examination.

152. *Subsection (5)* requires the person making the examination to report the result to the senior coroner as soon as is practicable.

**Clause 17: Power to remove body**

153. This clause specifies the arrangements for moving a body to a different location, for example to enable a post-mortem examination to be carried out.

154. Under *subsection (1)* a senior coroner who is responsible for conducting an investigation into the death or who needs to request a post-mortem examination in order to decide if he or she has a duty under clause 1 to conduct an investigation may order that the body be moved to any suitable place. (The notes to clause 16 set out when a senior coroner may need to request a post-mortem examination in order to decide if he or she has a duty under clause 1 to conduct an investigation.)

155. This removes the restriction in section 22(1) of the 1988 Act that a body can be moved only within a senior coroner's area or to an immediately adjoining area which has caused practical difficulties in a major incident where there have been several deaths. This power will also allow a senior coroner to make use of specialist equipment or skills available in a different part of the country and may, on occasion, mean that full post-mortems can be avoided.

156. The body can be moved to a place which is outside the senior coroner's area only with the consent of the person providing that place (for example, a mortuary manager and the relevant local authority). The issue of costs may be dealt with in regulations.

**Chapter 2: Notification, certification and registration of deaths**

**Clause 18: Notification by medical practitioner to senior coroner**

157. This clause enables regulations to be made by the Lord Chancellor requiring a registered medical practitioner to notify a senior coroner of deaths of which they become aware. Regulations may set out the circumstances in which the medical practitioner will have to make a referral.

**Clause 19: Medical examiners**

158. This clause relates to the appointment of, and functions to be carried out by, medical examiners. It also enables regulations to be made by the Secretary of State for Health (in relation to England) and the Welsh Ministers (in relation to Wales) about the appointment, payment and training of, and functions to be carried out by, medical examiners.

159. *Subsection (1)* requires Primary Care Trusts (PCTs) in England and LHBs in Wales to appoint of medical examiners to discharge the functions given to them by this Part.

160. *Subsection (2)(a)* specifies that PCTs and LHBs must appoint enough medical examiners and make available enough funds and other resources (including medical examiner's officers) to enable the medical examiners to discharge their function in the area served by the Trust or Board.

161. Under *subsection (2)(b),* medical examiners will be monitored by their PCT or LHB as to whether or not they meet expected standards or levels of performance in carrying out their work as medical examiners. This monitoring needs to be considered alongside the requirement in *subsection (5)* for PCTs and LHBs to take no role in relation to the way that medical examiners exercise their professional judgment as medical practitioners.

162. *Subsection (3)* specifies, subject to regulations under (4)(f), that medical examiners must, at the time of appointment, be fully registered, practising, medical practitioners with at least 5 years experience.

163. Regulations made under *subsection (4)(a*) will specify terms of appointment for medical examiners and allow for termination of their appointment. Whilst medical examiners will, for the most part, confirm or establish the cause of death for deaths that have occurred in the area served by the PCT or LHB by whom they have been appointed, they may be asked to scrutinise deaths in other areas.

164. Regulations made under *subsection (4)(b)* will specify what payments may be made to medical examiners by way of remuneration, expenses, fees, compensation for termination of appointment, pensions, allowances or gratuities. Such payments would be in line with arrangements applying in the specific area in respect of remuneration and those applying nationally in respect of other payments.

165. Regulations made under *subsection (4)(c)* will specify the training that medical examiners must have successfully completed prior to their appointment and the training that they need to undertake during the term of their appointment.

166. Regulations made under *subsection (4)(d)* will make provision about procedure to be followed by medical examiners in carrying out their functions with a view to ensuring that they are able to carry out independent scrutiny of medical certificates of cause of death (MCCDs) and do so in a way that is robust, proportionate, and consistent. The regulations may also provide that, in order to help ensure their professional independence, medical examiners will not be allowed to confirm or establish the cause of death of any person to whom they are related or with whom they have had any fiduciary relationship; and that they will not be allowed to scrutinise MCCDs prepared by any doctor with whom they have a close working or professional relationship or with whom they have an established fiduciary relationship (see also clause 20).

167. Regulations made under *subsection (4)(e)* may provide for the functions of the medical examiner to be extended or changed to support future developments of the service.

168. Regulations made under *subsection (4)(f)* may provide for the functions of the medical examiner to be carried out during a period of emergency certified by the Secretary of State in accordance with subsection (7) by people who do not meet the criteria in subsection (3). (See also clause 20(4) for a related provision allowing the MCCD to be given during a period of emergency by a registered medical practitioner who has not attended the deceased before his or her death and is therefore not the "attending practitioner".)

169. *Subsection (5)* specifies that PCTs and LHBs must allow medical examiners to exercise their own professional judgement as medical practitioners in deciding, for example, whether to confirm individual causes of death or refer them to a senior coroner. This provision needs to be read together with the obligation on PCTs and LHBs to monitor medical examiners in *subsection (2)* and the procedures to be prescribed by regulations under subsection (4)(d).

170. *Subsections (8) and (9)* make provision concerning periods of emergency certified by the Secretary of State under *subsection (7).*

**Clause 20: Medical certificate of cause of death**

171. This clause enables the Secretary of State for Health to make regulations about the preparation, scrutiny and confirmation of MCCDs and about the way the confirmed MCCD is notified and given to a registrar or about how the death is referred to a senior coroner. The clause also enables regulations to be made about the payment of a fee for the service provided by a medical examiner.

172. The independent scrutiny and confirmation of MCCDs is part of a wider process that starts with the preparation of the certificate by a registered medical practitioner who attended the deceased and ends with the certificate being returned to the medical examiner after it has been used by the registrar to register the death. The new unified process is intended to be simpler and more transparent than the current process and requires specification of activities, responsibilities and alternative scenarios that are more suited to regulations than to provisions on the face of the Bill. *Subsection (1)* provides the power to make the necessary regulations.

173. The new process has been designed with the active engagement of a wide range of stakeholders and is illustrated in an overview booklet published by the Department of Health (http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_090533).

174. Regulations made under *subsection (1)(a)* will require a registered medical practitioner who attended the deceased prior to death (the "attending practitioner") to prepare an MCCD (the "attending practitioner's certificate") stating the cause of death to the best of the practitioner's knowledge and belief. This duty has been transferred and adapted from section 22 of the 1953 Act (see *subsections (1)(m)* and *(3)* for the associated transfer of responsibility for prescribing forms, including the MCCD, and for making them available to medical practitioners).

175. The attending practitioner's certificate will be prepared using first-hand knowledge of the deceased's condition prior to death together with information from medical notes and patient records. PCTs (in England), LHBs (in Wales) and healthcare providers (both in the NHS and the private sector) will also be encouraged to adopt local protocols relating to the verification of the fact of death that are able to provide the attending practitioner with information on circumstances leading to the death. Knowledge of these circumstances may assist the attending practitioner in establishing the cause of death or in deciding that the death needs to be referred to a senior coroner.

176. Where the attending practitioner needs advice on how to complete an MCCD or wants to discuss the probable cause of death before preparing the certificate, he or she will be able to speak with a medical examiner. This is expected to reduce the number of deaths that are unnecessarily reported to a senior coroner.

177. If the attending practitioner is unable to establish the cause of death, or is unable to do so in a period of time prescribed by regulations made under *subsection (2)(a)*, then the death must be referred to a senior coroner.

178. If the attending practitioner is not contactable within a period of time after death prescribed by regulations that may be made under subsection (2)(a), then the death must be referred to a senior coroner. This is relevant, in particular, to deaths in the community, which, even though they are apparently due to natural causes, occur at a time when the deceased's usual doctor is not contactable.

179. If there is no attending practitioner, for example, where the deceased person was not receiving treatment for the condition that caused the death then the provisions under subsection (1) do not apply and the death must be notified to a senior coroner as prescribed by regulations that may be made under clause 18.

180. It is intended that regulations made under subsection (1)(a) will specify that an attending practitioner's certificate will not be required where the death has been notified to a senior coroner in accordance with regulations made under clause 18 and is investigated by the senior coroner as specified in clause 1. This is a key change from the current process and addresses a long-standing issue in which a strict interpretation of the 1953 Act requires an attending practitioner to prepare a certificate even if he or she cannot establish the cause of death, and requires the registrar to refer this certificate to a senior coroner.

181. Clause 18 together with regulations under *subsection (1)(a)(ii)* change the practice of medical practitioners to refer deaths to a senior coroner into a statutory duty.

182. It is intended that regulations made under *subsection (1)(b)* will require that where an attending practitioner's certificate has been prepared, the hospital bereavement office or GP surgery (or equivalent) must transmit a copy of it to a medical examiner's office. The original certificate will be held by the hospital bereavement office or GP surgery (or equivalent) until it has been scrutinised and confirmed by a medical examiner. This is a key change to the current process in which, if there is no local protocol to the contrary, the attending practitioner's certificate is given to the family immediately after it is written. The Government expects that the additional time required to complete the scrutiny will in most cases be no longer than the time taken to complete the forms currently required by the cremation regulations. These forms are removed in the new process.

183. Regulations made under *subsection (1)(c)* will allow registrars to invite a medical examiner to request a fresh attending practitioner's certificate. A fresh certificate may be required if, during registration, the informant provides new information about the death and invalidates the cause of death previously confirmed by the medical examiner. The provisions outlined here allow registrars to retain their current duty to provide a last check that a death does not need to be notified to a senior coroner. However, many registrars find it difficult to perform this role – particularly where they have to refer a substantial number of certificates –

because they have to rely on knowledge gained through experience and because the delays caused to bereaved families can cause considerable stress. The new process is designed to address this issue and to reduce significantly the number of MCCDs that registrars need to refer to senior coroners.

184. Regulations made under *subsection (1)(d)* will allow arrangements to be established in relation to deaths that senior coroners refer to medical examiners. These will be the deaths that were originally notified to a senior coroner under clause 18 or referred to a senior coroner under subsection (1)(a)(ii) that the senior coroner has decided not to investigate. In these cases, the senior coroner will issue a form stating that he or she has no further interest in the death and will transmit this form to the medical examiner's office together with any relevant information about the death that he or she has used in coming to his or her decision. In some cases, this information may include advice provided by a medical examiner in response to a request from the senior coroner or coroner's officer.

185. Since the senior coroner can refer a death to a medical examiner only where the cause of death is known, the regulations made under subsection (1)(a)(i) will allows the attending practitioner to prepare an attending practitioner's certificate. If there is no attending practitioner or if the attending practitioner is not available within a prescribed period after a senior coroner decides not to investigate, then a medical examiner will establish the cause of death and prepare a "medical examiner's certificate" as specified in regulations made under *subsection (1)(h)(i)*. These changes remove the current situation in which some deaths need to be registered as "uncertified".

186. Regulations may be made under *subsection (1)(e)* requiring a medical examiner to make whatever enquiries appear to be necessary in order to confirm or establish the cause of death. Whilst medical examiners will have full access to medical notes and patient records (as a result of the amendment to the Access to Health Records Act 1990 made by paragraph 28 of Schedule 19), they will not be able to require any individual or organisation to respond to their enquiries or provide information. If a medical examiner is not able to obtain information required to confirm or establish the cause of death, then the death will be referred to a senior coroner (as outlined below) and the senior coroner will be able to require the information to be provided.

187. When the copy of an attending practitioner's certificate is received by a medical examiner's office from a hospital bereavement office or GP's surgery (or equivalent) it should be accompanied by relevant medical notes and/or patient records. Where these cannot be transmitted or provided easily, arrangements may be made for a medical examiner to view them in situ. A medical examiner's officer will ensure that the attending practitioner's certificate has been completed and that the associated notes and records have been provided or are available and then, if necessary, contact the deceased person's next of kin, or other appropriate person or people, to obtain any further information required. The medical examiner's officer will talk with the bereaved family, usually by telephone, in a way that does not intrude on their grief or raise concerns that would otherwise not exist. As a further

safeguard against unnecessary intrusion, information collected by bereavement officers or, for reported deaths that a senior coroner has decided not to investigate, by coroners' officers, will be made available to the medical examiner's officer.

188. If the attending practitioner's certificate has been completed properly, it will advise that the attending practitioner or another prescribed person has seen, identified and externally examined the deceased person's body after death. The purpose of this examination is to confirm there are no injuries or other suspicious features that might indicate an unnatural death. If, in exceptional circumstances agreed with a medical examiner, the attending practitioner has not been able to see, identify and examine the body, then the medical examiner will need to arrange to do so during scrutiny. A medical examiner will also need to see, identify and examine the body for deaths that are referred to him or her by a senior coroner and which require a medical examiner's certificate as set out in subsection (1)(d).

189. Regulations may be made under *subsection (1)(f)* requiring a medical examiner, after scrutinising the attending practitioner's certificate and other information prepared by the medical examiner's officer, either to confirm the cause of death or to refer the death to the senior coroner.

190. In order to ensure that the scrutiny carried out by the medical examiner is robust, proportionate and consistent, there will be a protocol that recognises different levels of risk depending on the setting, stated cause and circumstances. The protocol will establish the minimum level of scrutiny for specific situations but will allow a medical examiner to use professional judgement to determine the degree to which the scrutiny is pursued.

191. If, during scrutiny, a medical examiner is unable to confirm the cause of death or decides that it meets any of the criteria prescribed in regulations made under clause 18, then the death will be referred to a senior coroner as specified in regulations made under *subsection (1)(h)(ii)*. The medical examiner will give reasons for the referral and, where appropriate, will suggest what type of post-mortem may be necessary. If, in exceptional cases, the senior coroner decides not to investigate the death and cannot come to an agreement with the medical examiner about the cause of death then the case would need to be taken through the appeals process as set out in Chapter 6 of Part 1 of the Bill. The medical examiner has been included as an "interested person" in relation to this appeals process in clause 38.

192. If, during scrutiny, a medical examiner forms the opinion that the cause of death stated on the attending practitioner's certificate is either insufficient or incorrect, but the death is not reportable to a senior coroner, the medical examiner will discuss the death with the attending practitioner and invite him or her to prepare a fresh certificate. The Government intends that this will be specified in regulations made under subsection (1)(c). If, in exceptional cases, the attending practitioner and medical examiner are unable to agree on the cause of death, the medical examiner will refer the case to a senior coroner.

193. Once any issues raised by the next of kin (or other appropriate person or people) have been resolved, they will be advised that the MCCD can be collected from the hospital bereavement office or GP Surgery (or equivalent) or, for an MCCD prepared by a medical examiner, from the medical examiner's office. At the same time, a medical examiner's authorisation will be transmitted to the attending practitioner (if one exists) and the registrar to notify them that the cause of death has been confirmed and that the MCCD can be issued and used to register the death.

194. A copy of the medical examiner's authorisation will be transmitted to funeral directors to allow them to finish preparing the body for burial or cremation where this involves changing the body in a way that might render it unsuitable for a post-mortem.

195. Regulations may be made under *subsection (1)(g)* about giving the MCCD to a registrar. In practice, the MCCD will be given to an informant or someone collecting it on behalf of the informant and the informant will give the MCCD to a registrar. The regulations may allow the MCCD to be given in other ways: for example, sent by secure post to the informant or sent directly to a registrar. These arrangements are intended to ensure that the new process is as fast and as convenient as possible.

196. Regulations may be made under subsection (1)(g) requiring that registrars must wait until they have received (or can access) a copy of the medical examiner's authorisation before they can accept (or confirm acceptance of): a request to register a death; a request to defer registration; or a request to authorise disposal before registration.

197. Where a medical examiner has issued a certificate by virtue of regulations under *subsection (1)(h)* after referral of the case to him by a senior coroner (see subsection (1)(d)), further provisions, made by regulations under *subsections (1)(i) and (j)*, will apply. These provisions will correspond to those made under subsection (1)(c) and (g) in relation to an attending practitioner's certificate that has been confirmed by the medical examiner in accordance with regulations under subsection (1)(f).

198. Once scrutiny has been completed, a medical examiner or someone acting on behalf of a medical examiner (usually the medical examiner's officer) will speak with the next of kin of the deceased person (or other appropriate person or people) to advise them of the outcome of the scrutiny. This conversation will be required by regulations made under *subsection (1)(k).*

199. Where the cause of death has been confirmed, the medical examiner or person acting on his or her behalf will explain the cause of death and check that it does not raise any issues that have not yet been considered. If issues are raised and cannot be resolved during the conversation then the medical examiner may decide to re-open the scrutiny or refer the death to the senior coroner.

200. Regulations may be made under *subsection (1)(l)* requiring the person nominated as the informant for the purpose of registration, or another prescribed person, to confirm in writing that a medical examiner or someone acting on his or her behalf (usually the medical examiner's officer) has explained the confirmed cause of death as set out in subsection (1)(k). At present the Government anticipates that this written confirmation will be provided during registration; however, there are other possible options. The purpose of this written confirmation is to provide evidence that the new process is more transparent than the current process.

201. Regulations made under subsection (1)(m) will enable the Secretary of State for Health, after consultation as set out in subsection (3), to prescribe forms, including the "MCCD" form. The regulations will also require the forms to be made available to medical examiners, registered medical practitioners and others who need to use them.

202. Regulations made under *subsection (1)(n)* will require the Chief Medical Officer of the Department of Health to issue guidance as to how certificates and other forms are to be completed and to do so after consulting the person who holds the office with corresponding functions in relation to Wales, as well as the Registrar General and the Statistics Board.

203. Regulations made under *subsection (1)(o)* will enable all forms, including the MCCD form, to be signed or otherwise authenticated. Authentication in this context will enable the forms to be transmitted or made available electronically.

204. *Subsection (2)(a)* enables any regulation in *subsection (1)* that imposes a requirement to have a prescribed period within which the requirement is to be complied with.

205. *Subsection (2)(b)* enables any regulation in subsection (1) that imposes a requirement to have prescribed cases or circumstances in which the requirement does, or does not, apply. This provision may need to be used, in particular, during periods of emergency as defined in clause 19(7).

206. *Subsection (3)* requires the Secretary of State for Health to consult with Welsh Ministers, the Registrar General and the Statistics Board before prescribing forms, including the MCCD form, as specified in *subsection (1)(m)*. The Statistics Board will continue to ensure that the MCCD form complies with requirements set by the World Health Organisation.

207. *Subsection (4)* allows regulations under subsection (1) to provide that functions otherwise exercisable by attending practitioners to be carried out during a period of emergency by registered medical practitioners who did not attend the deceased prior to death. The primary activities to which this would relate are the preparation of an MCCD and discussion with a medical examiner about any changes that might be required in order for the

cause of death to be confirmed (see also clause 19(4)(f) on when functions normally carried out by medical examiners may be carried out by others during a period of emergency).

208. *Subsection (5)* enables regulations to be made by the Secretary of State for Health (for England) and Welsh Ministers (for Wales) to provide for a fee to be payable to a PCT or LHB in respect of a medical examiner's scrutiny and confirmation of an attending practitioner's certificate or the preparation and issue of a medical examiner's certificate. The fee level will be set on the basis of full cost recovery, without any element of profit. The first such regulations, and any subsequent regulations that raise fees by more than the rate of inflation, will be subject to the affirmative resolution procedure: see subsections (4)(b) and (5) of clause 159.

209. Funeral arrangers currently pay a total of £160.50 to individual doctors for the preparation and issue of forms required under the Cremation Regulations 2009. In the new system, the medical examiner will perform the function of all three of these doctors and will, the Government expects, be able to do so at a lower total cost. An analysis of costs and benefits is available in the Department of Health's Impact Assessment (http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_076971).

**Chapter 3: Investigations concerning treasure**

**Clause 21: Investigations concerning treasure**

210. This clause sets out the circumstances in which senior coroners must conduct investigations in relation to treasure, and the purpose of such investigations. It translates the current jurisdiction of coroners as regards treasure into the new context of investigations under Part 1 of the Bill.

211. The senior coroner is required by *subsection (1)* to conduct an investigation into an object if notice has been given to him or her in accordance with the Treasure Act 1996 (the 1996 Act) and if it appears the object was found within his or her area.

212. Senior coroners, under *subsection (2)*, have discretion to conduct an investigation into objects which are suspected to be treasure under the 1996 Act and if it appears they were found within their area but where no notice has been given to the senior coroner.

213. *Subsection (3)* enables a treasure investigation to be transferred by agreement of the senior coroners involved or by direction of the Chief Coroner, in the same way as an investigation into a death.

214. *Subsection (4)* explains that the purpose of investigations is to establish whether the object is treasure or treasure trove and if so, who found it and where and when it was found.

215. *Subsection (5)* allows the senior coroner to hold an inquest as part of their investigation concerning the object in question, but does not require that he or she does so. Most treasure investigations are currently concluded without an inquest, and this is likely to continue.

216. *Subsection (6)* states that treasure inquests should generally be held without a jury, but there is also discretion for the senior coroner to summon a jury where he or she believes it is necessary.

217. *Subsection (7)* obliges the senior coroner to make a determination at the end of an investigation, whether or not an inquest is held as part of that investigation. The senior coroner will determine whether or not a particular object is treasure or treasure trove and if so, who found it, where and when it was found.

**Chapter 4: Coroner areas, appointments etc**

**Clause 22 and Schedule 2: Coroner areas**

218. This clause gives effect to Schedule 2 which provides for England and Wales to be divided into coroner areas and gives the Lord Chancellor the power to set and alter the boundaries of these areas (by order subject to the negative resolution procedure) after consultation with the relevant local authorities, Welsh Ministers, and any other persons the Lord Chancellor thinks appropriate. Each coroner area will cover either the whole of one local authority area or the whole of two or more local authority areas (although this provision will not apply in relation to coroner areas specified in the transitional order made under paragraph 1(1) of Schedule 20).

219. Where the area includes two or more local authorities (*paragraph 3 of Schedule 2*), one of them will be known as the relevant authority for the area. If the local authorities cannot agree which of them should be the relevant authority, the Lord Chancellor will decide on their behalf, consulting the Secretary of State for Communities and Local Government in respect of local authorities in England, and Welsh Ministers in respect of local authorities in Wales.

220. The Lord Chancellor may alter, by order subject to the negative resolution procedure, and change the names of, coroner areas using a similar consultation procedure.

221. The Schedule also makes provision in *paragraph 4* in relation to bodies which are situated outside the senior coroner's area. Once a senior coroner is responsible for conducting an investigation into a death, the fact that the body is outside that coroner's area does not change his or her functions in relation to the death. The paragraph clarifies that the presence of the body in senior coroner's area also does not give the second senior coroner any functions in relation to the death. This is broadly equivalent to the provision in section 22(3) of the 1988 Act.

**Clause 23 and Schedule 3: Appointment of senior coroners, area coroners and assistant coroners etc**

222. This clause gives effect to Schedule 3 which sets out the procedure for the appointment of coroners, qualifications required and terms of office. It also makes provision for the exercise of a senior coroner's functions by area and assistant coroners.

***Part 1 – Appointment of senior, area and assistant coroners***

223. The Bill will change the titles of the office of coroner. The hierarchy under the 1988 Act consists (in descending order) of coroners, deputy coroners and assistant deputy coroners. Under the Bill, there will be senior coroners, area coroners and assistant coroners.

224. Under the 1988 Act, the relevant local authority appoints coroners (but not deputy and assistant coroners). The Secretary of State must approve certain coroners' appointments; and where the coroner's district consists of two or more such areas, or two or more Welsh principal areas, the relevant local authority must consult the others before making an appointment. The coroner currently appoints his or her own deputy and any assistant deputy coroners (section 6 of the 1988 Act). This will not continue under the Bill.

225. Under Part 1 of Schedule 3 appointments of all coroners are to be made by the relevant authority for each coroner area. There is a new requirement for the Lord Chancellor and Chief Coroner to consent to the appointment of all senior coroners.

226. Following consultation with the Chief Coroner and the relevant local authorities, the Lord Chancellor can determine whether the coroner area requires one or more area coroners in addition to the senior coroner, and if so how many. He or she can also determine the minimum number of assistant coroners.

***Part 2 – Qualifications of senior, area and assistant coroners***

227. All coroners must be legally qualified. Under the 1988 Act (section 2(1)(b)), being a legally qualified medical practitioner of five years' standing also suffices. Transitional arrangements are made so that this provision does not apply in relation to those coroners treated as appointed under the transitional arrangements made in the Bill.

228. This part also disqualifies local councillors from appointment as coroners, if the area in respect of which they were elected falls within the coroner area.

***Part 3 – Vacancies, and functions of area and assistant coroners***

229. Part 3 of Schedule 3 makes provision for filling vacancies on the resignation, dismissal or retirement of coroners, and the arrangements for filling posts on a temporary basis. This Part also sets out the functions of area coroners and assistant coroners.

***Part 4 - Terms of office of senior, area and assistant coroners***

230. Part 4 of Schedule 3 introduces a new retirement age of 70 for coroners and sets out the procedure for resignation from office. A coroner is no longer to be regarded as holding a "freehold office".

231. It also gives the Lord Chancellor the power to remove a senior coroner, area coroner or assistant coroner from office if that coroner is incapable of performing his or her functions or is guilty of misbehaviour. Before he or she can exercise this power, the Lord Chancellor must have the agreement of the Lord Chief Justice.

232. Part 4 also provides for senior coroners, area coroners and assistant coroners to be disciplined in line with Chapter 3 of Part 4 of the Constitutional Reform Act 2005 (which includes the power for the Lord Chief Justice to issue reprimands).

233. It makes provision for the relevant authority for the area to pay salaries to senior coroners and area coroners and fees to assistant coroners. The amount of these salaries and fees is for the relevant coroner and the relevant authority to agree. If they fail to reach an agreement the matter can be referred to the Lord Chancellor.

234. This Part also requires the relevant authority for an area to make provision for pensions for senior and area coroners.

235. Additional terms of office can be agreed between the appropriate authority and the coroner.

**Clause 24: Provision of staff and accommodation**

236. This clause requires the relevant authority for a coroner area to provide sufficient administrative staff and coroners' officers. When, locally, the police authority is responsible for providing coroners' officers, then they will be expected to continue to do so. The local authority and local police authority will be expected to work together, with the senior coroner, to secure appropriate staffing levels. (Police authorities currently provide 90% of coroner's officers to support the work of coroners.)

237. The relevant authority is also obliged to provide, or secure the provision of, accommodation to enable senior coroners to carry out their functions. This accommodation must either be maintained by the relevant authority or they must secure that it is maintained. This does not apply if another person has responsibility for maintaining the accommodation. This recognises that, at present, not all coroners have a dedicated court to hold inquests and that there will continue to be a need to hire such facilities in the future, including court accommodation where the existing court room is insufficient for the purposes of a particular inquest. Under section 31 of the 1988 Act, the relevant council has power to provide accommodation for either investigations or inquests.

238. The relevant authority is required to take into account the views of the senior coroner when providing and, where relevant, maintaining accommodation. The Bill allows inquests to be held anywhere in England and Wales so that there is new flexibility if particular inquests have requirements for the sort of accommodation which is not available within the coroner's own area. The expectation will be, however, that an inquest is normally held within the area of the coroner who is conducting the investigation.

**Chapter 4: Coroner areas, appointments etc**

**Clause 25 and Schedule 4: Powers of senior coroner**

239. This clause brings Schedule 4 into effect, which sets out the powers of a senior coroner.

***Paragraph 1: Power to require evidence to be given or produced***

240. *Paragraph 1* of Schedule 4 gives the senior coroner statutory powers to summon witnesses and to compel the production of evidence for the purposes of an investigation

241. Under *paragraph 1(1*) a senior coroner may issue a notice requiring a person to attend at a given time and place to give evidence at an inquest or to produce any documents they have that are relevant to the inquest or to produce anything else they have that is relevant to the inquest so that it can be inspected, examined or tested.

242. *Paragraph 1(2)* provides that the senior coroner can also notify someone that they must provide the senior coroner with a written statement, or produce any documents or anything else they have that the senior coroner considers is relevant to the investigation.

243. *Paragraph 1(3)* sets out information which must be included in any notice that the senior coroner issues under paragraphs 1(1) or 1(2).

244. *Paragraph 1(4)* gives those to whom the senior coroner has issued a notice under paragraph 1(1) or (2) the right to make a claim to the senior coroner either that he or she is unable to comply with the notice or that it is not reasonable for the senior coroner to ask him or her to do so. The senior coroner can cancel or amend the notice if he or she thinks the claim is valid.

245. Under *paragraph 1(5)*, when deciding whether to cancel or amend the notice, the senior coroner has to take into account the public interest of that information being available to his or her investigation or inquest.

246. Under *paragraph 1(6)*, a document or thing is defined as being under a person's control if it is in that person's possession or if they have a right to possession of it.

247. By *paragraph 1(7)*, the notice is not limited by the coroner's area and can therefore be issued to a person anywhere in England and Wales.

***Paragraph 2: Privileged information etc***

248. *Paragraph 2* of Schedule 4 makes it clear that the senior coroner does not have the power to require anything to be provided to him or her that a person could not be required to provide to a civil court, mirroring the restriction on many information gathering powers contained in existing legislation. The senior coroner also does not have the power to require evidence to be provided if this would be incompatible with European Community Law. It is also made clear that the rules of law in relation to public interest immunity apply equally in relation to investigations or inquests under Part 1 of the Bill.

***Paragraph 3: Power of entry, search and seizure***

249. *Paragraph 3* of Schedule 4 gives senior coroners a new, statutory power to enter and search land and seize items which are relevant to their investigations.

250. By *paragraph 3(1)*, a senior coroner has a power to enter and search particular land if he or she has permission in writing from the Chief Coroner or from a senior coroner nominated by the Chief Coroner to give such permission.

251. By *paragraph 3(2)*, the Chief Coroner, or a senior coroner to whom the power is delegated, may allow a coroner to enter and search premises only if that coroner reasonably suspects that there might be something on the premises relevant to the investigation. The coroner must also be unable to contact the person from whom they could get permission to enter and search the premises, have already had permission refused, have reason to believe that if they asked for permission it would be refused, or that the benefit of the search would be lost or significantly reduced if it cannot be done immediately *(paragraph 3(3))*.

252. Under *paragraph 3(4)* a senior coroner has a power to seize anything on the premises, or inspect or take copies of any documents that are relevant to the investigation.

***Paragraph 4: Power of entry, search and seizure: supplemental***

253. The power to seize items, inspect and take copies of documents under paragraph 3 can only be used if the person using it has reason to believe that this power might assist the investigation and if they have reason to believe that seizure is necessary to prevent the items from being hidden, lost, damaged, changed or destroyed.

254. The power in paragraph 3 to inspect and take copies of documents includes power to require information stored in electronic form to be provided in a form which can be taken away and which enables them to be read or easily changed into a readable format. This would include for example printing copies of electronic documents or downloading copies of files from a computer so that they can be printed at a later date.

255. *Paragraph 4(3)* of Schedule 4 makes clear that the person exercising the power under paragraph 3 may not seize items which they believe to be subject to legal privilege.

256. Items seized or taken away under paragraph 3 may be kept for as long as they are needed, and reasonable force may be used in the exercising of any power.

***Paragraph 5: Exhumation of body for examination***

257. *Paragraph 5* of Schedule 4 sets out the powers of a senior coroner to order the exhumation of a body. This paragraph, to a great extent, replicates section 23 of the 1988 Act.

258. *Paragraph 5(2)* enables a senior coroner to order the exhumation of the body of a person buried in England and Wales if the senior coroner thinks it is necessary for a post-mortem examination to be made of the body. Although a senior coroner may order the exhumation of a body buried anywhere in England and Wales, it is likely that a senior coroner will only order the exhumation of a body if it is within that coroner's area. This is because the senior coroner will only have jurisdiction to investigate the death if the body is within his or her area. The exception to this will be if another senior coroner has been asked to conduct an investigation under clause 2 or if the Chief Coroner has directed another senior coroner to conduct an investigation under clause 3 or if a fresh investigation is ordered after an appeal. In such cases, a coroner will have power to order the exhumation of a body even if it is not within his or her area.

259. *Paragraph 5(3)* enables a senior coroner to order exhumation of a body buried within his or her coroner area if the senior coroner thinks it necessary for the body to be examined for the purpose of any criminal proceedings or possible criminal proceedings in respect of the death of that person or another person who died in circumstances connected to that person's death.

***Paragraph 6: Action to prevent other deaths***

260. *Paragraph 6* of Schedule 4 gives the senior coroner the power, at the end of an inquest, to make a report to authorities or organisations with a view to preventing deaths in the future. This power could, for example, be used by the senior coroner to report to a local authority the fact that several deaths have occurred in similar circumstances on the same stretch of road. The person or organisation to whom the report was made must respond to that report. Further provision may be made in regulations enabling reports and responses to be published.

261. All reports made under this paragraph, and all responses to them, must be sent to the Chief Coroner.

**Clause 26 and Schedule 5: Offences**

262. This clause gives effect to Schedule 5 which sets out offences relating to jurors, witnesses and evidence, and the penalties for these offences.

263. Offences relating to jurors include service on a jury by those who know they are disqualified from such service, failure to attend a coroner's jury and making false representations to avoid jury service. These offences reflect those jury-related offences in section 9 of the 1988 Act.

264. The offences relating to witnesses include failure to comply with a notice under paragraph 1 of Schedule 4, altering evidence, preventing evidence from being given, destroying or concealing documents, and giving false evidence. These offences are new, as the senior coroner is being given the power to compel evidence in these provisions.

265. The Bill does not remove or alter the powers of a senior coroner under the common law to summon witnesses, require evidence to be given and punish for contempt of court.

**Clause 27 and Schedule 6: Allowances, fees, expenditure and reimbursement**

266. This clause gives effect to Schedule 6 which gives the Lord Chancellor regulation-making powers regarding fees and allowances that the senior coroner can pay (or are paid on his or her behalf, for example by the local authority) to jurors and witnesses to cover costs incurred due to their attendance at an inquest or pre-inquest hearing. This Schedule also provides for other payments to be made by senior coroners to practitioners who conduct post-mortem examinations. It allows senior coroners to charge for supplying copies of documents. An appropriate authority can issue a schedule of the fees, allowances and other payments that senior coroners can make.

267. Section 27 of the 1988 Act requires senior coroners to produce accounts to the council of their appointing local authority, and makes provision as to the funds from which reimbursements should be paid. Section 27A requires the council to indemnify the senior coroner for expenses reasonably incurred in connection with his or her functions, or in relation to disputing a claim made against him or her. Provision about such matters will now be contained in secondary legislation.

**Chapter 6: Governance etc**

**Clause 28 and Schedule 7: Chief Coroner and Deputy Chief Coroners**

268. The Bill creates the offices of Chief Coroner and Deputy Chief Coroner, who will be responsible for hearing appeals against decisions of coroners, for establishing and overseeing national performance standards, and for providing leadership to the service in general. They may also conduct investigations. The Government intends to have one full time Chief Coroner and one full time Deputy Chief Coroner, and to appoint others as Deputy Chief Coroners to assist, if required, in particular to hear appeals.

269. Clause 28 also gives effect to Schedule 7, which makes provision for the appointment of the Chief Coroner and Deputy Chief Coroners and their terms of office, and specifies further functions.

270. Under *paragraph 1* of Schedule 7, a person has to be a Circuit or High Court judge in order to be eligible for appointment as Chief Coroner.

271. *Paragraph 2* of Schedule 7 sets out the eligibility criteria and appointment process for Deputy Chief Coroners; it requires appointees to be a Circuit or High Court judge or senior coroner. It also specifies that the Lord Chief Justice will consult the Lord Chancellor as to the number of Deputy Chief Coroners that are needed, and how many of these should be judges, and how many should be senior coroners.

272. Paragraph 2(4) of Schedule 7 states that the Lord Chief Justice will appoint Circuit or High Court judges as Deputy Chief Coroners. By subsection (5) the term of appointment will be decided by the Lord Chief Justice after consulting the Lord Chancellor. Paragraph 2(6) provides that the Lord Chancellor, at the invitation of the Lord Chief Justice, will be responsible for appointing senior coroners as Deputy Chief Coroners. The Lord Chancellor will make appointments following a Judicial Appointments Commission process and will decide the term after consulting the Lord Chief Justice.

273. There is a retirement age of 70 for both offices. This Schedule also sets out the arrangements for vacation of the office, resignation, removal from office and remuneration. It provides when a Deputy Chief Coroner may perform the functions of the Chief Coroner, and allows the Lord Chancellor to appoint staff to assist the Chief and Deputy Chief Coroners.

**Clause 29: Reports and advice to the Lord Chancellor from the Chief Coroner**

274. *Subsection (1)* requires the Chief Coroners to give an annual report to the Lord Chancellor.

275. The Chief Coroner's annual report must cover any matters he or she wishes to bring to the attention of the Lord Chancellor, and any matters the Lord Chancellor has asked the Chief Coroner to cover in the report. The report would also contain an assessment of consistency of standards between coroner areas; the number, nature and outcomes of appeals made to the Chief Coroner; and details of all reports made by coroners to prevent future deaths, and the responses received to those reports.

276. The annual report would be published by the Lord Chancellor, and a copy would be laid before each House of Parliament.

277. As well as producing an annual report from the Chief Coroner to the Lord Chancellor, it is also intended that the Chief Coroner will publish occasional summaries of the reports made by coroners and the responses to them.

278. If requested to do so by the Lord Chancellor, the Chief Coroner must also give advice to the Lord Chancellor about particular matters relating to the operation of the coroner system.

**Clause 30: Regulations about training**

279. This clause provides that the Chief Coroner may make regulations about the training of all levels of coroners, coroners' officers and other staff who support coroners. This is designed to ensure that all those working within the service are aware of and apply best practice, relevant guidelines and standards issued under clause 34 (for example) and other developments in legislation.

**Clause 31: Inspection of coroner system**

280. This clause sets out that Her Majesty's Inspectorate of Courts Administration will carry out inspections of the coroner system, and report their findings to the Lord Chancellor. The functions of the Chief Coroner and Deputy Chief Coroners will not be inspected in relation to any functions they carry out as Chief Coroner or Deputy Chief Coroner, nor will judges acting as senior coroners under Schedule 8.

281. Under *subsection (2)*, inspectors are expressly prevented from commenting on any judicial decisions taken by a coroner. This would include decisions taken about whether or not to order a post mortem or matters relating to the scope or conduct of inquests.

282. Under *subsection (3)*, the Chief Inspector must report to the Lord Chancellor on the coroner system. There is also provision (in section 60(5) of the Courts Act 2003) enabling an inspector to carry out the Chief Inspector's functions in the event that he or she is unable to do so.

283. Under *subsection (4)*, the clause provides for inspectors to enter coroners' premises and to take copies of any relevant records. Although they will be entitled to be present at inquests, under *subsection (5)* they will not be able to attend proceedings held in private, such as jury meetings.

284. Where a report under *subsection (1) or (3)* recommends that action be taken by a senior coroner, there is power in *subsection (8)* for the Lord Chancellor to direct the senior coroner to do so within a specified period.

**Clause 32: Appeals to the Chief Coroner**

285. This clause provides a right of appeal to the Chief Coroner against decisions that fall within *subsection (2).* This right is only open to interested persons (as defined in clause 38) although *subsection (4)* enables a person who the senior coroner decides is not classed as an interested person to appeal that specific decision. If such an appeal is upheld by the Chief Coroner, then that person would also be entitled to appeal against the decisions in *subsection (2)*.

286. *Subsection (2)* sets out the decisions that can be appealed. Appeals can be made against a decision to conduct or not conduct an investigation, a decision to discontinue an investigation and a decision to resume or not resume an investigation, for example, once

criminal proceedings or an inquiry under the Inquiries Act 2005 have concluded. It will be possible to appeal a coroner's decision not to request a post-mortem. A coroner's decision that a post-mortem is needed will not be subject to appeal however, except where a post-mortem of the same type has already been carried out. It will be possible to appeal against a decision as to whether an inquest is held with a jury.

287. A coroner's determination as to who the deceased was, and how, when and where the deceased came by his or her death (and, where relevant, the circumstances of the death) can also be appealed, as can his or her finding of details required for registration of the death.

288. *Subsection (5)* enables the Lord Chancellor to change the list of decisions in subsection (2) by making an order.

289. Rules under clause 36 will set out the procedure for appeals to be made to the Chief Coroner.

290. This route of appeal is new. Under the current law, there is no appeal as such against a coroner's decisions. Applications can be made to the High Court under section 13 of the 1988 Act if a coroner refuses to hold an inquest or where a fresh inquest is required. The High Court can compel a senior coroner to hold an inquest or quash the determination of a previous inquest and order a fresh inquest. Persons with sufficient interest can also apply for judicial review of a senior coroner's decision. However, there is no simple appeal route at present for bereaved people and other interested persons. This clause provides a route of appeal to the Chief Coroner. It also replaces the existing statutory procedure of application to the High Court with the Chief Coroner having powers to compel a coroner to hold an inquest, or to quash a verdict from a previous inquest (from the same coroner or a different coroner).

291. *Subsection (6)* allows the Chief Coroner to consider any evidence which he or she thinks is relevant to the decision, determination or finding against which an appeal has been brought. This can include considering evidence which relates to issues that arose after the decision, determination or finding was made.

292. If the Chief Coroner allows an appeal except where the appeal is against a determination, he or she can substitute his or her own decision or quash the decision and refer it back to the senior coroner for a fresh decision. If the appeal is against a determination, the Chief Coroner can amend the determination or finding, or quash it and order a fresh investigation. If the appeal is against a failure to make a decision – for example, to conduct an investigation – the Chief Coroner can make the decision that could have been made or, again, refer the matter back to the senior coroner for him or her to make a decision. The Chief Coroner may also make any order he or she sees fit, including in relation to costs, although he or she has no authority in relation to the award of legal aid.

293. A decision of the Chief Coroner or a Deputy Chief Coroner may be appealed to the Court of Appeal, on a point of law only. The Court of Appeal can either confirm the decision made by the Chief Coroner, substitute its own decision in line with what the Chief Coroner had power to decide if he or she had judged the case differently, or overrule the decision and ask the Chief Coroner to reconsider the matter. Different appeal arrangements apply when the coroner is a High Court or Circuit Judge, in which case when the appeal is directed to a judge of the Court of Appeal or a High Court judge, respectively.

**Clause 33 and Schedule 8: Investigation by Chief Coroner or by judge at Chief Coroner's invitation**

294. This clause gives effect to Schedule 8 which provides for the arrangements when an investigation into a death is to be conducted by the Chief Coroner or by a judge, or a retired judge or senior coroner, by invitation of the Chief Coroner.

295. The Chief Coroner has all the powers of a senior coroner. He or she can therefore conduct investigations personally. He or she can also arrange, with the permission of the Lord Chief Justice, for a judge (including a retired judge who has not reached the age of 70) to conduct an investigation. This will be appropriate when a case has particularly complex legal characteristics but it is envisaged that the power will be used sparingly. Arrangements can also be made for a retired senior coroner to conduct an investigation and this might be appropriate where backlogs have built up in a particular area or in an emergency situation.

296. This Schedule also describes the appeal process regarding decisions made by judges (including retired judges) who have dealt with investigations. This differs from the standard appeal process explained in clause 32 in which the Chief Coroner (or Deputy) will hear appeals. Where an investigation is carried out by a High Court Judge, retired High Court Judge, or retired Court of Appeal Judge, the appeal will be heard by the Court of Appeal (and subsections (8) and (9) of clause 32 are treated as omitted). Where an investigation is carried out by a Circuit judge an appeal will be heard by a High Court Judge nominated by the Lord Chief Justice.

**Clause 34: Guidance by the Lord Chancellor**

297. This clause enables the Lord Chancellor to issue guidance about how the coroner system is expected to operate for interested persons. It is intended that the first such guidance will be in relation to bereaved people, in the form of the draft Charter for the Bereaved, published on 14th January 2009. Further non-statutory guidance may be introduced for other classes of interested persons in the future.

298. *Subsection (4)* specifies that the Lord Chancellor must consult the Chief Coroner before issuing, changing or withdrawing any such guidance.

## Chapter 7: Supplementary

### Clause 35: Coroners regulations

299. This clause enables the Lord Chancellor, with the agreement of the Lord Chief Justice to make regulations for regulating the practice and procedure in connection with investigations (excluding inquests), post-mortem examinations and exhumations.

300. Regulations will include arrangements for:

- suspending and resuming investigations;
- discharging an investigation and providing for fresh investigations;
- delegation of a senior coroner's functions relating to investigations;
- retention, release and disposal of bodies including reinterment; and
- exercise of the powers of entry, search and seizure.

### Clause 36: Coroners rules

301. This clause enables Rules to be made by the Lord Chief Justice (or his or her nominee) as to the practice and procedure at or in connection with inquests and appeals to the Chief Coroner, thus separating out the inquest component of the senior coroner's investigation. It repeats the power in section 32 of the 1988 Act.

302. *Subsection (2)* sets out particular matters about which rules can be made. These are as follows:

- Subsection (2)(a) allows for rules regarding evidence including sworn and unsworn evidence;
- Subsection (2)(b) allows for rules regarding discharging a jury and summoning a new jury;
- Subsection (2)(c) concerns discharging inquests and holding fresh inquests;
- Subsection (2)(d) concerns adjourning and resuming inquests;
- Subsection (2)(e) would allow the senior coroner to direct that a person's name should not be disclosed except to persons specified in the direction. It is intended that any provision made in rules will provide for this discretion to be used sparingly, for example during inquests into the deaths of UK Special Forces personnel or other investigations where witnesses need to remain anonymous to protect their safety;

- Subsection (2)(f) provides for rules relating to a senior coroner delegating his or her non-judicial functions relating to inquests:

- Subsection (2)(g) permits rules about disclosure of information held by the senior coroner:

- Subsection (2)(h) concerns excusing persons from jury service;

- Subsection (2)(i) allows for rules that would clarify when a senior coroner should hold an inquest into a possible treasure find; and

- Subsection (2)(j) allows for rules requiring consent to be given to an appeal to the Court of Appeal against a decision by the Chief Coroner.

303. *Subsection (3)* sets out particular matters in relation to which rules can confer a power on a senior coroner. Subsection (3)(a) would enable the coroner to decide that, if in his or her opinion the interests of national security required it (and even if a case had not been certified under clause 11), persons should be excluded from attending all or part of the inquest.

304. Subsection (3)(b) enables a senior coroner to exclude persons from an inquest during the giving of evidence by a person aged under 18. A child or young person may find giving evidence at an inquest intimidating or traumatic. These powers would enable the coroner to be flexible about how evidence could be given.

305. *Subsection (4)* provides that, in cases that have been certified under clause 11, a direction may be made by the judge conducting the investigation to the effect that some or all persons are to be excluded from all or part of the inquest.

**Clause 37: Abolition of the office of coroner of the Queen's household**

306. This clause abolishes the office of coroner of the Queen's household. In future, any investigation which would have been carried out by the coroner of the Queen's household will be carried out by the senior coroner in whose area the body is, or by a coroner directed to carry out the investigation by the Chief Coroner or by a coroner requested to carry out the investigation under clause 2.

**Clause 38: "Interested person"**

307. This clause lists those who come within the definition of the term "interested person". "Interested persons" have, amongst other things, the right to appeal against certain decisions made during the course of investigations and inquests (clause 32). In addition to the specific list of those that fall into the category of "interested person", there is power for the coroner to determine that any other person is an interested person. This expands slightly the list of "interested persons" in rule 20(2) of the 1984 Rules and is intended to capture, for example, the role of the Independent Police Complaints Commission in conducting and managing some investigations.

308. *Subsection (6)* lists those who can be classed as an "interested person" for investigations into treasure finds.

**Clause 39: Interpretation: general**

309. This clause explains the meaning of various terms used within this Part of the Bill: for example, where the word "body" is used, this includes body parts.

**Clause 40 and Schedule 9: Amendments to the Coroners Act (Northern Ireland) 1959**

310. *Subsection (1)* introduces Schedule 9. This Schedule amends the Coroners Act (Northern Ireland) Act 1959 (the 1959 Act) so that inquests may be held without a jury where certified by the Secretary of State as having evidence that should not be made public. This broadly aligns Northern Ireland with England and Wales, as set out in clause 11.

311. Provision concerning witnesses and evidence and related offences is also made in relation to inquests in Northern Ireland. This brings Northern Ireland into line with the reformed system in England and Wales, as it contains provision which is broadly equivalent to Schedule 5.

312. *Subsection (2)* amends section 13 of the 1959 Act to enable a coroner to hold an inquest if informed that the body of a deceased person is lying within the coroner's district, irrespective of where the death took place. This will enable inquests to take place where a death has occurred abroad and the body is returned to Northern Ireland.

**Clause 41: Amendments to the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976**

313. This clause makes amendments to the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (the 1976 Act). *Subsection (2)* inserts a new section 1A into the 1976 Act. If subsection (4) of new section 1A applies the procurator fiscal for the appropriate district will be required to investigate the circumstances of a death and apply to the sheriff to hold a Fatal Accident Inquiry.

314. Subsection (4) of new section 1A will apply if, firstly, the Lord Advocate is notified by the Secretary of State or Chief Coroner that it may be appropriate for a death to be investigated under the 1976 Act, secondly (in the same way that Fatal Accident Inquiries would be triggered for a death that occurs in Scotland) the person who died was either in legal custody at the time or the death was sudden, suspicious or unexplained or the circumstances of the death would give rise to serious public concern. And thirdly, if the Lord Advocate decides that it would be appropriate for a Fatal Accident Inquiry to be held into the death and does not reverse this decision.

315. Subsection (5) of new section 1A provides that subsection (4) does not apply to a death if criminal proceedings have sufficiently established the circumstances of the death.

316. Subsection (6) of new section 1A outlines the process of an application from the procurator fiscal to the sheriff for a Fatal Accident Inquiry. Subsection (7) gives the Lord Advocate the responsibility for determining the appropriate district and sheriffdom.

317. *Subsections (3) to (5)* make consequential amendments to sections 2, 3 and 6 of the 1976 Act.

**Part 2- Criminal Offences**

**Chapter 1: Murder, infanticide and suicide**

**Clause 42: Persons suffering from diminished responsibility (England and Wales)**

318. The effect of clause 42 is to replace the current definition of the partial defence of diminished responsibility with a modernised definition based on the concept of "an abnormality of mental functioning" arising from a "recognised medical condition". It spells out the aspects of a defendant's functioning which must be affected in order for the defence to succeed and sets out that the defendant's abnormality of mental functioning should be at least a significant contributory factor in causing the defendant's acts or omissions.

319. *Subsection (1)* replaces the current subsection (1) of section 2 of the Homicide Act 1957 (the 1957 Act) with new subsections (1) to (1B). The amended section provides that a person is not to be convicted of murder if he or she was suffering from an abnormality of mental functioning which meets the three conditions set out in new section 2(1)(a) to (c). As now, under section 2(2) of the 1957 Act, the person will be convicted of the offence of manslaughter instead of murder.

320. New section 2(1)(a) sets out that the abnormality of mental functioning has to arise from a recognised medical condition. New section 2(1)(b) provides that the abnormality of mental functioning must have impaired the defendant's ability to do one or more of the things mentioned in new section 2(1A). These are the ability of that person to understand the nature of his or her conduct, to form a rational judgement or to exercise self-control. This contrasts with the existing definition of the partial defence which requires a person's mental responsibility to be substantially impaired but does not specify in what respects this must be so.

321. New section 2(1)(c) sets out that, in order for the partial defence to apply, the abnormality of mental functioning must provide an explanation for the defendant's involvement in the killing. New section 2(1B) clarifies that this will be the case where the abnormality was at least a significant contributory factor in causing the defendant to carry out the conduct.

322. *Subsection (2)* updates the language of section 6 of the Criminal Procedure (Insanity) Act 1964 insofar as it refers to the partial defence of diminished responsibility.

**Clause 43: Persons suffering from diminished responsibility (Northern Ireland)**
323. This clause makes provision for Northern Ireland equivalent to clause 42.

**Clause 44: Partial defence to murder: loss of control**
324. The common law partial defence to murder of provocation is supplemented by section 3 of the 1957 Act. It provides that a defendant who would otherwise be guilty of murder will be guilty of manslaughter instead if he or she was provoked by things said or done (or both) to lose self-control, and in the opinion of the jury the provocation was enough to make a reasonable person do as the defendant did.

325. Clause 46 abolishes the common law partial defence of provocation (section 3 of the 1957 Act and section 7 of the Criminal Justice Act (Northern Ireland) 1966 are, accordingly, also repealed). Clause 44 replaces the common law with a new partial defence to murder for circumstances where the killing resulted from a loss of self-control attributable to a "qualifying trigger", as defined.

326. Clause 44 sets out the criteria which need to be met in order for the new partial defence of loss of self-control to be successful.

327. *Subsection (1)* lists those as:

a) the killing was a result of the defendant's loss of self-control,
b) the loss of self-control had a qualifying trigger (which is defined in clause 45), and
c) a person of the defendant's sex and age with an ordinary level of tolerance and self-restraint and in the circumstances of the defendant might have acted in the same or similar way to the defendant.

328. *Subsection (2)* clarifies that the loss of control described in subsection (1) need not be sudden. Under the existing common law partial defence of provocation, the courts have held that the loss of self-control must be sudden. Case law has developed over time to the effect that the partial defence might still apply though where there was a delay between the provocative incident and the killing. The length of time between the incident and the killing does however affect whether there is sufficient evidence of a loss of self-control for the judge to leave the issue to the jury, and how readily a jury accepts that the defendant had indeed lost his or her self-control at the time of the killing. Although subsection (2) in the new partial defence makes clear that it is not a requirement for the new partial defence that the loss of self control be sudden, it will remain open, as at present, for the judge (in deciding whether to leave the defence to the jury) and the jury (in determining whether the killing did in fact result from a loss of self-control and whether the other aspects of the partial defence are satisfied) to take into account any delay between a relevant incident and the killing.

329. *Subsection (3)* supplements subsection (1)(c) by clarifying that the reference to the defendant's circumstances in that subsection means all of those circumstances except those that are only relevant to the defendant's general level of tolerance and self restraint. Thus, a defendant's history of abuse at the hands of the victim could be taken into account in deciding whether an ordinary person might have acted as the defendant did, whereas the defendant's generally short temper could not. Consequently, when applying the test in subsection (1)(c) the jury will consider whether a person of an ordinary level of tolerance and self-restraint to be expected from someone of the defendant's sex and age and in the defendant's specific circumstances (in the sense described earlier in this paragraph) might have acted as the defendant did.

330. *Subsection (4)* ensures that those acting in a considered desire for revenge cannot rely on the partial defence, even if they lose self-control as a result of a qualifying trigger.

331. *Subsection (5)* clarifies where the burden of proof lies in murder cases where the partial defence is raised. If sufficient evidence of the partial defence is raised, the burden of disproving the defence beyond reasonable doubt rests with the prosecution. It is supplemented by *subsection (6)* which confirms that for the purposes of subsection (5) the evidence will be sufficient where a jury, properly directed, could reasonably conclude that the partial defence might apply. It will be a matter of law, and therefore for a judge to decide, whether sufficient evidence has been raised to leave the partial defence to the jury. This differs from the position with the existing partial defence of provocation where, if there is evidence that a person was provoked to lose his or her self-control, the judge is required by section 3 of the 1957 Act to leave the partial defence to the jury even where no jury could reasonably conclude that a reasonable person would have reacted as the defendant did. Where there is sufficient evidence for the issue to be considered by the jury, the burden will be on the prosecution to disprove it. This is the same burden of proof as other defences, including self-defence.

332. *Subsection (7)* sets out that, when the defence is successful, the defendant will be guilty of manslaughter instead of murder.

333. *Subsection (8)* provides that even if one party to a killing is found not guilty of murder on the grounds of the partial defence of loss of self control, other parties may still be found guilty of murder (for example, if they acted without losing self control).

**Clause 45: Meaning of "qualifying trigger"**

334. Clause 45 defines the term "qualifying trigger" for the loss of self-control in clause 44(1).

335. *Subsections (2) to (5)* set out that the qualifying triggers for a loss of self-control can be where the loss of self-control was attributable to a fear of serious violence, to things done or said or to a combination of both.

336. Subsection (3) deals with cases where the defendant lost self-control because of his or her fear of serious violence from the victim. As in the complete defence of self-defence, this will be a subjective test and the defendant will need to show that he or she lost self control because of a genuine fear of serious violence, whether or not the fear was in fact reasonable. The fear of serious violence needs to be in respect of violence against the defendant or against another identified person. For example, the fear of serious violence could be in respect of a child or other relative of the defendant, but it could not be against an unidentified group of people (for example a political group).

337. Subsection (4) sets out when things said or done can amount to a qualifying trigger for the loss of self-control. The things said or done must amount to circumstances of an extremely grave character and cause the defendant to have a justifiable sense of being seriously wronged. Whether a sense of being seriously wronged is justifiable will be an objective question for a jury to determine (assuming that there is sufficient evidence for the defence to be left to the jury).

338. Subsection (4), therefore, has the effect of narrowing the circumstances in which a partial defence is available where a person loses self-control in response to words or actions alone. The example that the Law Commission identified where the partial defence might apply would be a case where a parent arrives home to find his or her child has just been raped, and in response the parent loses self-control and kills the offender as he tries to escape.

339. Subsection (5) allows the loss of self-control to be triggered by a combination of a fear of serious violence and things done or said which constitute circumstances of an extremely grave character and cause the defendant to have a justifiable sense of being seriously wronged.

340. *Subsection (6)* makes further provision in relation to determining whether a loss of self-control has a qualifying trigger:

- Subsection (6)(a) provides that, when the defendant's fear of serious violence was caused by something that the defendant incited for the purpose of providing an excuse to use violence, it is to be disregarded. The effect is that, in such a situation, the person would not be able to claim a partial defence based on his or her fear of serious violence.

- Subsection (6)(b) provides that, when the defendant's sense of being seriously wronged by something done or said relates to something that the defendant incited for the purpose of providing an excuse to use violence, it is to be disregarded. The effect is that, in such a situation, the person would not be able to claim a partial defence based on the relevant things done or said.

- Subsection (6)(c) has the effect that, in determining whether a loss of self-control has a qualifying trigger, the fact that something done or said amounted to sexual infidelity (on

the part of the victim or anyone else) is not justifiable. The effect is that, if a person kills another because they have been unfaithful, he or she will not be able to claim the partial defence.

**Clause 46: Abolition of common law defence of provocation**

341. Clause 46 abolishes the common law defence of provocation, and consequently repeals section 3 of the Homicide Act 1957 and the equivalent Northern Ireland provision, namely section 7 of the Criminal Justice Act (Northern Ireland) 1966. Section 3 supplemented the common law principles relating to provocation by providing that the issue of whether the provocation was enough to make a reasonable person do as the defendant did should be left to be determined by the jury. This has been interpreted as meaning that a judge must leave the partial defence to the jury even where the evidence is such that no jury properly directed could reasonably conclude that the defendant was acting reasonably. This is in contrast to the common law position that existed prior to the Homicide Act 1957, where the judge was not required to leave the issue to the jury in such circumstances.

**Clause 47: Infanticide (England and Wales)**

342. Clause 47 amends section 1 of the Infanticide Act 1938 so that it is clear that the offence and defence of infanticide are available only in respect of a woman who would otherwise be found guilty of murder or manslaughter. Whilst it had generally been assumed in the past that infanticide could apply only in circumstances that would otherwise amount to the offence of murder, the Court of Appeal has ruled in *R v Gore* [2007] EWCA Crim 2789 that section 1 may apply whenever the requirements of infanticide are made out regardless of what offence would otherwise have been committed.

343. Clause 47 limits infanticide to cases that would otherwise be murder or manslaughter through two changes. The first is to replace the words "notwithstanding that" with the word "if". This resolves an uncertainty that has existed in the past about the meaning of the term "notwithstanding that" which at different times has been interpreted as meaning "even if" and "provided that".

344. The second is to explicitly state that infanticide can apply (provided all the other criteria for infanticide apply) where the offence would otherwise be murder *or manslaughter.*

345. The combined effect of the two changes is that infanticide can apply "if the circumstances were such that but for the Infanticide Act 1938 the offence would have amounted to murder or manslaughter".

**Clause 48: Infanticide (Northern Ireland)**

346. This clause makes provision for Northern Ireland equivalent to clause 47.

**Clause 49: Encouraging or assisting suicide: England and Wales**

347. Section 2(1) of the Suicide Act 1961 currently provides that a person who "aids, abets, counsels or procures" the suicide or attempted suicide of another person commits an offence (the substantive offence). By virtue of section 1 of the Criminal Attempts Act 1981 it is also an offence to attempt to aid, abet, counsel or procure the suicide or attempted suicide of another person (the attempt offence). Clause 49 replaces the substantive and attempt offences with a single offence expressed in terms of "encouraging or assisting" the suicide or attempted suicide of another person. Paragraph 55 of Schedule 19 therefore disapplies the Criminal Attempts Act 1981 in respect of an offence under section 2 of the Suicide Act 1961. The clause modernises the language of the current law with the aim of improving understanding of this area of the law. It is in line with the case law relating to the existing substantive and attempt offences. The clause does not change the scope of the current law, when section 2 of the Suicide Act 1961 is read in combination with section 1 of the Criminal Attempts Act 1981.

348. *Subsection (2)* replaces section 2(1) of the Suicide Act 1961. It provides that a person commits an offence if he or she does an act which is capable of encouraging or assisting another person to commit or attempt to commit suicide, and if he or she intends the act to encourage or assist another person to commit or attempt to commit suicide. The person committing the offence need not know, or even be able to identify, the other person. So, for example, the author of a website promoting suicide who intends that one or more of his or her readers will commit or attempt to commit suicide is guilty of an offence, even though he or she may never know the identity of those who access the website.

349. *Subsection (3)* amends section 2(2) of the Suicide Act 1961 so that the language is consistent with the new section 2(1).

350. *Subsection (4)* inserts new sections 2A and 2B into the Suicide Act 1961. The new section 2A elaborates on what constitutes an act capable of encouraging or assisting suicide. New section 2A(1) provides that a person who arranges for someone else to do an act capable of encouraging or assisting the suicide or attempted suicide of another person will be liable for the offence if the other person does that act. New section 2A(2) has the effect that an act can be capable of encouraging or assisting suicide even if the circumstances are such that it was impossible for the act to actually encourage or assist suicide. An act is therefore treated as capable of encouraging and assisting suicide if it would have been so capable had the facts been as the defendant believed them to be at the time of the act (for example, if pills provided with the intention that they will assist a person to commit suicide are thought to be lethal but are in fact harmless) or had subsequent events happened as the defendant believed they would (for example, if lethal pills which were sent to a person with the intention that the person would use them to commit or attempt to commit suicide get lost in the post), or both. New section 2A(3) clarifies that references to doing an act capable of encouraging or assisting another to commit or attempt suicide include a reference to doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide. The new section 2B provides that an act includes a course of conduct.

**Clause 50: Encouraging or assisting suicide (Northern Ireland)**
351. This clause makes provision for Northern Ireland equivalent to clause 49.

**Clause 51 and Schedule 10: Encouraging or assisting suicide: providers of information society services**
352. Clause 51 and Schedule 10 ensure that the provisions outlined in clauses 49 and 50 above are consistent with the UK's obligations under the E-Commerce Directive.

353. Schedule 10 ensures that providers of information society services who are established in England, Wales or Northern Ireland are covered by the offence of encouraging or assisting suicide even when they are operating in other European Economic Area states. *Paragraphs 4 to 6* of the Schedule provide exemptions for internet service providers from the offence in limited circumstances, such as where they are acting as mere conduits for information that is capable, and provided with the intention, of encouraging or assisting suicide or are storing it as caches or hosts.

**Chapter 2: Images of Children**

**Clause 52: Prohibited images**
354. *Subsection (1)* creates a new offence in England and Wales and Northern Ireland of possession of a prohibited image of a child.

355. *Subsections (2) to (8)* set out the definition of a "prohibited image of a child". Under subsection (2) in order to be a prohibited image, an image must be pornographic, fall within subsection (6) and be grossly offensive, disgusting or otherwise of an obscene character. The definition of "pornographic" is set out in subsection (3). An image must be of such a nature that it must reasonably be assumed to have been produced solely or mainly for the purpose of sexual arousal. Whether this threshold has been met will be an issue for a jury to determine. Subsection (4) makes it clear that where (as found in a person's possession) an individual image forms part of a series of images, the question of whether it is pornographic must be determined by reference both to the image itself and the context in which it appears in the series of images.

356. Subsection (5) expands on subsection (4). It provides that, where an image is integral to a narrative (for example a mainstream or documentary film) which when it is taken as a whole could not reasonably be assumed to be pornographic, the image itself may not be pornographic, even though if considered in isolation the contrary conclusion might have been reached.

357. Subsection (6) and (7) provide that a prohibited image for the purposes of the offence is one which focuses solely or principally on a child's genitals or anal region or portrays any of a list of acts set out in subsection (7).

358. Subsection (8) provides that for the purposes of subsection (7) penetration is a continuing act from entry to withdrawal.

359. *Subsection (9)* requires proceedings to be instituted by or with the consent of the Director of Public Prosecutions.

**Clause 53: Exclusion of classified film, etc**

360. This clause provides an exclusion from the scope of the offence under clause 52 for excluded images.

361. An "excluded image" is defined in *subsection (2)* as an image which forms part of a series of images contained in a recording of the whole or part of a classified work. A "recording" is defined in *subsection (7)* as any disc, tape or other device capable of storing data electronically and from which images may be produced. This therefore includes images held on a computer. A classified work is a video work in respect of which a classification certificate has been issued by an authority designated under section 4 of the Video Recordings Act 1984.

362. The effect of the exclusion is that a person who has a video recording of a film which has been classified by the British Board of Film Classification (BBFC), and which contains images that, despite their context, might amount to a "prohibited image of a child" for the purposes of the clause 52 offence, will not be liable for prosecution for the offence.

363. However, the effect of *subsection (3)* is that the exclusion from the scope of the offence does not apply in respect of images contained within extracts from classified films which must reasonably be assumed to have been extracted solely or principally for the purpose of sexual arousal. Essentially the exemption for an image forming part of a classified work is lost where the image is extracted from that work for pornographic purposes. Subsection (7) defines "extract" to include a single image.

364. *Subsection (4)* provides that when an extracted image is one of a series of images, in establishing whether or not it is of such a nature that it must reasonably be assumed to have been extracted for the purpose of sexual arousal, regard is to be had to the image itself and to the context it which it appears in the series of images. This is the same test as set out in subsection (4) of clause 52. Subsection (5) of clause 52 also applies in determining this question.

365. The effect of *subsection (5)* is that, in determining whether a recording is a recording of a whole or part of a classified work, alterations due to technical reasons (such as a failure in the recording system), due to inadvertence (such as setting the wrong time for a recording) or due to the inclusion of extraneous material (such as advertisements), are to be disregarded.

366. *Subsection (6)* makes it clear that nothing in clause 53 affects any duty of a designated authority to take into account the offence in clause 52 when considering whether to issue a classification certificate in respect of a video work.

367. *Subsection (7)* sets out the definitions used in this section. *Subsection (8)* states that section 22(3) of the Video Recordings Act 1984 applies. The effect of section 22(3) is that, where an alteration is made to a video work in respect of which a classification certificate has been issued, the classification certificate does not apply to the altered work.

**Clause 54: Defences**

368. This clause sets out a series of defences to the clause 52 offence of possession of prohibited images of children. These defences are set out in *subsection (1)*. They are the same as those for the offence of possession of indecent images of children under section 160(2) of the Criminal Justice Act 1988 and Article 15(2) of the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988. They are:

- that the person had a legitimate reason for being in possession of the image (this will cover those who can demonstrate that their legitimate business means that they have a reason for possessing the image);

- that the person had not seen the image and did not know, or have reasonable cause to suspect, that the images held were prohibited images of children (this will cover those who are in possession of offending images but are unaware of the nature of the images); and

- that the person had not asked for the image – it having been sent without request – and that he or she had not kept it for an unreasonable period of time (this will cover those who are sent unsolicited material and who act quickly to delete it or otherwise get rid of it).

369. *Subsection (2)* provides that "prohibited image" in this clause has the same meaning as in clause 52.

**Clause 55: Meaning of "image" and "child"**

370. This clause defines "image" and "child" for the purposes of clauses 52, 53 and 54. These definitions are applied to these clauses by *subsection (1)*.

371. *Subsection (2)* sets out the definition of an image. It states that for the purposes of this offence, "an image" includes still images such as photographs, or moving images such as those in a film. The term "image" also incorporates any type of data, including that stored electronically (as on a computer disk), which is capable of conversion into an image. This covers material available on computers, mobile phones or any other electronic device.

372. *Subsection (3*) provides that "image" does not include an indecent photograph or indecent pseudo-photograph of a child, as these are subject to other controls. *Subsection (4)* defines "indecent photograph" and "indecent pseudo-photograph" in accordance with the Protection of Children Act 1978 and for Northern Ireland, the Protection of Children (Northern Ireland) Order 1978. "Indecent photograph" includes an indecent film, a copy of a photograph or film, a negative and electronic data capable of conversion into a photograph. It also includes a tracing or other image derived from the whole or part of a photograph or pseudo-photograph and electronic data capable of conversion into such an image. A pseudo-photograph is an image, whether made by computer-graphics or otherwise, which appears to be a photograph and includes a copy of a pseudo-photograph and electronic data capable of conversion into a pseudo-photograph.

373. *Subsection (5)* defines a child to be a person under 18 years of age.

374. *Subsection (6)* requires that a person in an image is to be treated as a child if the impression conveyed by the image is that the person shown is a child, or the predominant impression conveyed is that the person shown is a child despite the fact that some of the physical characteristics shown are not of a child.

375. *Subsection (7)* provides that references to an image of a person include references to an imaginary person, and *subsection (8)* makes it clear that references to an image of a child include references to an imaginary child.

**Clause 56: Penalties**

376. The penalties that will apply to persons found guilty of an offence under clause 52 are set out in this clause.

377. In England and Wales and Northern Ireland on conviction on indictment the maximum sentence is imprisonment for three years.

378. The maximum sentence on summary conviction of the offence in England and Wales is six months' imprisonment. On the commencement of section 154(1) of the 2003 Act, the maximum sentence on summary conviction in England and Wales will rise to 12 months (see paragraph 14(1) of Schedule 20 to the Bill). The maximum custodial penalty on summary conviction in Northern Ireland is six months.

**Clause 57: Entry, search, seizure and forfeiture**

379. *Subsection (1)* applies the entry, search, seizure and forfeiture powers of the Protection of Children Act 1978 to prohibited images of children. *Subsection (2)* applies the equivalent Northern Ireland legislation.

380. *Subsection (3)* applies these powers to prohibited images to which clause 52 applies.

381. Paragraph 14(2) of Schedule 20 to the Bill provides that these powers of forfeiture have effect regardless of when the images were lawfully seized.

**Clause 58 and Schedule 11: Special rules relating to providers of information society services**

382. Clause 58 and Schedule 11 ensure that the provisions outlined above which make it an offence to possess prohibited images of children are consistent with the UK's obligations under the E-Commerce Directive.

383. Under Schedule 11 providers of information society services who are established in England, Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 3 to 5 of the Schedule provide exemptions for internet service providers from the offence of possession of prohibited images of children in limited circumstances, such as where they are acting as mere conduits for such material or are storing it as caches or hosts.

**Clause 59: Indecent pseudo-photographs of children: marriage etc**

384. *Subsection (1)* amends section 1A of the Protection of Children Act 1978 to extend the "marriage and other relationships" defence to offences under that Act so that it applies in relation to "pseudo-photographs". The defence already applies to an offence under section 1(1)(a) of the Protection of Children Act 1978 of taking or making an indecent photograph of a child and to an offence under section 1(1)(b) or (c) of that Act relating to possession and distribution of an indecent photograph of a child.

385. *Subsection (2)* amends section 160A of the Criminal Justice Act 1988 to extend the "marriage and other relationships" defence to offences under that Act to "pseudo-photographs". The defence already applies to an offence under section 160 of the Criminal Justice Act 1988 relating to possessing an indecent photograph of a child.

386. *Subsection (3)* amends Article 15A of the Criminal Justice (Evidence etc.) (Northern Ireland) Order 1988 (SI 1988/1847 (NI.17)) to extend the "marriage and other relationships" defence to offences under that Order to "pseudo-photographs". The defence already applies to an offence under Article 15 of the Criminal Justice (Evidence etc.) (Northern Ireland) Order 1988 (SI 1988/1847 (NI 17)) relating to possession of an indecent photograph of a child.

387. *Subsection (4)* amends Article 3B of the Protection of Children (Northern Ireland) Order 1978 (SI 1978/1047 (NI 17)) to extend to the "marriage and other relationships" defence to offences under that Order "pseudo-photographs". The defence already applies to an offence under Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 (SI 1978/1047 (NI 17)) of taking or making an indecent photograph of a child and to Article 3(1)(b) or (c) of that Order relating to possession and distribution of an indecent photograph of a child.

## Chapter 3: Other offences

### Clause 60: Conspiracy

388. Clause 60 amends section 1A of the Criminal Law Act 1977 which sets out the conditions for the offence of "conspiracy to commit offences outside the United Kingdom". As a result section 1A will apply to conspiracies to commit offences "outside England and Wales", thereby including conspiracies to commit offences in Scotland or Northern Ireland (which are not currently covered by section 1A).

389. This change is achieved by widening the scope of the first condition in section 1A(2) of the Criminal Law Act 1977, which currently applies only to agreements to pursue a course of conduct that would involve an act or event intended to take place in a country or territory outside the United Kingdom. This condition will now be satisfied where the act or event is intended to take place outside England and Wales and therefore will include acts or events in Scotland or Northern Ireland.

390. The clause also substitutes 3 new subsections for section 1A(14) of the Criminal Law Act 1977. These ensure that the changes made by the clause do not have retrospective effect. Any agreement entered into during the period beginning on 4th September 1998 and ending with the date that the clause comes into force will be subject to the current wording of section 1A(2).

391. *Subsection (2)* makes equivalent changes for Northern Ireland.

### Clause 61: Hatred against persons on grounds of sexual orientation

392. This clause removes section 29JA of the Public Order Act 1986, which provides that, for the purposes of the offence of stirring up hatred on the grounds of sexual orientation, discussion or criticism of sexual conduct or practices or urging persons to refrain from or modify such conduct is not, in itself, to be taken to be threatening or intended to stir up hatred. The removal of the section will not affect the threshold required for the offence to be made out.

## Part 3 - Criminal Evidence, Investigations and Procedure

## Chapter 1: Anonymity in investigations

### Clause 62: Qualifying offences

393. *Subsection (1)* stipulates that an offence is a qualifying offence if it is listed in *subsection (2)* and the condition in *subsection (3)* is satisfied in relation to it. The offences listed in subsection (2) are murder and manslaughter, and the condition in subsection (3) is that the death was caused by being shot with a firearm, and/or by being injured with a knife. The purpose of defining qualifying offence in this way is to limit investigation anonymity orders so that they are available only in respect of investigations concerning suspected homicides (murder and manslaughter) where death was caused by gun and/or knife.

394. *Subsections (4)* gives power to the Secretary of State to amend subsections (2) and (3) by order so as to alter what is a qualifying offence. The order making power is subject to the affirmative resolution procedure (see clause 159(4)(a) and (5)).

**Clause 63: Qualifying criminal investigations**

395. *Subsection (1)* defines a qualifying criminal investigation as one which is conducted by an investigating authority, wholly or in part with a view to ascertaining whether a person should be charged with a qualifying offence (as defined in clause 62), or whether a person charged with a qualifying offence is guilty of it. Investigating authorities are listed in *subsection (2*). They are:

- a police force in England and Wales;
- the British Transport Police Force;
- the Serious Organised Crime Agency; or
- the Police Service of Northern Ireland

396. *Subsection (3)* gives power to the Secretary of State to amend *subsection (2)* by order so as to alter the list of investigating authorities. The power is linked to (although not contingent upon) the power to amend clause 62. If that power is exercised so as to add a new offence to subsection (2) of that clause, the power in clause 63, may need to be exercised to add a person not already listed in subsection (2) as an investigating authority, if that person has power to investigate the newly added offence. This order making power is subject to the affirmative resolution procedure (see clause 159(4)(a) and (5)).

397. *Subsection (4)* provides that an order made under subsection (3) may modify any provision of this Chapter.

**Clause 64: Investigation anonymity orders**

398. *Subsection (1)* defines an investigation anonymity order. An investigation anonymity order is an order made by a justice of the peace, in relation to a person specified in the order, prohibiting the disclosure of any information that (a) identifies the specified person as a person who is or was able or willing to assist a qualifying criminal investigation specified in the order, or (b) that might enable the specified person to be identified as such a person. The order applies to the officers and others involved in the investigation, and indeed to anybody else, including the specified person. The purpose of the order is to prevent disclosure of information relating to the identity of an individual who is or was able or willing to assist a qualifying criminal investigation, and thus to protect an informant from harm and to provide reassurance to a reluctant informant that their identity will be protected by a court order.

399. *Subsection (3)* provides that an investigation anonymity order is not contravened if a person discloses information identifying the specified person, or which might enable the specified person to be identified, as someone is or was able or willing to assist a specified

qualifying criminal investigation, if the person disclosing the information does not know and has no reason to suspect that an order is in force.

400. *Subsection (4)* provides that an investigation anonymity order is not contravened if a person discloses information which might enable the specified person to be identified as someone who is or was able or willing to assist a specified qualifying criminal investigation, if the person disclosing the information does not know, and has no reason to suspect, that the information might enable the specified person to be so identified.

401. *Subsections (5) and (6)* provide that an investigation anonymity order is not contravened if a person ("A") discloses the fact that an investigation anonymity order has been made to another person ("B"), where A knows that B is aware that the informant for whose benefit the order was made is or was able or willing to help with an investigation.

402. *Subsection (7)* provides that an investigation anonymity order is not contravened where disclosure of information is to a person who is involved in the specified qualifying criminal investigation or in the prosecution of an offence to which the instigation relates, and the disclosure is made for the purposes of the investigation or prosecution.

403. *Subsection (8)* provides that an investigation anonymity order is not contravened where disclosure is required by any enactment or rule of law, or where required by a court order. However, *subsection (9)* provides that a person may not rely on subsection (8) in a case where (a) it might have been determined that the person was required or permitted to withhold the information but (b) the person disclosed the information without there having been a determination as to whether the person was required or permitted to withhold the information. The effect of subsection (9) on subsection (8) is to limit the protection based on being obliged to disclose to cases where there is no exception to that obligation and cases where an exception that could have applied to protect the informant (such as public interest immunity) has been raised.

404. *Subsection (10)* provides that disclosing information in contravention of an investigation anonymity order is a criminal offence. A person who is guilty of this offence is liable to imprisonment and/or a fine. On summary conviction the maximum term of imprisonment is 12 months (or, in Northern Ireland, 6 months). Following conviction on indictment, the maximum term of imprisonment is 5 years. However, *subsections (3) to (8)* set out the circumstances in which an order will not be contravened.

405. *Subsection (13)* defines the term "specified" as meaning specified in the investigation anonymity order.

**Clause 65: Applications**

406. *Subsection (1)* provides that an application must be made to a justice of the peace. A justice of the peace includes any person acting as such, whether a lay justice, or a judge who

is a District Judge (Magistrates' Court) (see section 25 of the Courts Act 2003), or a Crown Court judge (see section 66 of the Courts Act 2003).

407. The subsection also restricts the availability of investigation anonymity orders to investigations conducted by certain organisations. Only certain persons in those organisations (and persons to whom they delegate the function under clause 69) may apply for an order. Those persons are listed in *subsection (1)(a) to (g)*:

(a) in a case where a police force in England and Wales is conducting the qualifying criminal investigation, the chief officer of police of the police force;

(b) in a case where the British Transport Police Force is conducting the qualifying criminal investigation, the Chief Constable of the British Transport Police Force;

(c) in a case where the Serious Organised Crime Agency is conducting the qualifying criminal investigation, the Director General of the Serious Organised Crime Agency;

(d) in a case where the Police Service of Northern Ireland is conducting the qualifying criminal investigation, the Chief Constable of the Police Service of Northern Ireland;

(e) the Director of Public Prosecutions;

(f) the Director of Revenue and Customs Prosecutions; and

(g) the Director of Public Prosecutions for Northern Ireland.

408. *Subsection (2)* makes it clear that the applicant is not obliged to give notice of the application to a suspect or someone who has been charged with an offence subject to a qualifying criminal investigation (or their legal representatives). Such notice could defeat the purpose of the order.

409. *Subsection (3)* requires the applicant to inform the justice of the peace of the identity of the person whose identity is to be protected by the investigation anonymity order. However, the justice of the peace can direct the identity of that person to be withheld.

410. *Subsection (4)* permits a justice of the peace to grant an application on the papers, without an oral hearing. The Government expects, however, that in the vast majority of cases there will be an oral hearing.

411. *Subsection (5)* provides that where a justice of the peace determines an application without a hearing the designated officer in relation to that justice of the peace must notify the applicant about the decision, and *subsection (6)* makes similar provision for Northern Ireland.

412. *Subsection (7)* provides the Secretary of State with a power to amend subsection (1) by order. This will allow the persons who may make an application to be altered. The order-making power will also allow for consequential changes where amendments are made to the list of offences or conditions specified in relation to qualifying offences in clause 62, or for amendments to reflect changes in organisations that investigate qualifying offences. *Subsection (8)* provides that an order made under subsection (7) may modify any provision of this Chapter.

**Clause 66: Conditions for making order**

413. *Subsection (1)* applies this clause where an application for an investigation anonymity order is made.

414. Under *subsection (2)*, an investigation anonymity order may be made where the justice of the peace is satisfied that there are reasonable grounds for believing that the five conditions specified in *subsections (3) to (8)* are satisfied. This is to avoid placing an unduly high burden of proof on the applicant, particularly at the early stages of an investigation when the information available may be limited but an investigation anonymity order in respect of a particular informant is highly desirable in order to progress the investigation.

415. The condition in *subsection (3)* is that a qualifying offence has been committed. (Qualifying offence is defined in clause 62).

416. The condition in *subsection (4)* is that the person likely to have committed the offence was at least 11 but under 30 years old at the time the offence was committed.

417. The condition set out in *subsections (5) and (6)*, is that the person likely to have committed the offence is a member of a group (1) which it is possible to identify from the criminal activities that its members appear to be engaged in and (2) it appears that the majority of the members of the group are at least 11 but under 30 years old. The reason for the conditions in subsections (4) to (6) is that the provisions are targeted at informants in qualifying criminal investigations who are afraid of reprisals from street gangs. The age range set out is the understood age range for membership of such gangs, and the activities are the understood activities of such gangs.

418. The condition in *subsection (7)* is that the informant in respect of whom the order would be made has reasonable grounds to fear intimidation or harm if he or she were identified as a person who is or was able or willing to assist in the investigation into the homicide at issue.

419. The condition in s*ubsection (8)* has two limbs, both of which must be satisfied. The first is that the person who would be specified in the order, is able to provide information that would assist the qualifying criminal investigation, and the second is that that person is more likely than not to provide the information if the order was made.

420. *Subsection (9)* provides that where more than one person is suspected of having caused the death under investigation, the five conditions need be satisfied only in relation to one of the suspects.

421. *Subsection (10)* gives power to the Secretary of State to modify or repeal subsections (4) to (6) and subsection (9) by order. The conditions set out in subsections (3), (7) and (8) cannot therefore be modified or repealed using this power. This order making power is subject to the affirmative resolution procedure (see clause 159 (4)(a) and (5)).

422. *Subsection (11)* provides that an order made under subsection (10) may modify any provision of this Chapter.

**Clause 67: Appeal against refusal of order**

423. *Subsection (1)* permits an applicant to appeal to a judge of the Crown Court if the justice of the peace refuses the application for an investigation anonymity order.

424. *Subsection (2)* requires that in order to appeal a refusal of an application, the applicant must indicate an intention to appeal a refusal either in the application for the order or before the justice of the peace at the hearing if there is one. Otherwise no appeal will be possible.

425. *Subsections (3) and (4)* provide that if the applicant has given an indication of intention to appeal, in the event of a refusal of the application the justice must nevertheless make the investigation anonymity order which has been applied for. The order will continue in force until the appeal is determined or disposed of. This is to err on the side of caution and to protect the informant's identity until such time as the appeal has been dealt with.

*426. Subsection (5)* provides that where an appeal is made the judge must consider afresh the application for an investigation anonymity order and clause 65(3) to (5) applies accordingly to the determination of the application by the judge.

**Clause 68: Discharge of order**

427. Situations may arise in which an investigation anonymity order should be discharged, for example, the informant no longer has any fear of reprisals. *Subsection (1)* therefore permits a justice of the peace to discharge an investigation anonymity order if it appears to the justice to be appropriate to do so.

428. *Subsection (2)* provides that a justice of the peace may discharge an investigation anonymity order an application by the person who applied for the original order or on an application by the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of Public Prosecutions for Northern Ireland or the informant in respect of whom the order was made.

429. Under *subsections (3) and (8)* an application for the discharge of an investigation anonymity order may be made only if there has been a material change of circumstances since the order was originally made, or since the last application to discharge the order was made. It will be for the justice of the peace to determine what amounts to a material change in circumstances.

430. *Subsection (4)* provides that where a person applies for the discharge of an investigation anonymity order any other person who is eligible to apply for the discharge of the order is entitled to be party to the proceedings.

431. *Subsection (5*) provides that if an application to discharge an investigation anonymity order is made by a person other than the informant in respect of whom the order was made, the justice may not determine the application unless (a) the informant has had an opportunity to oppose the application, or (b) the justice is satisfied that it is not reasonably practicable to communicate with the informant.

432. *Subsection (6)* provides a party to the proceedings with a right to appeal the justice of the peace's decision to a judge of the Crown Court.

433. *Subsection (7)* provides that if a party to the proceedings indicates an intention to appeal against a determination to discharge the investigation anonymity order, a justice of the peace who makes such a determination must provide for the discharge of the order not to have effect until the appeal is disposed of.

**Clause 69: Delegation of functions**

434. By virtue of clause 65, the power to apply for an investigation anonymity order is vested in a number of individuals, such as the chief officer of police of a police force. Clause 69 makes provision for those individuals to delegate their functions in relation to investigation anonymity orders to other persons. It would not be conducive to operational efficiency for chief officers to deal with every order personally.

**Clause 70: Public interest immunity**

435. This clause provides that this Chapter of the Bill does not affect the common law rules on public interest immunity.

**Clause 71: Application to armed forces**

436. By *subsection (1),* the provisions of this Chapter of the Bill do not apply to investigations concerning service offences as defined by the Armed Forces Act 2006. However, *subsections (2) and (3)* give power to the Secretary of State to, by order, make provision by order as regards the sort of investigation equivalent to the provisions in this Chapter (subject to any modifications the Secretary of State considers appropriate). Provision may be made in such way as the Secretary of State considers appropriate, including applying any of the provisions of this Chapter, with or without modifications. This will allow the

Secretary of State to provide for the use of investigation anonymity orders in investigations concerning service offences. An order made under this power is subject to the negative resolution procedure (clause 159(4)).

**Clause 72: Interpretation**

437. Clause 72 defines terms which are used in this Chapter of the Bill.

**Chapter 2: Anonymity of Witnesses**

**Clause 73: Witness anonymity orders**

438. *Subsection (1)* sets out what a witness anonymity order is. Breach of the order by the unauthorised disclosure of a witness's identity will fall to be dealt with as contempt of court. Subsection (1) defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case. For example, in some cases the court might consider that it is only necessary to screen the witness from the defendant and public; in others it might think it necessary to apply a whole range of measures.

439. *Subsection (2)* lists the kinds of measures the court may use to secure the witness's anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.

440. Under *subsection (4)* the court may not make a witness anonymity order which prevents the judge, magistrates or jury either from seeing the witness or from hearing the witness's natural voice. The judge, magistrates and jury must always be able to see and hear the witness.

**Clause 74: Applications**

441. *Subsection (1)* provides that applications for a witness anonymity order may be made by defendants as well as prosecutors. This reflects the position in the case of *Davis*, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. The Government expects that defence applications are most likely to be made in multi-handed cases (that is, where there is more than one defendant) where one defendant does not wish a witness's identity to be known by the other defendant or defendants. But this subsection does not exclude the possibility of a defence application in a single-handed case.

442. *Subsection (2)* provides that, where an application for a witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the defence before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.

443. Subsection (2) therefore provides that prosecutors are under no obligation to disclose the witness's identity to the defence at the application stage but must inform the court of the identity of the witness. Similar provision is made for the defence in *subsection (3)*, except that the defence must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.

444. In addition, *subsection (4)* provides that where the prosecution or the defendant proposes to make an application for a witness anonymity order, information that might identify the witness can be taken out of any relevant material which is disclosed before the application has been determined. This does not, however, override the obligation to disclose the identity of the witness to the court (in the case of a prosecution application) or to the court and prosecutor (in the case of a defence application).

445. Subsection (2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.

446. S*ubsections (6) and (7)* set out two basic principles. *Subsection (6)* states that on an application for a witness anonymity order every party to the proceedings must be given the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So *subsection (7)* provides that the court has the power to hear any party without a defendant or his or her legal representatives being present. This reflects the existing practice, by which prosecution applications were expected to be made in the absence of any other parties in the case, with the defence able to make representations later at a hearing with the prosecution (and possibly other defendants) present. It is expected that defence applications will be permitted without other defendants being present but will always be made in the presence of the prosecution.

447. *Subsection (8)* confirms that this clause does not affect the power of the Criminal Procedure Rule Committee to set out further procedures relating to witness anonymity in the Criminal Procedure Rules.

**Clause 75: Conditions for making order**

448. *Subsection (2)* requires three conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B and C.

449. *Subsection (3)* sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is to prevent real harm to the

public interest. This will cover the public interest in national security and in the ability of police or other agencies to conduct undercover work.

450. *Subsection (4)* sets out condition B, which is that the effect of the order would be consistent with the defendant receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.

451. *Subsection (5)* sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify and that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made (such harm might, for example, arise as a result of the identity of a member of the security services being made public).

452. *Subsection (6)* specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or to prevent damage to property, the court must have regard to the witness's reasonable fear of death or injury either to himself or herself or to another person ("we'll get your kids") or reasonable fear that there would be serious damage to property ("we'll fire-bomb your house").

**Clause 76: Relevant considerations**

453. *Subsection (1)* requires the court to have regard to the considerations set out in *subsection (2)* when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.

454. The considerations in subsection (2) are the defendant's general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the weight of the evidence he or she gives, whether the witness's evidence might be the sole or decisive evidence, whether the witness's evidence can be properly tested without knowing the witness's identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness.

**Clause 77: Warning to jury**

455. This clause requires the judge to warn the jury in a Crown Court trial, in such way as the judge considers appropriate, so as to ensure that the fact that the order was made does not prejudice the defendant. The provision is based on section 32 of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act) which makes similar provision for jury warnings where a special measures direction has been made to assist a vulnerable or intimidated witness.

**Clause 78: Discharge or variation of order**

456. The Bill does not provide for a right of appeal against the making of, or refusal to make, a witness anonymity order. The Government considers that existing appeal procedures are sufficient. Thus in the case of the prosecutor, the appeal against a terminating ruling under

Part 9 of the 2003 Act or Part IV of the Criminal Justice (Northern Ireland) Order 2004 is available. In the case of a defendant, the matter may be raised on appeal against conviction. Clause 78 does however provide for the court that made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.

457. Under *subsection (3)* the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative.

**Clause 79: Discharge or variation after proceedings**

458. This clause provides the court that makes a witness anonymity order with the power to discharge or vary that order after the proceedings have finished. The court may vary or discharge the order either on an application by a party to the proceedings or on an application made by the witness. This may be appropriate for example, if a considerable period of time has elapsed since the trial and the circumstances of the witness have changed.

459. *Subsection (4)* requires that the court, prior to discharging or varying a witness anonymity order, provide all parties to the proceedings and the witness the opportunity to be heard unless it is not reasonably practicable to do so, for example, if it is not possible to trace the person concerned.

**Clause 80: Discharge or variation by appeal court**

460. This clause provides that an "appeal court" (defined in *subsection (6)* as the Court of Appeal, Court of Appeal in Northern Ireland or Court Martial Appeal Court) can discharge or vary a witness anonymity order made in the proceedings which gave rise to the appeal. Under the CEWAA, an appeal court already has the power to make a witness anonymity order itself. However, this power does not of itself give it the power to discharge or vary an order made by the lower court.

461. This clause gives an appeal court the flexibility it requires. There is no provision for an application procedure: it is intended that the power will be exercised by the appeal court of its own motion, how and when it thinks fit. The provision also applies to witness anonymity orders made under the CEWAA (see paragraph 17 of Schedule 20).

462. *Subsection (1)* sets out that the power applies where a court has made a witness anonymity order in a criminal trial and the defendant has been convicted, found not guilty by reason of insanity or been found to be under a disability and to have done the act charged. The new power will therefore apply in any appeal against conviction or other finding.

463. *Subsection (2)* gives an appeal court the discretion to take into account a wide range of factors before discharging or varying an anonymity order.

464. *Subsection (3)* requires the appeal court to hear any representations made by the parties to the trial proceedings, unless it would be impracticable to communicate with them. This mirrors the duty of the lower court to hear representations from the parties before making, discharging or varying an order during the course of the trial.

465. However under *subsection (4)* the duty to hear representations does not fetter the appeal court's power to hear a party in the absence of one or more of the defendants and their legal representatives.

**Clause 81: Special provisions for service courts**

466. This clause provides for the application of the witness anonymity provisions in relation to criminal proceedings before the service courts. Matters of law arising in the service courts, with the exception of the Court Martial Appeal Court and its successor under the Armed Forces Act 2006, are dealt with by the judge advocate. There are no juries in the service courts but such courts do have lay members. *Subsection (3)* requires the lay members to be warned as to the effect of the making of an order in the same way as juries are warned.

**Clause 82: Public interest immunity**

467. This clause provides that this chapter of the Bill does not affect the common law rules on public interest immunity.

**Clause 83: Power to make orders under the 2008 Act**

468. This clause repeals sections 1 to 9 and 14 of the CEWAA, which provide for making a witness anonymity order under that Act. Paragraphs 17 and 18 of Schedule 20 preserve the effect of a witness anonymity order made under the CEWAA before 1 January 2010 and set out how such orders are to operate.

**Clause 84: Interpretation**

469. This clause defines terms which are used in this chapter of the Bill.

**Chapter 3: Vulnerable and Intimidated Witnesses**

**Clause 85: Eligibility for special measures: age of child witnesses**

470. Chapter 1 of Part 2 of the 1999 Act enables a court in criminal proceedings to give a direction that one or more special measures should apply to a witness when giving evidence. A special measures direction can only be made in relation to a witness who is eligible for assistance. The criteria for eligibility are also set out in that Part.

471. Clause 85 amends section 16(1)(a) of the 1999 Act so that all persons aged under 18 will automatically qualify as witnesses eligible for assistance under Part 2. Currently, only witness aged under 17 are automatically eligible for assistance.

**Clause 86: Eligibility for special measures: offences involving weapons**

472. Section 17(1) of the 1999 Act provides that a witness is eligible for assistance if the court is satisfied that the quality of the witness's evidence would be reduced on the grounds of fear or distress about testifying. Section 17(4) of the 1999 Act gives automatic eligibility for complainants in respect of sexual offences who are witnesses. Automatic eligibility means that the court does not need to be satisfied that the quality of the witness's evidence will be diminished for the purposes of establishing eligibility.

473. Clause 86 extends section 17 and gives automatic eligibility for assistance to witnesses in proceedings related to "relevant offences". The court does not need to be satisfied that the quality of the witness' evidence will be diminished for the purposes of establishing eligibility. However under section 19 of the 1999 Act, the court still has to determine whether any of the available special measures will in fact improve the quality of the witness's evidence and consider whether any such measure or measures might inhibit the evidence being effectively tested. Relevant offences are specified gun and knife crimes which are listed in new Schedule 1A to the 1999 Act (inserted by Schedule 12 to the Bill). A witness can inform the court that he or she does not wish to be eligible for assistance.

474. The list of relevant offences is inserted as a new Schedule 1A to the 1999 Act and the list can be amended by order made by the Secretary of State. The effect of *subsection (3)* is that the order-making power is subject to the negative resolution procedure.

**Clause 87: Special measures directions for child witnesses**

475. Clause 87 amends section 21 of the 1999 Act so as to modify the "primary rule" that applies to child witnesses. This rule (before amendment of this clause) requires all child witnesses to give evidence in chief by a video recorded statement and any further evidence by live link, unless (except for child witnesses in need of "special protection" in certain sexual and other offence cases) the court is satisfied that to do so will not improve the quality of that child's evidence.

476. *Subsections (2) and (7)* remove the special category of child witnesses who are "in need of special protection". The effect is to place all child witnesses on the same footing, regardless of the offence to which the proceedings relate.

477. *Subsections (4) and (5)* modify the primary rule to allow a child witness to opt out of giving evidence by a combination of video recorded evidence in chief and live link provided the court is satisfied, after taking into account certain factors, that not giving evidence in that way will not diminish the quality of the child's evidence. If as a result of opting out of the primary rule, the child witness would fall to give his or her evidence in court (and not by way of a live link) a secondary requirement applies. This obliges the child witness to give evidence in court in accordance with the special measure in section 23 of the 1999 Act, that is, from behind a screen that shields the witness from viewing the defendant. The secondary requirement does not apply if the court considers it would not maximise the quality of the

child's evidence. The child may also opt out of this secondary requirement, subject to the agreement of the court.

478. *Subsection (6)* inserts new subsection (4C) into section 21 of the 1999 Act which sets out the factors the court must consider in deciding whether the child witness may opt out of the primary rule and also in deciding whether the child witness may opt out of the secondary requirement to give evidence from behind a screen. These are: the witness's age and maturity, the witness's ability to understand the consequences of giving evidence in court rather than via video-recorded statement, any relationship between the witness and accused, the witness's social, cultural and ethnic background, the nature and circumstances of the offence being tried as well as any other factors the court considers relevant.

479. *Subsection (8)* makes related amendments to section 22, which relates to witnesses who attain the age of 18 after the video recorded statement is made.

**Clause 88: Special provisions relating to certain sexual offences**

480. Clause 88 inserts new section 22A into the 1999 Act. Section 22A makes special provision for complainants in respect of sexual offences tried in the Crown Court. New section 22A(7) and (9) require the admission of the complainant's video-recorded statement under section 27 of the 1999 Act, unless that requirement would not maximise the quality of the complainant's evidence.

481. New section 22A(1) and (3) establish that this new section will apply if the complainant of a sexual offence is a witness in proceedings relating to that sexual offence, but not if the witness is under 18 years old (the rules set out in section 21 apply to a witness under 18). Also the requirement to admit the video recorded evidence in chief only applies if a party to the proceedings makes an application requesting that it should be admitted.

482. New section 22A(2) excludes proceedings in magistrates' courts from these provisions. This does not mean that video recorded evidence in chief is not admissible in such proceedings, but only that the rule in section 22A in favour of admitting such evidence does not apply.

**Clause 89: Evidence by live link: presence of supporter**

483. Section 24 of the 1999 Act enables the court to make a direction allowing a witness to give evidence by live link. Clause 89 amends this section so that the court, when making such a direction can also direct that a person specified by the court can accompany the witness when the witness is giving evidence by live link. The court must take the witness's wishes into account when it determines who is to accompany the witness.

**Clause 90: Video recorded evidence in chief: supplementary testimony**

484. Section 27 of the 1999 Act enables the court to give a special measures direction that allows a video recorded statement to be admitted as a witness's evidence in chief. Clause 90

amends this section so as to relax the restrictions on a witness giving additional evidence in chief after the witness's video-recorded statement has been admitted.

485. *Subsection (2)* removes the prohibition on asking a witness questions about matters the court considers have been covered adequately in the recorded statement. The effect of this is that the witness may be asked additional questions regarding:

- matters that are not covered in the recorded statement (as is now the case under section 27), and

- matters that are covered in the recorded statement (so long as the permission of the court is given).

486. *Subsections (3) and (4)* remove the requirement that where an application to ask additional questions is made by a party, the court can give permission to ask a witness supplementary questions only if there has been a material change in circumstances since the court gave the direction to admit the recording.

**Clause 91: Examination of accused through intermediary**

487. The powers of the court under Chapter 1 of Part 2 of the 1999 Act to make directions allowing for special measures when giving evidence do not apply where the witness is the accused. Chapter 1A gives the court more limited powers regarding the evidence of accused persons. Clause 91 increases these powers by adding sections 33BA and 33BB to Chapter 1A. These new sections provide for the use of an intermediary where certain vulnerable accused persons are giving evidence in court.

488. Subsections (1) and (2) of new section 33BA provide that the court may make a direction allowing an intermediary in any proceedings if the accused satisfies either the condition in subsection (5) or the conditions in subsection (6) and making the direction is necessary to ensure that the accused receives a fair trial.

489. Subsections (3) and (4) of new section 33BA set out the nature of a direction and the role of the intermediary when the accused gives evidence. The intermediary relays questions that are put to the accused and relays the answers to the questioner. In doing so the intermediary can explain to the accused what the questions mean and to the questioner what the answers mean. Subsection (3) requires the intermediary to be a person approved by the court.

490. Subsection (5) of new section 33BA sets out the condition that is to be satisfied before a court may allow an accused aged under 18 to use an intermediary. This is that the accused's ability to participate effectively in the trial in terms of giving oral evidence as a witness is compromised by his or her level of intellectual ability or social functioning.

491. Subsection (6) of new section 33BA sets out the condition applying to an accused who is 18 years or older. The condition is that the accused is prevented from participating effectively as a witness giving oral evidence because the accused has a mental disorder (as defined by the Mental Health Act 1983) or a significant impairment of intelligence and social function.

492. Subsections (7) and (8) of new section 33BA are about the manner in which an examination through an intermediary is to be conducted, whether or not other provision about the examination is made. The examination is to take place in circumstances which enable the judge or justices, the legal representatives, the jury and a co-accused to see and hear the examination and also enable the judge or justices and the legal representatives to communicate with the intermediary.

493. Subsections (9) and (10) of new section 33BA require intermediaries to declare that they will perform the role faithfully and extend the Perjury Act 1911 to persons in the role of an intermediary. This is the same obligation that applies to foreign language interpreters and also to intermediaries assisting witnesses under section 29 of the 1999 Act.

494. New section 33BB gives the court power to discharge a direction for the use of an intermediary where this is no longer necessary for the purposes of a fair trial. A court must state publicly its reasons for discharging an intermediary direction. This accords with similar provisions in section 20 of the 1999 Act that apply to special measures directions made in respect of witnesses.

**Clause 92: Age of child complainant**

495. Section 35 of the 1999 Act prevents the cross-examination of a "protected witness" by an accused in person. The definition of a "protected witness" includes a child and clause 92 amends the definition of "child" in section 35 to mean a person under the age of 18 (as opposed to 17).

**Chapter 4: Live Links**

**Clause 93: Directions to attend through live link**

496. *Subsection (2)* amends section 57B of the Crime and Disorder Act 1998, which makes provision for courts to give live link directions for preliminary hearings where the defendant is in custody. The effect of the provision is to enable a single justice of the peace to give or rescind such a direction, thus obviating the need to convene a full court for that purpose.

497. *Subsection (3)* amends section 57C of the Crime and Disorder Act 1998 by removing the requirement for the defendant's consent to the use of a live link for a preliminary hearing in a magistrates' court where the defendant is at the police station, whether detained there in connection with the offence or having returned to answer live link bail (subsection (3)(b)). It also adds a requirement for the court to be satisfied that a live link direction would not be

contrary to the interests of justice (subsection (3)(a)) and removes the ability of a court to rescind a live link direction before the hearing (subsection (3)(c)).

498. *Subsection (4)* amends section 57D of the Crime and Disorder Act 1998 by removing the requirement for a defendant's consent to be sentenced by live link where he or she has pleaded guilty at a live link preliminary hearing. The subsection adds a requirement for the court to be satisfied that the defendant continuing to attend through the live link would not be contrary to the interests of justice. The separate requirement for the defendant's consent if he or she is to give oral evidence at this kind of live link sentencing hearing is also removed.

499. *Subsection (5)* amends section 57E of the Crime and Disorder Act 1998 by removing the need for the defendant's consent for a live link sentencing hearing where he or she has previously been convicted of the offence and is in custody. The separate requirement for the defendant's consent if he or she is to give oral evidence at this kind of live link sentencing hearing is also removed.

**Clause 94: Answering to live link bail**

500. This clause amends section 46ZA of the Police and Criminal Evidence Act 1984 (which sets out the circumstances in which a person answering live link bail may be treated as being in police detention), and section 46A(1ZA) of that Act, by making changes that are consequential on the removal of the consent requirement by clause 93.

**Clause 95: Searches of persons answering to live link bail**

501. *Subsection (1)* amends the Police and Criminal Evidence Act 1984 by inserting new sections 54B and 54C giving police the power to search defendants attending the police station for the purposes of answering live link bail. Such searches would at present depend on defendants giving their consent to be searched, as they are not treated as in police detention when they enter a police station in answer to live link bail and the existing powers of search in that Act therefore do not apply to them.

502. Subsections (2) and (3) of new section 54B provide that a constable may seize and retain anything found on the defendant if the constable reasonably believes it may jeopardise the maintenance of order in the station, endanger anyone in the police station, or be evidence relating to an offence. New section 54B(4) provides that a constable may record any or all of the items seized and retained.

503. Subsections (5) and (6) of new section 54B provide that the constable searching must be of the same sex as the defendant and that the constable may not carry out an intimate search.

504. New section 54C(1) provides that anything seized and retained under new section 54B(2) must be returned to the defendant when he or she leaves the police station. However,

this is subject to subsections (2) and (3) of new section 54C which provide that items can continue to be retained by a constable:

- in order to establish the lawful owner of the item, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence, or

- if the item is evidence of or relating to an offence, for use as evidence at trial for an offence or for forensic examination or investigation in connection with an offence unless a photograph or copy of the item would be sufficient for that purpose (new section 54C(4)).

505. New section 54C(5) preserves the power of a court to make an order under section 1 of the Police (Property) Act 1897.

506. *Subsection (2)* of clause 95 inserts new subsection (1ZB) into section 46A of the Police and Criminal Evidence Act 1984 which extends the power of arrest for failure to answer to police bail to include defendants who attend the police station to answer live link bail but refuse to be searched under the new section 54B.

507. *Subsection (3)* of the clause inserts a new paragraph 27A into Part 3 of Schedule 4 to the Police Reform Act 2002, to ensure that designated detention officers, as well as constables, can use the powers in new sections 54B and 54C to search and seize. Where a detention officer exercises the power to seize things found pursuant to a search the officer must deliver the things seized to a constable as soon as practicable and in any case before the person from whom it was seized leaves the police station.

**Clause 96: Use of live link in certain enforcement hearings**

508. *Subsection (1)* of this clause adds a new section 57F to the Crime and Disorder Act 1998 to permit a live link direction to be given in respect of hearings held to enforce a confiscation order, in much the same way as for preliminary hearings under section 57B of that Act. This will enable enforcement proceedings in respect of confiscation orders made against persons who are in custody having been sentenced for the substantive matter to take place by live link between the prison and the magistrates' court.

509. Subsection (1) of the new section 57F sets out the conditions for making a live link direction in enforcement proceedings for confiscation orders. Subsection (4) of the new section provides that the direction may be given by the court of its own motion or on application by a party to the proceedings. The court may rescind a live link direction at any time before or during the hearing (new section 57F(5)); the court must allow the parties to the proceedings to make representations before giving or rescinding such a direction (new section 57F(6)), and if the person in respect of whom the order has been made is to give oral evidence at this type of hearing, the court must be satisfied that it is not contrary to the interests of justice for him or her to do so (new section 57F(8)). The powers to give and rescind a direction are exercisable by a single justice of the peace (new section 57F(10)).

510. *Subsection (2)* makes necessary consequential amendments and defines the types of confiscation order in respect of which a direction under the new section 57F may be given.

**Clause 97: Direction of registrar for appeal hearing by live link**

511. This clause permits the power to give a live link direction for hearings in the Court of Appeal to be exercised by the registrar.

**Chapter 5: Miscellaneous**

**Clause 98: Effect of admission of video recording**

512. Clause 98 repeals section 138(1) of the 2003 Act. The repealed subsection provides that where an eyewitness's video recorded evidence in chief has been admitted as evidence under section 137 of that Act, the eyewitness cannot give further evidence in chief about a matter which, in the opinion of the court, is adequately covered in the recording.

**Clause 99: Admissibility of evidence of previous complaints**

513. Section 120 of the 2003 Act provides for the admission of certain previous statements of witnesses and is part of the code on hearsay evidence set out in that Act.

514. A previous statement will be admissible as evidence of the facts contained within it as if it were oral evidence provided the witness who made it is called to give evidence in the relevant proceedings, states that he or she made the previous statement and believes it to be true, and one of the following also applies:

- subsection (5) – the statement describes or identifies a person, place or thing:

- subsection (6) – the statement was made when matters were fresh in the witness's memory and he or she cannot reasonably be expected to remember the matters stated;

- subsection (7) – the statement consists of a complaint by the victim of the alleged offence which satisfies various requirements including the requirement that it was made as soon as could reasonably be expected after the alleged conduct.

515. Clause 99 amends section 120(7) so as to remove the requirement that "the complaint was made as soon as could reasonably be expected after the alleged conduct". Provided the other criteria for admissibility set out in section 120(7) are met, such complaints will be admissible regardless of when they were made.

**Clause 100: Powers in respect of offenders who assist investigations and prosecutions**

516. The 2005 Act creates a statutory framework to clarify and strengthen common law provisions that provide for immunity and sentence reductions for defendants who co-operate in the investigation and prosecution of others who may have committed criminal offences. Section 71 of the Act confers on a "specified prosecutor" (as defined in section 71(4)) power

to grant a person immunity from prosecution. Section 72 of the 2005 Act confers on specified prosecutors power to give an undertaking that any information which a person provides will not be used against that person in any criminal proceedings, or proceedings under Part 5 of the POCA, which are brought in England and Wales or Northern Ireland. Section 73 gives specified prosecutors power to enter into a written agreement with a defendant to provide assistance in relation to an offence and for the court to take into account the assistance given or offered when determining the sentencing to impose on the defendant. There is also a power in section 74 for specified prosecutors to refer a case back to the court where a defendant benefits from a sentence reduction but then reneges on the agreement to provide assistance.

517. *Subsections (2) and (5)* of clause 100 amend section 71(1) and section 72(1) of the 2005 Act to provide that these provisions can only be used for the investigation or prosecution of serious criminal offences. While a person who assists the authorities under these powers can be offered immunity or a restricted use undertaking or sentence reduction agreement for *any* offence, the assistance must be in relation to the investigation or prosecution of an offence that is capable of being tried in the Crown Court (that is it is either an indictable offence or triable either way).

518. *Subsection (3)* amends section 71 of the 2005 Act by adding the FSA and the Secretary of State for Business Enterprise and Regulatory Reform to the list of "specified prosecutors" who can use the powers set out in sections 71 to 74 of the 2005 Act.

519. *Subsection (4)* adds new subsections (6A) to (6C) to section 71 of the 2005 Act. New subsection (6C) provides that the power of the FSA and BERR to grant immunity from prosecution under section 71 in any case is subject to the consent of the Attorney General. This reflects the fact that the other "specified prosecutors" under the 2005 Act are superintended by the Attorney General and the Attorney General is consulted before any grant of immunity is made by a superintended prosecutor. The requirement that the FSA and BERR obtain the Attorney General's consent before granting immunity under section 71 is aimed at putting FSA and BERR in a comparable position to the other "specified prosecutors" when granting immunity under section 71 of the 2005 Act.

520. New subsection (6A) provides that BERR and the FSA may delegate the powers in sections 71 to 74 of the 2005 Act within their respective organisations only to one prosecutor (or a nominated deputy in that person's absence). New subsection (6B) disapplies the normal arrangements for discharging the functions of the FSA in order to ensure that these powers are delegated only in the circumstances set out in new subsection (6A).

521. *Subsection (7)* introduces a new section 75B which provides the Attorney General with the power to issue guidance to all the "specified prosecutors" on the use of the powers set out at sections 71 to 74 of the 2005 Act.

**Clause 101: Bail: assessment of risk of committing an offence causing injury**

522. Clause 101 amends Schedule 1 to the Bail Act 1976.

523. *Subsection (2)* provides that a defendant who is charged with murder may not be granted bail unless the court is of the opinion that there is no significant risk that, if released on bail, he or she would commit an offence that would be likely to cause physical or mental injury to another person.

524. *Subsection (3)(a)* provides that, in deciding whether it is of the opinion that there is no such significant risk, the court must have regard to any relevant considerations in paragraph 9 of Part 1 of Schedule 1 to the Bail Act 1976.

525. *Subsection (3)(b)* amends paragraph 9 in relation to bail decisions where the alleged offence is imprisonable and triable in the Crown Court. It provides that, in deciding whether to grant bail in a case where the court is satisfied that there are substantial grounds for believing the person would commit an offence while on bail, the court must have regard to the risk that such further offending would, or would be likely to, cause physical or mental injury to another person.

**Clause 102: Bail decisions in murder cases to be made by a Crown Court judge**

526. Clause 102 provides that a person who is charged with murder (including one charged with murder and other offences – *subsection (6)*) may not be granted bail except by a judge of the Crown Court. The power of magistrates to consider bail in murder cases, whether at the first hearing or after a breach of an existing bail condition, is thus removed.

527. *Subsection (3)* provides where a person charged with murder appears, or is brought before, a magistrates' court, a bail decision cases must be made by a judge of the Crown Court as soon as reasonably practicable, and in any event within 48 hours (excluding public holidays – *subsection (7))* beginning with the day after person's appearance in the magistrates' court.

528. *Subsection (4)* provides that the person must if necessary be committed in custody to the Crown Court to enable a bail decision to be made, and *subsection (5)* that it is immaterial whether he or she is at the same time sent for trial or remanded following adjournment of proceedings under section 52 of the Crime and Disorder Act 1998. That section generally requires a defendant charged with an offence only triable in the Crown Court to be sent by the magistrates' court to the Crown Court forthwith.

**Clause 103: Indictment of offenders**

529. The need for clause 103 arises from the decision of the House of Lords in *R v Clarke, R v McDaid* [2008] UKHL 8. Under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 (the 1933 Act), a bill of indictment becomes an indictment upon which a trial on indictment may proceed only once the bill has been signed by a proper officer of the

court. Where a trial proceeds without a bill of indictment having been signed, the House of Lords confirmed in these cases that those proceedings and any subsequent conviction and sentence will be invalid as signature of the bill of indictment is a necessary prerequisite to the Crown Court obtaining jurisdiction to try the case.

530. Clause 103 removes from section 2 of the 1933 Act the requirement that a bill of indictment be signed by the proper officer of the court with the result that the bill becomes an indictment on being preferred (*subsection (1)(a) and (b)*). Subsection (1)(c) inserts into section 2 of the 1933 Act three new subsections which provide that objections to an indictment based on an alleged failure to observe procedural rules may not be taken after the start of the trial proper, that is, when the jury has been sworn. (For this purpose a preparatory hearing does not mark the start of trial.)

531. Subsection (1)(d) and (2) make consequential amendments.

532. Paragraph 26 of Schedule 20 provides that, for the purposes of any proceedings before a court after the Bill is passed, the amendments are deemed always to have had effect. They apply even if the proceedings (including appeals) have begun before the Bill was passed.

**Part 4 - Sentencing**

**Chapter 1: Sentencing Council for England and Wales**

**Clause 104 and Schedule 13: Sentencing Council for England and Wales**

533. This clause establishes the Sentencing Council for England and Wales and introduces Schedule 13 which sets out details of the Council's organisation and membership. Clause 121 abolishes the Sentencing Advisory Panel and the Sentencing Guidelines Council

534. Schedule 13 sets out the constitution of the Council, and makes provision about the appointment of the chair, deputy chair and members, the terms of appointment of members and the remuneration of members.

535. The Sentencing Council will consist of 14 members, of whom eight are judicial members and six are non-judicial members.

536. The judicial members will be appointed by the Lord Chief Justice with the agreement of the Lord Chancellor.

537. The non-judicial members will be appointed by the Lord Chancellor with the agreement of the Lord Chief Justice.

538. The Lord Chief Justice will appoint, with the agreement of the Lord Chancellor, one of the judicial members to chair the Council. The Lord Chancellor will appoint one of the non-judicial members as Deputy Chair, with the agreement of the Lord Chief Justice.

539. The eight judicial members will consist of two ordinary judges of the Court of Appeal, a High Court judge, two Circuit judges, a District Judge (Magistrates' Courts) and two lay justice.

540. The Lord Chancellor will appoint as non-judicial members individuals with experience in one or more of the following areas: criminal defence, criminal prosecution, policing, sentencing policy and the administration of justice, the promotion of the welfare of victims of crime, academic study or research in criminal law or criminology, statistics.

541. The Lord Chancellor can nominate a representative with experience of sentencing policy to attend and speak at Council meetings.

542. The Lord Chancellor can make an order with the agreement of the Lord Chief Justice to cover terms of office, re-appointment and removal of members.

543. The Council's actions will remain valid even if there is a vacancy on the Council or there was a defect in the appointments procedure.

544. The Lord Chancellor may pay appropriate remuneration and expenses.

**Clause 105: Annual Report**

545. At the end of each financial year the Council will report on the exercise of its functions to the Lord Chancellor who will lay that report before Parliament.

**Clause 106: Sentencing guidelines**

546. The Sentencing Council is given the power to prepare sentencing guidelines. Guidelines may be general in nature or specific to an offence or category of offence. The Council must prepare guidelines on the reduction of sentence for a guilty plea, and on the application of the totality principle. The Council may prepare sentencing guidelines about any other sentencing matter.

547. When it draws up guidelines, the Council must have regard to current sentencing practice, the need to promote consistency in sentencing, the need to promote public confidence in the criminal justice system, the cost of different sentences and their effectiveness in reducing re-offending, and the Council's monitoring of the application of its guidelines.

548. Guidelines must be published first in draft. The Council must consult on the draft with the Lord Chancellor, with the Justice Select Committee of the House of Commons, with

anyone whom the Lord Chancellor directs the Council to consult and with anyone else the Council considers appropriate. After this consultation, the Council may amend its draft and issue definitive guidelines.

549. The Council has the power to review and revise its guidelines as it considers necessary. If it does so, it must undertake the same consultation process.

**Clause 107: Sentencing guidelines: sentence ranges**

550. Sentencing guidelines which relate to a particular offence must, if the Council think it is appropriate for the offence to which the guideline relates, divide the offence into levels of seriousness based on the offender's culpability and/or the harm caused. The guidelines must state the range of sentences which the Council considers appropriate for a court to impose for the offence. If the guidelines divide the offence into levels of seriousness, they must also state the range of sentences which the Council considers appropriate for a court to impose for offences at each level. The guidelines must specify a starting point in the range or, if the guidelines divide the offence into levels of seriousness, in the range specified for each level. The starting point is the sentence the Council considers to be appropriate in a case where the offender has pleaded not guilty and before aggravating or mitigating factors are taken into account.

551. The guidelines must set out relevant aggravating and mitigating factors that are likely to apply to the offence and the relevant mitigating factors personal to an offender. The guidelines must also include criteria and guidance on the weight to be given to an offender's previous convictions and other aggravating and mitigating circumstances where these are significant to the offence or the offender being sentenced. This may be general guidance for the offence as a whole and there is no requirement, where the guidelines divide the offence into levels of seriousness, for specific guidance on aggravating and mitigating factors to be included for each of the levels.

552. The requirement to list mitigating circumstances personal to the offender does not apply to the requirements to take into account in sentencing an early guilty plea or the reduction in sentence for providing assistance (Queen's evidence) or any rule of law as to reducing sentences under the totality principle. Clause 106(3) already requires the Council to produce sentencing guidelines dealing with the first and last of these matters.

553. The provision made in accordance with this clause for offenders under 18 years of age may differ from that made for offenders who are 18 years or over. If the penalty for an offence changes, sentencing guidelines may make provision for cases where the new penalty applies which differs from that made for cases where the old penalty still applies (for example, offences committed before a certain date).

**Clause 108: Allocation guidelines**

554. The Council may prepare guidelines for magistrates' courts on how to allocate cases either to a magistrates' court for summary trial or the Crown Court for trial on indictment. In

framing or revising allocation guidelines the Council must have regard to the need to promote consistency in allocation decisions and the results of the Council's monitoring.

**Clause 109: Preparation or revision of guidelines in urgent cases**

555. In a case of urgency, the Council will not be required to go through the normal procedures set out for issuing guidelines if it is impractical to do so. However, the Council must always consult with the Lord Chancellor before issuing definitive guidelines. If the Council does adopt this abbreviated process the Council must state that it is doing so and give its reasons.

**Clause 110: Proposals by Lord Chancellor or Court of Appeal**

556. The Lord Chancellor can propose to the Council that it prepare or revise its guidelines. If the Court of Appeal is considering an appeal against sentence or an Attorney General's reference case, it may propose to the Council that it prepare or revise sentencing guidelines for an offence relevant to the case it is considering.

557. The Council must consider a proposal from either the Lord Chancellor or the Court of Appeal.

**Clause 111: Sentencing Guidelines: duty of court**

558. Every court must, in sentencing an offender, follow any relevant guidelines, unless it is satisfied that it would be contrary to the interests of justice to do so. Where there are offence-specific guidelines relevant to the offender's case (that is guidelines to which clause 107 applies), a court must sentence within the range of sentences for the offence set out in the guideline unless the court considers it would not be in the interests of justice to do so. Where those guidelines specify different levels of seriousness of the offence, the court must decide which category most resembles the offender's case in order to identify the sentencing starting point. But in such cases the court's duty is still a duty to sentence within the range of sentences for the offence as a whole (as opposed to the range specified for the particular level), unless the court considers it would not be in the interests of justice to do so.

559. The duty to follow sentencing guidelines is subject to various statutory provisions, for example, those which place restrictions on imposing community sentences and imposing discretionary custodial sentences; the requirement that custodial sentences should be for the shortest term commensurate with the seriousness of an offence and the requirements for minimum sentences in certain cases. The duty to impose a sentence within the identified range is subject to the requirements to take into account an early guilty plea, the reduction in sentence for providing assistance (Queen's evidence) and any rule of law as to reducing sentences under the totality principle.

**Clause 112: Determination of tariffs etc**

560. The clause applies where a court is imposing an indeterminate sentence such as a mandatory life sentence, discretionary life sentence, imprisonment for public protection sentence or an extended sentence for certain violent and sexual offences. In these cases, the

court is required to follow the guidelines specifying a sentence range when determining the notional determinate term for the purpose of setting a tariff for the indeterminate sentence.

**Clause 113: Resource implications of guidelines**

561. When the Council issues draft or definitive guidelines it must publish an accompanying resource assessment of the impact of the implementation of the guidelines, setting out the impact on prison places and on probation and youth justice services.

562. In the case of guidelines issued in the case of urgency, the resource assessment should be published as soon as possible after the guidelines have been issued.

563. The Council must keep its resource assessments under review, and revise them if they become materially inaccurate.

**Clause 114: Monitoring**

564. The Council must monitor the operation and effect of its sentencing guidelines, and consider the conclusions which can be drawn from the information obtained by its monitoring. The Council must, in particular, discharge this duty with a view to drawing conclusions about the frequency with which, and extent to which, sentencers depart from guidelines, the factors which influence sentences imposed by courts, the effect of guidelines on consistency in sentencing and the effect of guidelines on the promotion of public confidence in the criminal justice system. The Council's annual report must include a summary of its monitoring information and a report of any conclusions it has drawn.

**Clause 115: Promoting awareness**

565. The Council must publish, in relation to each local justice area, information on sentencing practice of the magistrates' courts in that area and, in relation to each location at which the Crown Court sits, information on the sentencing practice of the Crown Court sitting in that location.

566. The Council may promote awareness of matters relating to sentencing in England and Wales, including the manner of sentencing, its cost effectiveness and the operation and effect of the guidelines. In particular, it can promote this awareness by publishing data on sentencing.

**Clause 116: Resources: effect of sentencing practice**

567. The Council's annual report must include a sentencing factors report. This report is an assessment by the Council of the effect which any changes to sentencing practice are having or are likely to have on the demand for prisons places and the resources required for probation and youth justice services.

**Clause 117: Resources: effect of factors not related to sentencing**
568. The Council's annual report must discuss any non-sentencing factors which are having, or are likely to have, a significant effect on the resources needed or available for giving effect to the sentences imposed by courts. These factors include recalls to prison, breaches of court orders, patterns of re-offending, actions by the Parole Board, early release and levels of remands in custody. The Council may also report to the Lord Chancellor at any time on the impact of such factors.

**Clause 118: Duty to assess impact of policy and legislative proposals**
569. The Lord Chancellor may refer to the Council any government policy proposal or proposal for legislation which the Lord Chancellor considers may have a significant effect on the demand for prison places, or the resources required for probation provision and the provision of youth justice services. The Council must assess any likely effect of the policy or legislation and publish its assessment.

570. For this purpose a government policy proposal or proposal for legislation includes a proposal of the Welsh Ministers, and proposals for primary or subordinate legislation are relevant if, or to the extent that, the legislation extends to England and Wales.

**Clause 119: Assistance by Lord Chancellor**
571. The Lord Chancellor may, if the Council request it, provide the Council with assistance in carrying out any of its functions, for example, by sharing data or other information with the Council.

**Clause 120: Entrenchment of Lord Chancellor's functions**
572. This clause amends Schedule 7 to the Constitutional Reform Act 2005 so as to provide that all of the functions of the Lord Chancellor in relation to the Council are protected functions of the office. Protected functions can only be transferred to another Minister by Act of Parliament.

**Clause 121: Abolition of existing sentencing bodies**
573. This clause abolishes the Sentencing Guidelines Council and Sentencing Advisory Panel.

**Clause 122: Interpretation of this Chapter**
574. This clause sets out the definitions of terms used in the clauses in this Chapter.

**Chapter 2: Other provisions relating to sentencing**

**Clause 123 and Schedule 14: Extension of driving disqualification**
575. Clause 123 introduces Schedule 14. *Paragraph 1(2)* of Schedule 14 inserts a new section, section 35A, into the Road Traffic Offenders Act 1988. Section 35A provides for an extension in the length of the period of a driving disqualification imposed under sections 34

and 35 of that Act where a custodial sentence is also imposed for the offence. The court must determine the appropriate discretionary period of disqualification and then add on the appropriate extension period. This section applies where the offender is convicted in England and Wales.

576. New section 35A(4) defines the appropriate extension period, which takes account of that part of the sentence which the offender will serve in prison. Where a life sentence or an indeterminate sentence for public protection sentence is imposed the extension period is the period of the minimum tariff set by the court. Where an extended sentence is imposed the extension period is half the custodial term, that is, the period of the sentence to be served in prison. Where a detention and training order is imposed, the extension period is half the term of the order. Once the provisions in section 181 of the 2003 Act are commenced, if custody plus is imposed the extension period is the custodial period specified by the court and if intermittent custody is imposed the extension period is equal to the number of custodial days specified by the court. In all other cases, the extension period is equal to one half of the custodial sentence (at which point the offender is subject to automatic release or, for sentences of 12 months or more, released on licence in the community until the end of sentence).

577. New section 35A(4) and (5) ensure that the appropriate extension period is reduced to reflect any reduction in the custodial sentence as a result of the court taking into account time already served on remand, or credits periods of remand on bail in a case where the offender was subject to a curfew condition which was electronically monitored.

578. Under new section 35A(6) the extension of disqualification does not apply where the court imposes a suspended sentence or where a life sentence to which no early release provisions apply (cases where the offender must spend the rest of his life in prison).

579. New sections 35A(7) and (8) provide for an order-making power to amend the extension period where an amending order is made under section 267 of the 2003 Act to change the proportion of time to be served in custody in relation to a standard determinate sentence, or the appropriate custodial term of an extended sentence.

580. *Paragraph 1(3)* of Schedule 14 inserts a new section 35B into the Road Traffic Offenders Act 1988, which makes provision equivalent to that made by paragraph 1(2) for cases where the person is convicted in Scotland.

581. *Paragraph 2* inserts a new section 248D into the Criminal Procedure (Scotland) Act 1995 to the same effect as paragraph 1(3) but this time in relation to a person disqualified under section 248 (driving disqualification where vehicle used to commit an offence) or section 248A (general power to disqualify offenders) of that Act in circumstances where a custodial sentence is also imposed.

582. *Paragraph 3* of Schedule 14 inserts new provisions in the Road Traffic Offenders (Northern Ireland) Order 1996 to the same effect as paragraph 1(2).

583. *Paragraph 4* of Schedule 14 inserts a new section, section 147A, into the Powers of Criminal Courts (Sentencing) Act 2000. This section makes similar provision to the new section inserted by paragraph 1(2), but this time for an extension of the period of the driving disqualification imposed under sections 146 (driving disqualification for any offence) and or 147 (driving disqualification where vehicle used for the purposes of crime) of that Act in cases where a custodial sentence is also imposed for the offence.

**Clause 124: Dangerous offenders: terrorism offences (England and Wales)**
584. Schedule 15 to the 2003 Act lists specified violent or sexual offences which may attract a sentence of imprisonment for public protection under section 225 of the 2003 Act or an extended sentence under section 227 of the 2003 Act. Clause 124 amends Part 1 to Schedule 15 of the 2003 Act (specified violent offences) by inserting certain terrorist offences. All the offences inserted carry a maximum penalty of ten years or more. The changes take effect as provided in clause 165 (commencement 2 months after Act is passed) and paragraph 37 of Schedule 20 (transitional, transitory and saving provisions).

**Clause 125: Dangerous offenders: terrorism offences (Northern Ireland)**
585. This clause makes amendments to Schedules 1 and 2 to the Criminal Justice (Northern Ireland) Order 2008 to similar effect.

**Part 5 - Miscellaneous Criminal Justice Provisions**

**Clause 126: Commissioner for Victims and Witnesses**
586. A Commissioner for Victims and Witnesses was legislated for in the Domestic Violence, Crime and Victims Act 2004 (sections 48 to 53 and Schedules 8 and 9), but a Commissioner was never appointed and the legislation has not yet been commenced. This clause amends sections 48 to 55 of that Act so as to modify the status and functions of the Commissioner. *Subsections (2) and (6)* repeal the provisions in section 48 of, and Schedule 8 to, that Act that establish the Commissioner as a corporation sole, and make new provision in respect of funding.

587. The core functions of the Commissioner are set out in section 49(1) of the Domestic Violence, Crime and Victims Act 2004. These functions are that the Commissioner must promote the interests of victims and witnesses; take such steps as he or she considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses; and keep under review the operation of the code of practice issued under section 32 of the Domestic Violence, Crime and Victims Act 2004. These core functions remain unchanged.

588. In addition, under section 49(2) of that Act the Commissioner, for any purpose connected with the performance of his or her duties, may (a) make proposals to the Secretary

of State for amending the code (at the request of the Secretary of State or on his or her own initiative); (b) make a report to the Secretary of State; (c) make recommendations to an authority within his or her remit; (d) undertake or arrange for or support (financially or otherwise) the carrying out of research; and (e) consult any person he thinks appropriate. *Subsection (3)(a)* repeals section 49(2)(d). In future, any such research would be arranged and funded by the Department.

589. In addition to reports made under section 49(2)(b), new subsections (4) to (7) of section 49 require the Commissioner to prepare an annual report. Copies of all reports are to be sent to the Justice Secretary, the Attorney General and the Home Secretary. The Commissioner is responsible for publishing all reports.

590. *Subsection (4)* amends section 50 of the Domestic Violence, Crime and Victims Act 2004 which sets out when the Commissioner can be required to give advice and to whom. Section 50(2) is repealed so the Commissioner is not required to give advice on the request of "an authority within his or her remit". The Government envisages that such requests can be made through a Minister of the Crown under section 50(1).

591. Section 55 of the Domestic Violence, Crime and Victims Act 2004 created a Victims Advisory Panel which was set up in October 2006. The terms of reference for the Panel are to advise the Home Secretary, the Lord Chancellor and the Attorney General of the views of victims of crime with particular reference to their interaction with the Criminal Justice System and its agencies. The Panel's remit also includes offering views and advice on the prevention of crime from a victim's perspective and generally contributing to developing and safeguarding the rights of victims. *Subsection (5)* inserts new sections (1A) and (1B) into section 55 which provide for the Commissioner to be a member of the Victims Advisory Panel and to chair the Panel.

**Clause 127: Implementation of E-Commerce and Services directives: penalties**

592. The clause will allow the Government to implement fully Article 30(2) of the Services Directive and Article 3(1) of the E-Commerce Directive.

593. In both cases the UK is required to extend the powers of its regulatory agencies (competent authorities) so that they are able, if so required, to take action in relation to offences committed by UK-based service providers in other European Union member States.

594. Both Articles will be implemented by secondary legislation through the powers in section 2(2) of the European Communities Act 1972. However there are limitations in paragraph 1(1)(d) of Schedule 2 to that Act on the penalties that can be imposed by secondary legislation under section 2(2). This clause disapplies these limitations for the purposes of the implementation of the Services and E-Commerce Directives. This is so that penalties can be imposed in relation to offences committed by UK-based service providers, whether in the UK or elsewhere in the European Union.

**Clause 128 and Schedule 15: Treatment of convictions in other member States etc**

595. Clause 128 introduces Schedule 15. Clause 128 and Schedule 15 implement the Council of the European Union Framework Decision 2008/675/JHA to ensure that previous convictions in other European Union member States are taken into account in criminal proceedings in England, Wales and Northern Ireland, to the extent that previous United Kingdom convictions are taken into account in criminal proceedings. The Schedule also makes a number of associated changes.

***Admission of evidence as to bad character of a defendant***

596. Section 103 of the 2003 Act (which extends to England and Wales only) concerns evidence of a defendant's bad character that is admissible because it is relevant to an important matter in issue between the defendant and the prosecution. Evidence which demonstrates that a defendant has a propensity to commit offences of the kind with which he is charge can be admitted under section 103(1)(a). This includes evidence of previous convictions.

597. *Paragraph 1(2)* of Schedule 15 amends section 103 of the 2003 Act, by inserting new subsections (7), (8) and (9), so that previous convictions of an offence, under the law of any country outside England and Wales can be admitted as evidence to the same extent as previous convictions in England and Wales, provided that the offence would also be an offence in England and Wales if it were done there at the time of the trial for the offence with which the defendant is now charged. As well as giving effect to the Council Framework Decision (2008/675/JHA) to make it clear that offences committed anywhere in the European Union can be admitted in these circumstances, this amendment puts beyond doubt that previous convictions in any other country can be admitted to the same extent as previous convictions of offences committed in England and Wales.

598. Section 108 of the 2003 Act (which extends to England and Wales only) deals with the admissibility of certain juvenile convictions. It provides that certain of those convictions (those relating to offences committed under the age of 14 in any trial for an offence committed over the age of 21) fall under the general scheme for admitting evidence in this Part of the Act, and can only be admitted if, firstly, the offence for which the defendant is being tried and the offence for which the defendant was previously convicted are triable only on indictment, and, secondly, the court is satisfied that the interests of justice require the admission of the evidence.

599. *Paragraph 1(3)* of Schedule 15 amends section 108 by inserting new subsections (2A) and (2B) which extend this section convictions of offences under the law of a country outside England and Wales, provided that the offence would also have been an offence in England and Wales if it were done there at the time of the proceedings for the offence with which the defendant is now charged. Again, this amendment is to give effect to the Council Framework Decision (2008/675/JHA) to make it clear that offences committed anywhere in the European Union can be admitted, and also to put beyond doubt that previous convictions in other

countries can be admitted to the same extent as previous convictions of offences committed in England and Wales.

600. *Paragraph 2* amends the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (which makes equivalent provision to sections 103 and 108 of the 2003 Act in respect of Northern Ireland) to the same effect in respect of convictions of offences under the law of a country outside Northern Ireland.

***Bail***

601. *Paragraph 3* amends section 25 of the Criminal Justice and Public Order Act 1994, (which extends to England and Wales only), which provides that a person charged with homicide or rape who has a previous conviction obtained in the United Kingdom of any such offence or of culpable homicide shall only be granted bail if there are exceptional circumstances which justify it.

602. The application of section 25 is amended. New subsection (3A) amends the current wording of section 25 to make it clear that the section applies to a person convicted in any part of the UK of an offence specified in subsection (2) (which includes homicide, rape and other sexual offences) or of culpable homicide, and, if that previous conviction was one of manslaughter or culpable homicide, only if that person was then a child or young person and was sentenced to long-term detention under the enactments specified as relevant, or if the person was not then a child or young person, they were sentenced to imprisonment or detention. Under the relevant enactments, only those aged over 21 years of age can be sentenced to imprisonment. Those aged under 21 years can only be sentenced to detention. A child or young person is a person under the age of 18 years.

603. New subsection (3B) provides that a previous conviction of an offence in another European Union member State which corresponds to a UK offence which would trigger the application of section 25 will cause section 25 to apply. An offence corresponds to a UK offence if it would have constituted that offence if it had been done in the United Kingdom at the time when the offence was committed in the EU member State. As the relevant enactments cannot apply to European Union offences as they only concern domestic situations, the new subsection (3B) uses the term "detention" to cover both what is known in the United Kingdom as "imprisonment" (for offenders aged 21 years and over) and "detention" (for offenders aged under 21), and spells out what amounts to long-term detention under those enactments (detention in excess of 2 years).

***Decision as to allocation***

604. *Paragraphs 4 and 5* amend section 19 of the Magistrates' Courts Act 1980 and paragraph 9 of Schedule 3 to the Crime and Disorder Act 1998 respectively, as substituted by Schedule 3 to the 2003 Act (not yet in force). The existing legislation sets out the criteria for determining whether an offence triable either way should be tried summarily or on indictment by, in the case of the Magistrates' Courts Act 1980 a magistrates' court, or, in the case of the Crime and Disorder Act 1998, a Crown Court. It permits the prosecution to inform the courts

of any previous convictions of the defendant, previous convictions being convictions by a court in the United Kingdom or convictions or findings of guilt under service law.

605. The amendments add to what is a previous conviction to include convictions by a court in another member State, provided that the offence of which the defendant was convicted would also have been an offence in the United Kingdom if it had been done there at the time the allocation decision is made.

***Seriousness***

606. *Paragraph 6* of Schedule 15 amends section 143 of the 2003 Act, which sets out the principles the court must follow when determining the seriousness of an offence, in the context of sentencing an offender. Any previous convictions, where they are recent and relevant, must be regarded as an aggravating factor which should increase the severity of the sentence.

607. Paragraph 6 extends what is a previous conviction to include previous convictions by a court in another European Union member State, provided that the offence would have been an offence in the United Kingdom if it had been done there at the time of the trial of the defendant for the current offence. Paragraph 6 also makes clear that the court is not prevented from treating a previous conviction, by a court outside the UK and a European Union member State, or a conviction by a court in an European Union member State of an offence which would not amount to an offence in the UK, as aggravating factors where the court considers it appropriate to do so.

608. *Paragraph 7* amends section 238 of the Armed Forces Act 2006, which makes equivalent provision to section 143 of the 2003 Act in respect of service offences. Section 238 has been amended in a similar fashion to section 143.

609. Section 151 of the 2003 Act provides the court with a discretionary power for dealing with persistent petty offenders. Where an offender is aged 16 or over when he is convicted and has been sentenced to a fine on at least three previous occasions, the court may impose a community sentence even if the current offence is one which would on its own warrant a fine only. Section 151 has been amended by the Criminal Justice and Immigration Act 2008, and although these amendments have not yet come into force, the amendments made by paragraph 8 are to section 151 as amended.

610. *Paragraph 8* of Schedule 15 extends section 151 to require previous convictions by a court in another European Union member State to be taken into account to the same extent as previous convictions in the United Kingdom, provided that the offence to which the conviction relates would also have been an offence in the United Kingdom if it had been done there at the time of the defendant's conviction for the current offence. *Paragraph 9* amends section 270B of the Armed Forces Act 2006. Section 270B provides for the award of a community punishment where an offender, guilty of an offence, has on 3 or more previous occasions been convicted and sentenced to a fine only. The amendment provides for previous

convictions by a court in another European Union member State to be taken into account to the same extent as previous convictions in the United Kingdom, provided that the offence to which the conviction relates would also have been an offence in the United Kingdom if it had been done there at the time of the defendant's conviction for the current offence.

***Required custodial sentences for certain offences***

611. Section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 (the 2000 Act) provides for a minimum sentence of seven years' imprisonment where a person aged 18 or over at the time of the offence is convicted of a third class A drug trafficking offence in England and Wales, unless the court considers it would be unjust to do so in all the circumstances of the case. A class A drug trafficking offence may be committed anywhere in the UK. Section 111 of that Act similarly provides for a minimum sentence of three years' imprisonment where a person aged 18 or over at the time of the offence is convicted of a third domestic burglary in England and Wales. Only previous domestic burglaries committed in England and Wales are counted. Section 113 of that Act provides that certificates of conviction which are in accordance with the requirements of that section are evidence of convictions in relation to a class A drug trafficking offence or a domestic burglary.

612. *Paragraph 10* extends sections 110 of the 2000 Act to require a previous conviction by a court in another European Union member State to be taken into account to the same extent as a previous conviction in the UK, provided that the offence to which the conviction relates would have constituted, a class A drug trafficking offence if it were done in the UK at the time of the conviction. Only offences committed after the time that the amendment comes into force will be relevant.

613. Section 111 of the 2000 Act is extended so that a previous conviction, by a court in another European Union member State, or a conviction by a court in another part of the UK, must be taken into account to the same extent as a previous domestic burglary conviction in England and Wales, provided that the offence to which the conviction relates would have constituted domestic burglary if it were done in England and Wales at the time of the conviction. Only offences committed after the time that the amendment comes into force will be relevant.

614. Also amended is section 113 of the 2000 Act, to make provision for the treatment of certificates of convictions produced by courts in other parts of the UK outside England and Wales and in European Union member States.

**Restriction on imposing custodial sentence or service detention**

615. *Paragraph 11* amends section 263 of the Armed Forces Act 2006, which imposes a restriction on imposing a custodial sentence or service detention on an unrepresented offender. The restriction does not apply if the offender was aged 21 or over when convicted, and has previously been sentenced to imprisonment by a civilian court in the UK, or for a service offence. Section 263 is amended to include a previous sentence to detention by a court in any other European Union member State.

***Young offenders: referral conditions***

616. *Paragraph 12* of Schedule 15 makes changes to the conditions which must be satisfied for a young offender to be sentenced to a referral order by amending section 17 of the 2000 Act to take account of convictions obtained in another European Union member State.

617. When a child or young person is given a referral order, he or she is required to attend a youth offender panel, which is made up of two volunteers from the local community and a panel adviser from a youth offending team. The panel, with the young person, their parents/carers and the victim (where appropriate), agree a contract lasting between three and 12 months. The aim of the contract is the prevention of reoffending by the offender.

618. Section 17 of the 2000 Act has been amended by section 35 of the 2008 Act and, although these changes have not yet come into force, references below are to the 2000 Act as amended.

619. Section 17(1) of the 2000 Act sets out the conditions which, if met, require the court to make a referral order ("the compulsory referral conditions"). They apply where a young offender aged under 18 appears before a UK court, has no previous convictions and pleads guilty to the offence or offences with which they are charged. Paragraph 12(2) extends the provision in respect of what count as previous convictions, so that a previous conviction by a court in another European Union member State will count in the same way as a conviction by a UK court, so that a young offender with previous convictions in another European Union member State will fall within the compulsory referral conditions.

620. Section 17(2A) to (2C) of the 2000 Act set out the circumstances in which a court may, but is not obliged to, impose a referral order ("the discretionary referral conditions"). Where the compulsory referral conditions are not satisfied, a referral order may be made where the young offender pleads guilty to the offence or at least one of the other offences they are charged with and the young offender:

a) has not been convicted previously in a UK court;

b) has been convicted only once before in a UK court and has not previously received a referral order, or;

c) has been convicted more than once before a UK court and received a referral order on only one other occasion (subject to further conditions).

621. Paragraph 12(3) to (5) make amendments to these conditions so that convictions by or before a court in another European Union member State are treated in the same way as a conviction by or before a UK court (making allowance for the fact that of course an offender convicted in another European Union member State cannot have received a referral order in respect of that conviction).

***Proving of foreign convictions before courts***

622. Section 73 of the Police and Criminal Evidence Act 1984 enables convictions (or acquittals) for offences in the UK to be proved by means of a certificate of conviction (or acquittal) signed by the proper officer of the court. At present, overseas convictions are proved under section 7 of the Evidence Act 1851, which requires that the judgment either be sealed by the foreign court or signed by the judge of the foreign court. *Paragraph 13* of Schedule 15 amends section 73 of the Police and Criminal Evidence Act 1984 so as to extend the procedures for proving convictions or acquittals in other member States of the European Union by way of certificates signed by the proper officer of the court.

623. Section 74 of the Police and Criminal Evidence Act 1984 provides that the fact that a person other than the accused has been convicted of an offence by a UK court or a service court, is admissible in evidence for the purpose of proving that that person committed the offence; where a person other than the accused is proved to have been convicted of an offence by or before a UK court or a service court, he must be taken to have committed that offence unless the contrary is proved; and establishes a presumption that any person convicted of an offence in the UK actually committed it. *Paragraph 14* amends section 74 so that convictions for offences in other European Union member States are treated in the same way as UK convictions.

624. Section 75 of the Police and Criminal Evidence Act 1984 makes certain documents, such as the charge-sheet, admissible as evidence of the facts on which a conviction was based for the purposes of section 74. It also provides that a copy of a document which is purported to be certified or authenticated by or on behalf of the court or authority having custody of that document, where the document is admissible under this section, is to be taken to be a true copy of that document unless the contrary is proved. *Paragraph 15* amends section 75 to extend these provisions to documents relating to convictions in other European Union member States.

625. Sections 73 to 75 of the Police and Criminal Evidence Act 1984 extend to England and Wales only. Equivalent provision to sections 73 to 75 is made for Northern Ireland in the Police and Criminal Evidence (Northern Ireland) Order 1989.

626. *Paragraphs 16 to 18* make similar amendments to the 1989 Order as are provided by *paragraphs 13 to 15* for the 1984 Act.

**Clause 129: Transfer to Parole Board of functions under the Criminal Justice Act 1991**

627. Clause 129 applies the same early release arrangements to all long-term 1991 Act prisoners whose release at the half-way point of sentence remains a matter for Parole Board discretion. It amends section 35(1) of the 1991 Act (power to release long-term prisoners) so that after a long-term prisoner has served half his sentence a recommendation by the Parole Board to release him is binding on the Secretary of State.

628. The clause also inserts a new section 37(5A) into the 1991 Act, which provides that, where a prisoner is released at the discretion of the Parole Board under section 35(1), the Secretary of State may only set, vary or cancel licence conditions in accordance with the Board's recommendations.

**Clause 130: Retention of knives surrendered or seized: England and Wales**

629. Sections 54 to 56 of the Courts Act 2003 set out grounds for the surrender, seizure and retention of certain articles carried by persons entering court buildings. In particular, section 55 provides, with certain exceptions, that seized or surrendered items must be returned when the owner leaves the court building.

630. *Subsection (3)* of clause 130 inserts a new section 55A, into the Courts Act 2003, to provide a different procedure for the retention of all knives that have been surrendered to or seized by a court security officer. New section 55A(2) provides that section 55 does not apply where a knife is seized by or surrendered to a court security officer. Under new section 55A, knives must be retained, unless returned or disposed of in accordance with regulations under section 55A(5) or 56.

631. New section 55A(4) provides that, if the court security officer reasonably believes that a retained knife may be evidence of, or in relation to, an offence, he or she can retain the knife for so long as necessary to enable the court security officer to draw it to the attention of a police constable.

632. Under new section 55A(5), the Lord Chancellor must make provision in regulations, subject to the negative resolution procedure, for the procedure to be followed when a knife is retained, the making of requests for the return of retained knives and the procedure for the return of knives. Under section 56, regulations can make provision about the disposal of unclaimed knives.

633. New section 55A(6) states that the definition of a knife includes "a knife-blade and any other article which (a) has a blade or is sharply pointed, and (b) is made or adapted for use for causing injury to the person".

**Clause 131: Retention of knives surrendered or seized: Northern Ireland**

634. Clause 131 provides a similar scheme for Northern Ireland by amending paragraph 5 of, and adding a new paragraph 5A into, Schedule 3 to the Justice (Northern Ireland) Act 2004.

**Clause 132: Security in tribunal buildings**

635. Clause 132 provides for Part 4 of the Courts Act 2003 to be applied in respect of tribunal buildings as it currently does for courts. Part 4 of the Courts Act 2003 details the powers of court security officers and the circumstances in which they may exercise them

lawfully. It also sets out grounds for the surrender, seizure and retention of certain articles carried by persons entering court buildings.

636. *Subsection (1)* gives the Lord Chancellor power, by order subject to the affirmative resolution procedure, to provide for the designation of security officers in tribunal buildings. The order may apply the provisions in Part 4 of the Courts Act 2003 with any necessary modifications. Part 4 includes the powers in new section 55A of that Act (inserted by clause 130) which provides different procedure for the retention of all knives that have been surrendered to or seized by a court security officer. Under the new section 55A of the Courts Act 2003 knives must be retained, unless returned or disposed of in accordance with regulations under sections 55A(5) or 56.

637. The definition of "tribunal buildings" and other definitions are set out in *subsection (3).* "Tribunal buildings" includes buildings used by the following tribunals: the First-tier Tribunal, the Upper Tribunal, employment tribunals, the Employment Appeal Tribunal, and the Asylum and Immigration Tribunal. Subsection (3) also gives the Lord Chancellor power to designate by order further tribunals whose buildings are to be included in the definition of "tribunal buildings". This clause extends to England and Wales only; therefore the provision of security arrangements under clause 132 can only apply to UK-wide tribunals listed in section 39(1) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) when they are sitting in England and Wales.

**Part 6 - Legal Aid**

**Clause 133: Community Legal Service: pilot schemes**

638. The creation of the Community Legal Service (CLS) was part of the Government's fundamental reform of the legal aid system, as set out in the Access to Justice Act 1999.

639. The purpose of the CLS is to ensure that individuals who qualify financially and have reasonable grounds for bringing or being part of any action, can receive publicly funded legal assistance in civil matters that are within scope of the civil scheme.

640. The Legal Services Commission (LSC) was created under the Access to Justice Act 1999, and has responsibility for administering the CLS Fund, and setting priorities about the types of services that may be funded; or for carrying out any changes to funding priorities that the Lord Chancellor directs are necessary.

641. The services that may be funded through the CLS Fund are set out in the Funding Code, which also sets out the criteria according to which the LSC decides whether or not to fund services.

642. As the LSC continuously monitors, reviews and enhances the services being provided through the CLS, it will occasionally need to explore or pilot new ways of delivering specialist services so that the costs and benefits can be judged in practice. Section 18A of the Access to Justice Act 1999 (inserted by section 58 of the 2008 Act) contains a power to pilot schemes in relation to the Criminal Defence Service (CDS), but at present there is no express power to pilot civil schemes under the CLS within the Act.

643. Clause 133 amends the Access to Justice Act 1999 to give express power to pilot schemes as part of the CLS. Section 6(8) of the Access to Justice Act 1999 empowers the Lord Chancellor to direct or authorise the LSC to fund the provision of particular types of legal services in specified circumstances. *Subsection (2)* of the clause inserts new subsections (8A) and (8B) into section 6 of the 1999 Act to make it clear that the circumstances specified in a direction or authorisation may relate to particular areas or courts and that a direction or authorisation may require or authorise the LSC to fund the provision of certain types of legal service only for particular classes or selections of people.

644. *Subsection (3)* inserts a new section 8A into the Access to Justice Act 1999. New section 8A will enable the Funding Code to contain provisions ("pilot provisions") which are to have effect for period not exceeding 3 years. The pilot provisions of the Funding Code will be capable of having a limited application; for example the pilot provisions may apply only in relation to a particular area specified in the Code or only in relation to particular classes of person specified in the Code. At the end of the three-year pilot period the LSC will be able to decide whether to amend the Funding Code so that the pilot provisions have a more general application.

645. *Subsection (4)* makes a consequential amendment to section 9(5) of the Access to Justice Act 1999. The effect of the amendment is that a revised version of the Funding Code which contains changes made in pursuance of new section 8A will not come into force until it has been approved by a resolution of both Houses of Parliament.

646. *Subsection (5)* inserts a new section 11A into the Access to Justice Act 1999. The effect of new section 11A is that subordinate legislation made under the 1999 Act in relation to the CLS will be capable of having a limited application. For example, it will be possible to make subordinate legislation in relation to the CLS that applies only in relation to a particular area or only in relation to a particular description of court. New section 11A specifies that the length of subordinate legislation made in pursuance of the new section is limited to three years. The Lord Chancellor may extend this period to cover any gap between the end of the pilot and extending the pilot more generally.

647. *Subsection (6)* amends section 25 of the Access to Justice Act 1999 to provide for the parliamentary procedure for delegated legislation containing pilot schemes.

**Clause 134: Excluded services: help in connection with business matters**

648. Schedule 2 to the Access to Justice Act 1999 lists those legal services which may not be funded as part of the CLS.

649. Paragraph 1(h) of Schedule 2 currently excludes services consisting of the provision of help in relation to matters arising out of the carrying on of a business. Business cases were excluded from the scope of civil funding as they are low priority cases and alternative forms of funding are available. In addition, only individuals may make applications or be funded as part of the CLS.

650. *Subsection (2)* of clause 134 omits paragraph 1(h) and *subsection (3)* replaces it with a new paragraph 1A. The new paragraph provides that as well as cases arising out of the carrying on of a business, which can be any activity carried out by an individual with a view to profit, cases which relate to an individual planning or proposing to set up a business, or cases which relate to the transfer or termination of a business, are also excluded from the CLS. Examples are disputes that arise out of the carrying on of a business that is no longer trading and disputes arising out of the preliminary steps of establishing a business regardless of whether the business exists at the time of the application.

**Clause 135: Criminal Defence Service: information requests**

651. This clause amends section 17A of and Schedule 3 to the Access to Justice Act 1999. *Subsection (1)* extends the power to seek information from the Commissioners for Her Majesty's Revenue and Customs (HMRC) and the Secretary of State, which at present may be exercised for purposes relating to an individual's financial eligibility for legal aid services, to cover purposes relating to an individual's liability to make contributions towards the cost of those services.

652. *Subsections (3) to (5)* amend paragraph 6 of Schedule 3 to the Access to Justice Act 1999 to provide that requests may be made for information relating to a time specified in the request, as well as to information as at the date of the request. Subsection (7) is a consequential amendment to paragraph 7 of Schedule 3 (restrictions on disclosure).

653. *Subsection (4)* amends paragraph 6 of Schedule 3 to allow requests to be made for any previous names or addresses of an individual.

654. *Subsection (5)* amends paragraph 6 of Schedule 3 to allow requests to the Commissioners to be made about self-employed individuals and an individual's benefit status.

655. *Subsection (6)* amends paragraph 6 of Schedule 3 to allow information requests to be made about an individual's assets as well as income.

656. *Subsection (8)* amends paragraph 8 of Schedule 3 to clarify how requests as to an individual's employment apply where the individual is an office-holder, and to delete an unnecessary provision relating to the 1998 Act.

**Clause 136 and Schedule 16: Criminal Defence Service: enforcement of order to pay cost of representation**

657. Clause 136 amends sections 17 and 17A of the Access to Justice Act 1999. It also introduces Schedule 16 which inserts new Schedule 3A into that Act.

658. *Subsection (2)* inserts new subsection (4) and (5) in section 17 of the Access to Justice Act 1999, and sets out what regulations on the enforcement of recovery of defence costs order may provide for.

659. Such regulations may provide for the addition of the costs of enforcing liability under a recovery of defence costs order to the amount which is unpaid and, for this purpose subsection (3)(c) adds a definition of "overdue sum".

660. This clause also provides 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. Overdue sums are also recoverable if a county court or the High Court so orders on the application of the person owed the sums, as if they were payable under an order of that court in accordance with rule 70.5 of the Civil Procedure Rules (The Civil Procedure (Amendment No 3) Rules 2008, SI 2008/3327), thereby making it unnecessary to begin fresh proceedings in respect of the debt.

661. *Subsection (3)* inserts new subsections (2A) to (2E) into section 17A of the Access to Justice Act 1999. New subsection (2A) provides, as for recovery of defence costs orders, that enforcement regulations may add the costs of enforcing liability under a contribution order to the amount which is unpaid, and in addition that any overdue sums are recoverable summarily as a civil debt or recoverable, if a county court or the High Court so orders as if they were payable under an order of that court. Enforcement regulations may also provide for the withdrawal of an individual's right to representation in certain circumstances and may empower courts to make motor vehicle orders. These are defined in new subsection (2B) of section 17A as clamping orders and vehicle sale orders, which are themselves defined in new subsections (2C) and (2D) of section 17A. 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 applied in paying the overdue sum. *Subsection (4)* inserts new Schedule 3A to the Access to Justice Act 1999.

662. New Schedule 3A sets out further provisions relating to motor vehicle orders. Paragraph 2 of new Schedule 3A states that enforcement regulations may in particular make provision for the procedure for making an order, what matters must be included in the order, the fitting of clamping devices and notices to motor vehicles, the removal and storage of motor vehicles, the release of the clamp or the motor vehicle from storage, the conditions

which need to be met before the release, sale or other disposal of an unreleased motor vehicle, the imposition of charges in connection with any of the above and the recovery of such charges.

663. Paragraph 3 of new Schedule 3A requires enforcement regulations to provide that a motor vehicle order may be made only on the application of the person or body to which the overdue sum is owed (in practice this is likely to be the LSC).

664. Before a clamping order is made the court must be satisfied (paragraph 4 of new Schedule 3A) that the person has wilfully refused or culpably neglected to pay and that the value of the motor vehicle, if sold, would be likely to be an amount which exceeds half of the estimated recoverable amount. The estimated recoverable amount is the combined total of the amount of the overdue sum and the amount of charges likely to be due under the enforcement regulations.

665. Enforcement regulations must also provide (paragraph 5 of new Schedule 3A) that a clamping order may be made only in relation to a vehicle which is owned by the individual liable to pay the overdue sum. A clamping order may not be made in relation to a vehicle used by a disabled person (paragraph 6 of new Schedule 3A).

666. Paragraph 7 of new Schedule 3A provides that enforcement regulations must also state that no vehicle sale order may be made in respect of the vehicle before the end of a specified period.

**Clause 137: Statutory instruments relating to Legal Services Commission**

667. Part 1 of the Access to Justice Act 1999 contains a number of powers for the Lord Chancellor to make orders or regulations in respect of the services provided by the LSC as part of the CLS or CDS. However, that Act does not currently contain a general power, which is commonly found in primary legislation, for such secondary legislation to include consequential, incidental, supplementary transitional, transitory or saving provision.

668. Subsection (2) is a consequential amendment to section 2 of the Access to Justice Act 1999 (power to replace LSC with two bodies).

669. Subsection (3) inserts a new subsection (8A) into section 25 of the Access to Justice Act 1999 so that secondary legislation made by the Lord Chancellor (whether in relation to the CLS or the CDS) may include consequential, incidental, supplementary, transitional, transitory and saving provisions.

## Part 7 - Criminal Memoirs etc

### Clause 138: Exploitation proceeds orders

670. *Subsection (1)* provides the High Court (or the Court of Session in Scotland) with the power to make an exploitation proceeds order. This is an order made in relation to a qualifying offender who has obtained exploitation proceeds from a relevant offence. The effect of an order is to require the offender (called the "respondent") to pay a sum of money to the enforcement authority in respect of those proceeds.

671. *Subsection (3)* explains that a person obtains exploitation proceeds from a relevant offence if he or she derives a benefit from the exploitation of any material relating to the offence or any steps taken with a view to such exploitation. So, for example, a person who receives payment for writing a book, or giving a television interview, about their crime will have obtained exploitation proceeds. A person will also have derived a benefit if he or she receives a payment but the book is not published or the interview does not go ahead.

672. *Subsection (4)* explains that an order must specify a recoverable amount and identify the benefits derived by respondent that the order relates to. *Subsection (6)* provides that if the respondent does not pay the recoverable amount by the required time he or she must pay interest at the appropriate rate for the period that the amount is unpaid. The appropriate interest rate is defined in *subsection (8)* as that specified in section 17 of the Judgments Act 1838 or, in the case of an order made in Scotland, the rate payable under a decree of the Court of Session.

### Clause 139: Qualifying offenders

673. An exploitation proceeds order can only be made in respect of a person who is a qualifying offender and this clause sets out who is a "qualifying offender" for the purposes of the provisions. A person is a qualifying offender if they have been convicted of an offence in a United Kingdom court, have been found not guilty by such a court by reason of insanity or have been found by such a court to be suffering from a disability and to have done the act charged (*subsection (2*)). In addition, under *subsection (3)* a United Kingdom national, resident or person resident in the United Kingdom at the time of an offence will be a qualifying offender if they have been convicted by a court outside the United Kingdom of a foreign offence or if that court makes a finding equivalent to a finding that the person was not guilty by reason of insanity or equivalent to a finding that the person was under a disability and did the act charged. *Subsection (4),* in conjunction with *subsection (6),* defines a foreign offence as an act, or omission, amounting to an offence under the law in force in the foreign country that, at the time it was committed, would have been an offence if committed in the United Kingdom and which would be an offence if done in the United Kingdom at the time that the application for an exploitation proceeds order is made.

### Clause 140: Qualifying offenders: service offences

674. This clause makes supplementary provision to clause 139 in respect of service offences under UK and foreign service law.

**Clause 141: Qualifying offenders: supplementary**

675. This clause ensures that the Rehabilitation of Offenders Act 1974 does not prevent account being taken of a conviction for the purposes of this Part, and makes equivalent provision for Northern Ireland. It also disapplies provisions which provide that an offence is not treated as a conviction where an offender is given an absolute or conditional discharge in respect of it.

**Clause 142: Relevant offences**

676. This clause sets out what is a "relevant offence" for the purposes of clause 138. A relevant offence is an offence committed by a person as a result of which that person falls within the definition of a qualifying offender. In addition, an offence taken into consideration by a court when sentencing a person for the offence which results in the person being a qualifying offender is a relevant offence. Furthermore, an offence is a relevant offence if it is committed by a third party but it is associated with the offence which results in a person being a qualifying offender (or it is associated with an offence which is taken into consideration by the court when sentencing a person for an offence which results in the person being a qualifying offender). *Subsections (2) and (3)* set out when an offence will amount to an "associated offence".

**Clause 143: Deriving a benefit**

677. This clause sets out what amounts to "deriving a benefit" for the purposes of clause 138. *Subsection (2)* explains what amounts to "exploitation" and provides that exploitation can be by any means including publishing material in written or electronic form, using any media from which visual images, words or sounds can be produced and live entertainment, representation or interview.

678. *Subsection (3)* provides that the offender will be deemed to have derived a benefit if he or she obtains the benefit for himself or herself or secures the benefit for another person. This ensures that a qualifying offender cannot circumvent the scheme by arranging for exploitation proceeds to be paid directly to a third party.

679. The effect of *subsection (4)* is that it is irrelevant whether the benefit is dreviced, or the exploitation takes place, in the United Kingdom or before or after conviction for the relevant offence. This would be relevant, for example, where an offender is paid for the story of his crime while he was standing trial and is subsequently convicted. However, where the relevant offence is an offence committed by a third party, the respondent must have committed the associated offence before deriving the benefit.

680. *Subsection (5)* ensures that the scheme does not apply retrospectively. The scheme applies to offences whenever committed, but benefits derived before the provisions are commenced will not be recoverable under the new scheme.

**Clause 144: Applications**

681. This clause provides that the court may only make an exploitation proceeds order on the application of an enforcement authority. *Subsection (2)* explains that the enforcement authority in relation to England and Wales and Northern Ireland is the Serious Organised Crime Agency or a person prescribed by order made by the Secretary of State. The Scottish Ministers are the enforcement authority for Scotland.

682. *Subsection (3)* provides that an enforcement authority in England and Wales may only apply for an exploitation proceeds order with the consent of the Attorney General. An enforcement authority in Northern Ireland may apply for such an order only with the consent of the Advocate General for Northern Ireland (which, under paragraph 44 of Schedule 20 is to be read as a reference to the Attorney General for Northern Ireland until the relevant sections of the Justice (Northern Ireland) Act 2002 come into force).

**Clause 145: Determination of applications**

683. This clause sets out a range of factors that the court must take into consideration when deciding whether to make exploitation proceeds order in respect of any benefit and, if it makes an order, the recoverable amount to be specified in the order. *Subsection (3)* lists the specific matters that the court must take into account but the list is not exhaustive and the court may take into account any other matters it considers relevant.

**Clause 146: Limits on recoverable amount**

684. This clause places a limit on the amount that the court can order a person to pay (known as the "recoverable amount"). The "recoverable amount" cannot exceed the total value of the benefits derived by the offender (including those secured for a third party) in respect of which the order is made. The order must identify the benefits it relates to. Also the recoverable amount cannot exceed the funds available to the offender (the "available amount") as it is not the intention of the scheme to cause bankruptcy. *Subsection (2)* also provides that the recoverable amount may be a nominal amount.

685. *Subsection (3)* provides that the order may seek to recover any benefits derived by the offender up until the time the court makes its determination. But it cannot seek to recover benefits that have already been subject to a previous order.

686. Where the offender receives a benefit in kind rather than cash, *subsections (4) and (5)* set out how the value of the benefit is determined. Subsection (4) provides that where the benefit is a benefit in kind rather than cash the value of the benefit is the market value at the time the benefit is received. If a particular benefit has no market value, subsection (5) provides that the court can attribute to the benefit such value as is "just and reasonable".

687. There may be circumstances where an offender receives payment from a publisher, but only a small part of the payment directly relates to material pertaining to a relevant offence. This could arise, for example, where a criminal is paid to write a series of magazine articles about his life, but only one article in the series relates to the relevant offence. *Subsection (6)*

gives the court the discretion to decide what proportion of the benefit it is just and reasonable to attribute to the exploitation of material pertaining to the relevant offence.

**Clause 147: The available amount**

688. This clause defines the "available amount". This is the sum which, if lower than the total value of the benefits from exploitation included in the order, will be the maximum that a respondent can be ordered to pay. The available amount is the total of the respondent's assets, any benefits secured by the respondent for a third party (for example where the respondent has asked the publisher to pay proceeds from a book to a family member); and the value of any relevant gifts that the court considers it just and reasonable to take into account. *Subsection (2)* defines the value of the respondent's assets as the value of any free property held by the respondent, less the total amount payable in respect of obligations that have priority. *Subsection (3)* sets out that property is free unless it is subject to certain types of forfeiture and deprivation orders. *Subsection (4)* defines priority obligations. Such obligations will include court fines and liabilities such as mortgages. A relevant gift is defined in *subsection (6)* as a gift made on or after the time the respondent derived any of the benefits identified in the order. A gift includes transaction at a significant undervalue.

**Clause 148: Property**

689. This clause defines the meaning of property for the purposes of section 142.

**Clause 149: Effect of conviction being quashed**

690. This clause addresses the situation where the court has made an exploitation proceeds order and a conviction relevant to the order is quashed. *Subsections (1) and (2),* provide that, where the conviction or (if there was more than one) all the convictions that brought the offender within the scheme as a qualifying offender is or are quashed, the order ceases to have effect. On an application by the respondent, the court must order the Secretary of State (in Scotland, the Scottish Ministers) to repay to the respondent the sum that the respondent paid to satisfy the order (excluding the amount paid in respect of interest for late payment), known as "the recovered amount", together with interest at a rate to be determined by the court. *Subsection (4)* addresses the situation where one, but not all, such convictions are quashed or where an associated conviction mentioned in clause 142(1)(c) is quashed. In such cases, on application by the respondent, the court has the discretion to decide that the order should cease to have effect; to reduce the recoverable amount by such amount as it considers is just and reasonable; or to leave the order in place without alteration. If the court determines that the order should cease to have effect, the court must order the Secretary of State to repay the recovered amount together with interest at a rate to be determined by the court. If the court decides to reduce the recoverable amount and the offender has already paid a sum in excess of the new amount, the court must order the Secretary of State to repay the difference.

**Clause 150: Powers of court on repeat applications**

691. This clause confers on the court certain powers where an application for an exploitation proceeds order is made in relation to a person and the court has previously made an exploitation proceeds order in respect of that person. This may arise, for example, where

an offender publishes a new edition of the autobiography that led to the original order being imposed and receives a further payment for the new edition. Under this clause, the court can adopt any finding of fact made by the court in connection with the earlier order. If both orders relate to benefits derived from the same source, the court must also have regard to its previous determination of the recoverable amount specified in the earlier order.

**Clause 151: Additional proceeds reporting orders**

692. This clause provides that a court making an exploitation proceeds order can also make an additional proceeds reporting order if it believes that the likelihood of the respondent obtaining further exploitation proceeds is so high as to justify making such as order. An additional proceeds reporting order works in the same way as a financial reporting order in sections 76-81 of the Serious Organised Crime and Police Act 2005. The effect is that a person subject to such an order is required to report on specified particulars of his financial affairs at specified periods. The period for such an order must not exceed 20 years. This type of order might be considered appropriate, for example, where a publisher has agreed to pay the offender in instalments or where royalties from a particular publication flow into the offender's account over a lengthy period.

**Clause 152 and Schedule 17: Exploitation proceeds investigations**

693. Clause 152 and Schedule 17 amend Part 8 of POCA so as to extend the provisions relating to investigations to include exploitation proceeds investigations. This means, for example, that the enforcement authority carrying out an exploitation proceeds investigation is able to apply to a judge for a production order or search and seizure warrant.

**Clause 153: Functions of Serious Organised Crime Agency**

694. This clause makes consequential changes to the functions of the Serious Organised Crime Agency.

**Clause 154: Limitation**

695. *Subsection (1)* inserts a new section 27C into the Limitation Act 1980. *Subsections (1) to (3)* have the effect that an application for an exploitation proceeds order may not be made more than six years after the enforcement authority's cause of action accrued. *Subsection (4)* provides that a cause of action will accrue from the time that the enforcement authority has actual knowledge that a person has obtained exploitation proceeds from a relevant offence.

696. *Subsection (2)* inserts new section 72C into the Limitation (Northern Ireland) Order (SI 1989/1339) which makes similar provision for Northern Ireland.

697. Subsection (3) inserts a new section 19C into the Prescription and Limitation (Scotland) Act 1973. This makes similar provision for Scotland, although in that case the limitation period is five rather than six years, in line with other provision made by that Act.

**Clause 155: Interpretation of Part 7**
698. This clause sets out the meaning of terms used in this Part of the Bill.

**Part 8 - Data Protection Act 1998**

**Clause 156: Assessment notices**
699. Clause 156 inserts new sections 41A and 41B into the 1998 Act. New section 41A(1) enables the Information Commissioner to carry out an assessment to determine whether a public body has complied or is complying with the data protection principles. The Information Commissioner is not required to seek the consent of the public authority to undertake this assessment. Under this subsection, the Information Commissioner will be able to issue an assessment notice, which will require the subject of the notice to take certain action as set out in section 41A(3).

700. New section 41A(2) provides that the data controllers that may be given an assessment notice are government departments, and public authorities designated for the purposes of this section by an order made by the Secretary of State. Section 41A(2) further provides that the powers do not apply to excluded bodies. "Excluded bodies" are defined in section 41A(12) as any body specified in section 23(3) of the Freedom of Information Act 2000. Those bodies are:

- the Security Service,
- the Secret Intelligence Service,
- the Government Communications Headquarters,
- the special forces,
- the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- the Tribunal established under section 7 of the Interception of Communications Act 1985,
- the Tribunal established under section 5 of the Security Service Act 1989,
- the Tribunal established under section 9 of the Intelligence Services Act 1994,
- the Security Vetting Appeals Panel,
- the Security Commission, and
- the Serious Organised Crime Agency.

701. The Office for Standards in Education, Children's Services and Skills, is also an excluded body, but only in so far as it is a data controller in respect of information processed for the purposes of functions exercisable by Her Majesty's Chief Inspector of Education, Children's Services and Skills by virtue of section 5(1)(a) of the Care Standards Act 2000.

702. New section 41A(3) lists the obligations that may be included in an assessment notice. These include permitting the Commissioner to enter any specified premises, to inspect or examine any documents, information, equipment or material to which the Commissioner is directed or which the Commissioner is assisted to view, and to observe the processing of any personal data that takes place on the premises. The recipient of an assessment notice may also be obliged to direct the Commissioner to any documents, equipment or other material on the premises that are of a specified description. The recipient of the notice may also be required to assist the Commissioner to view any information of a specified description that is capable of being viewed using equipment on the premises, and to comply with any request from the Commissioner for a copy of any of the documents to which the Commissioner is directed and a copy (in a format requested by the Commissioner) of any of the information which the Commissioner is assisted to view. Finally, the notice may require the recipient to make available for interview by the Commissioner persons who process personal data on behalf of the data controller (and are willing to be interviewed).

703. New section 41A(5) sets out that the assessment notice must specify either the time when, or the period within which, the requirements of the notice must be complied with.

704. New section 41A(6) sets out that assessment notices must contain particulars of the rights of appeal conferred by section 48 of the 1998 Act.

705. New section 41A(7) provides that the time and period given in an assessment notice must allow time for an appeal to be brought under section 48. The result of this is that the need to comply with an assessment notice will be suspended if an appeal is brought.

706. New section 41A(8) establishes an exception to the provisions of section 41A(7) by virtue of which, if there are special circumstances, the Commissioner can ask the data controller to comply with a requirement in an assessment notice as a matter of urgency. In this case the notice can take effect after seven days, beginning with the day on which the assessment noticed is served. The assessment notice in this case will need to include a statement that the Commissioner considers that the notice must be complied with as a matter of urgency and the Commissioner's reasons for that conclusion.

707. New section 41A(9) ensures protection for material benefiting from legal professional privilege. An assessment notice does not have effect in relation to material that meets one of the tests set out in section 41A(9).

708. New section 41A(11) provides that the Commissioner may cancel an assessment notice by written notice to the data controller on whom it was served.

709. New section 41A(12) provides a number of definitions. It defines "public authority", for the purpose of the order-making power in section 41A(2)(b), as any body, office-holder or other person in respect of which an order may be made under section 4 or 5 of the Freedom of Information Act 2000 or under section 4 or 5 of the Freedom of Information (Scotland) Act 2002. This expands on the definition of public authority in section 1(1) of the 1998 Act, which provides that public authority means a public authority as defined by the Freedom of Information Act 2000 or a Scottish public authority as defined by the Freedom of Information (Scotland) Act 2002.

710. New section 41B of the 1998 Act requires the Information Commissioner to produce a code of practice in relation to the exercise of his or her new function of issuing assessment notices. Section 41B(1) requires the Commissioner to produce the code and section 41B(2) provides a non-exhaustive list of the matters that must be covered by the Code. Section 41B(3) provides that the Code must make provision about access to health information and social care information. Section 41B (5) and (6) provide that the Commissioner may alter or replace the Code and that such a replacement or altered Code must be issued by the Commissioner. Section 41B(7) provides that any Code must be approved by the Secretary of State before being issued. Section 41B(8) requires the Commissioner to publish the Code.

**Clause 157: Data-sharing code of practice**

711. This clause inserts new sections 52A to 52E into the 1998 Act. New section 52A places the Information Commissioner under a duty to publish and keep under review a data-sharing code of practice.

712. New section 52A(1) and (2) provide that the code will contain practical guidance and any other guidance that promotes good practice in the sharing of personal data. Good practice is defined as practice that appears to the Information Commissioner to be desirable including, but not limited to, compliance with the requirements of the 1998 Act. When deciding what is desirable practice, the Information Commissioner must have regard to the interests of data subjects, and others who might be affected by data-sharing.

713. New section 52A(3) requires that in preparing the code the Information Commissioner must consult with trade associations, data subjects and persons who represent the interests of data subjects as he or she considers appropriate.

714. New section 52A(4) defines sharing of personal data as the disclosure of the data by transmission, dissemination or otherwise making it available. For example the sending of files, the granting of access to a database and the publication of information all amount to "sharing" under this definition.

715. New section 52B(1) requires that once the Information Commissioner has prepared the code it must be submitted to the Secretary of State for approval.

716. New section 52B(2) provide that approval may be withheld only if the Secretary of State is of the opinion that the code is incompatible with any community obligations (in particular EC Directive 95/46/EC on the protections of individuals with regard to the processing of personal data and on the free movement of such data) or any international obligations of the UK (such as the Convention for the protection of individuals with regard to automatic processing of personal data: Convention 108 of the Council of Europe).

717. If approval is withheld, new section 52B(3) requires the Secretary of State to publish the reasons for this. If approval is granted, the Secretary of State must lay the code before Parliament.

718. New section 52B(4) to (11) makes provision relating to the issuing of the code. In particular, either House of Parliament has 40 days (excluding any period during which Parliament is not sitting for more than 4 days) in which to pass a resolution refusing to approve the code. If such a resolution is passed, or if the Secretary of State withholds approval, then the Information Commissioner is obliged to prepare another code of practice for resubmission. Where approval is granted and no resolution is passed, the Information Commissioner must issue the code. The code then comes into force 21 days later.

719. New section 52C(1) requires the Information Commissioner to keep the code under review and empowers him or her to prepare an alteration or replacement to the code. New Section 52C(2) obliges the Information Commissioner to alter or replace the code if he or she becomes aware that application of the code could give rise to a claim that the UK was in any way in breach of its European Community or other International obligations.

720. New section 52C(3) requires the Commissioner in preparing an alteration or replacement code to consult with trade associations, data subjects and such persons who represent the interests of data subjects, as the Commissioner considers appropriate.

721. New section 52D makes provision for the code, any replacement code and any alteration, to be published by the Information Commissioner.

722. New section 52E(1) to (5) provides that although the code is not legally binding, a person's breach or compliance with the code is to be taken into account by the courts, the Information Tribunal, and the Commissioner, whenever it is relevant to a question arising in legal proceedings or in connection with the exercise of the Commissioner's functions. So, for example, the Information Commissioner is entitled to consider levels of compliance with the data-sharing code of practice when evaluating whether to instigate enforcement action in relation to an instance of data-sharing. Equally a court would be entitled to have regard to levels of compliance with the code where it was attempting to resolve an issue relating to

whether or not a particular person had fulfilled their legal obligations by complying with good practice and not acting negligently.

**Clause 158 and Schedule 18: Further amendments of the Data Protection Act 1998**

723. This clause introduces Schedule 18. The Schedule makes amendments to the 1998 Act.

***Data Controllers' Registration***

724. *Paragraph 1* of Schedule 18 amends section 16(1) of the 1998 Act. The Information Commissioner is obliged under section 19 of the 1998 Act to maintain a register of data controller notifications. Section 17(1) of the 1998 Act prohibits the processing of personal data unless the data controller has an entry recording his details in the register of data controllers. Section 18(5) of the 1998 Act provides that where a data controller notifies the Information Commissioner, the notification must be accompanied by such fee as may be prescribed by fees regulations. Under section 19(2) of the 1998 Act each register entry shall consist of the registrable particulars of the data controller and such other information as is required by the notification regulations. The term "registrable particulars" is defined in section 16(1). The amendment in paragraph 1 adds a new registrable particular to section 16(1) of the 1998 Act (new subparagraph (h)).

725. The new registrable particular is such information about the data controller as is prescribed under new section 18(5A) of the 1998 Act. Section 18(5A) is inserted by *paragraph 2* of Schedule 18 and provides that notification regulations may prescribe the information about the data controller that is required for the purpose of verifying the fee payable under section 18(5).

726. The overall effect of these amendments is to provide a way for the Information Commissioner to check that a data controller has paid the correct notification fee. At the moment the Data Protection (Notification and Notification Fees) Regulations 2000 (SI 2000/188) provide that the fee payable each year is a flat amount of £35 per data controller. The intention is to modify this to provide a tiered fee scheme with different levels of fees for different data controllers. Once there are different levels of fees, the Information Commissioner will need to be able to verify that the correct fee has been paid. If false information is provided in a notification then this may be an offence under section 5 of the Perjury Act 1911, Article 10 of the Perjury (Northern Ireland) Order 1979 (SI 1979/1714 (NI 19)) or section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995.

727. *Paragraph 3* of Schedule 18 amends section 19 of the 1998 Act to add a new subsection (8). It provides that the Information Commissioner will not be required to comply with section 19(6) and (7) in relation to the information that has to be supplied under new section 16(1)(h). Section 19(6) provides for the Information Commissioner to make the register of notifications available to the public for inspection and available to the public in such other ways as he or she considers appropriate. Section 19(7) requires the Information

Commissioner to provide certified copies of registrable particulars in the register of notifications to members of the public.

***Assessment notices***

728. Paragraphs 4 and 5 of Schedule 18 make three amendments that are consequential on the creation of new sections 41A and 41B of the 1998 Act by clause 156. Paragraph 4 amends section 48 of the 1998 Act to provide a right of appeal to the Information Tribunal against an assessment notice. Paragraph 5 amends section 67 of the 1998 Act to specify the parliamentary procedure that is to be followed by the Secretary of State in making orders under the power in new section 41A(2)(b) (power to designate specific public authorities as being within the scope of Assessment Notices). Such orders will be subject to the negative resolution procedure. Paragraph 6 inserts a new definition of government department into section 70(1) of the 1998 Act.

***Power to require information***

729. Paragraph 7 of Schedule 18 amends section 43 of the 1998 Act to strengthen the Information Commissioner's powers for inspecting a data controller's compliance with the data protection principles, using an information notice.

730. Paragraph 7(3) inserts two new subsections into section 43 of the 1998 Act, which is the power of the Information Commissioner to issue an information notice. New section 43(1A) allows an information notice to require that the data controller must provide (a) particular information as specified; (b) information of a particular description; or (c) information in a category as specified or described. New section 43(1B) allows an information notice to require that the information is provided (a) within a specified period; (b) at a specified time and place; (c) in a specified form.

731. *Paragraph 8* provides an equivalent amendment (to that made in paragraph 6 detailed above) to section 44 for special information notices (which makes special provisions in relation to the processing of personal data for journalistic, artistic and literary purposes).

**Restriction on the use of information**

732. *Paragraph 9* of Schedule 18 amends section 43 of the 1998 Act to place restrictions on the use of certain information obtained under the newly extended information notice power.

733. Paragraph 9(3) inserts three new subsections into section 43 of the 1998 Act. These subsections make provision to ensure that the principle against self-incrimination is protected in relation to this section. First, the new section prohibits a data controller from being required to provide information which would incriminate him or her in relation to proceedings other than proceedings for offences under the 1998 Act, and certain perjury offences. Second, statements made under the new expanded power of section 43 cannot be used as evidence against the data controller for any data protection offence (other than the offence of failing to comply with the terms of an information notice), unless the accused acts in such a way as to

forfeit this particular protection. In those circumstances evidence of the original statement would be admissible in order to rebut the false assertions made by the accused.

734. *Paragraph 10* of Schedule 18 provides for an equivalent amendment (to that made in paragraph 9(3)) to be made to section 44 relating to special information notices (which makes special provisions in relation to the processing of personal data for journalistic, artistic and literary purposes).

735. *Paragraph 11* of Schedule 18 amends paragraph 11 of Schedule 7 to the 1998 Act to make provision in relation to the principle against self-incrimination. This existing provision of the 1998 Act provides that data controllers are not obliged to satisfy subject access requests under section 7 of the 1998 Act, where to do so would reveal incriminating evidence of an offence other than an offence under the 1998 Act. The amendment adjusts the provisions so that neither the 1998 Act offences nor certain perjury offences are covered by this protection.

**Monetary penalties: restriction on matters to be taken into account**

736. Section 55A of the 1998 Act provides for the Information Commissioner to issue a civil monetary penalty for serious breaches of the data protection principles of a kind likely to cause substantial damage or distress that are carried out either deliberately or recklessly.

737. Under section 51(7) of the 1998 Act the Information Commissioner can, with the consent of the data controller, assess any processing of personal data for the following of good practice.

738. *Paragraph 12* of Schedule 18 amends section 55A of the 1998 Act to prevent the imposition of a civil monetary penalty based on information that has been obtained from a good practice assessment (section 51 of the 1998 Act) or the use of an assessment notice under new section 41A of the 1998 Act as inserted by clause 156.

**Warrant for entry and inspection**

739. *Paragraph 13* of Schedule 18 amends Schedule 9 to the 1998 Act to give broader inspection powers to the Information Commissioner in relation to warrants obtained under Schedule 9 to the 1998 Act.

740. Paragraph 13(2) broadens the range of activities the Information Commissioner can engage in when executing a warrant granted under Schedule 9. In particular, it gives the Information Commissioner the power to require any person on the premises to provide an explanation of any document or other material found on the premises (new paragraph 1(3)(e)) and to require such a person to provide information that is reasonably required to determine whether there has been any contravention of the data protection principles (new paragraph 1(3)(f)).

741. Paragraph 13(3) makes amendments to paragraph 12 of Schedule 9 to the 1998 Act, which provides a criminal offence for the obstruction of, or failure to assist, a person executing a warrant under that Schedule. The additional text extends the offence to cover deliberately or recklessly making false statements in response to the new powers to require information created in paragraph 13(2) detailed above.

742. Paragraph 13(4) provides protection against self-incrimination for any person required to provide information under the extended powers created under paragraph 13(2) above. In particular, any information provided by that person in response to this new warrant power cannot be used as evidence in criminal proceedings against that person. However this protection is not absolute, and the response given can be used in evidence if the offence concerned is either the offence of obstructing or failing to assist a person executing a Schedule 9 warrant or is one of a specific group of perjury offences. Furthermore the response can be used in evidence for the prosecution of any criminal offence if the accused acts in such a way as to forfeit this particular protection. In those circumstances evidence of the original statement becomes admissible in order to rebut the false assertions made by the accused.

**Part 9 - General**

**Clause 159: Orders, regulations and rules**

743. This clause makes provision in connection with the various powers under the Bill to make orders, regulations and rules. The affirmative resolution procedure applies to statutory instruments made under the powers listed in *subsection (5)*. The effect of *subsection (4)* is that all other powers are subject to the negative resolution procedure or, in the case of the power to make commencement orders, no procedure applies. *Subsection (3)* provides that any power under the Bill to make orders, regulations or rules includes a power to make provision generally or only for specified purposes, cases, circumstances or areas and to make different provision for different purposes, cases, circumstances or areas. This subsection also enables orders and regulations to make incidental, supplementary, consequential, transitional, transitory or saving provisions.

**Clause 160 and Schedules 19 and 20: Consequential etc. amendments and transitional and saving provisions**

744. This clause enables the Secretary of State by order to make supplementary, incidental, consequential, transitory, transitional or saving provision for the purposes of the Bill. It is a power to make consequential provisions for those purposes at any time, including amendments to primary and secondary legislation. The clause also introduces Schedule 19 (minor and consequential amendments) and Schedule 20 (transitory, transitional and saving provisions).

**Schedule 19: Minor and consequential amendments**

***Part 1 - Coroners***

745. The 1953 Act is amended by *paragraphs 6, 7, 8 and 9* of Schedule 19, changing the time within which an informant is required to provide information for the registration of a

death. Time begins to run from the date of confirmation by the medical examiner of the cause of death by virtue of clause 20 of the Bill or at the date of discontinuation of a coroner's investigation under clause 4 of the Bill, rather than at the date of death. Paragraphs 8 and 9 also extend the categories of those who have a duty to give information for the registration of a death to include the partner of the deceased and the deceased's personal representative. These terms are defined in the same way as in the list of interested persons given in clause 38.

746. *Paragraph 13* of Schedule 19 omits section 21 of the 1953 Act so that the Registrar General no longer needs to authorise the registration of a death where this is requested more than 12 months after the death. This provision is removed because all deaths will be reviewed either by a coroner or medical examiner under the provisions of Part 1 of the Bill.

747. *Paragraph 14* of Schedule 19 substitutes a new section 22 of the 1953 Act so as to remove the provisions for issuing medical certificates of cause of death. The provisions are replaced by powers in clause 20 for the Secretary of State to make regulations for the certification of cause of death. Section 22 is also amended to require the registrar to record the cause of death where this is provided under regulations made under clause 20. References to section 22 elsewhere in the 1953 Act are amended to refer to regulations under clause 20.

748. *Paragraph 18* of Schedule 19 amends section 29 of the 1953 Act so that an error of fact or substance in the cause of death recorded in an entry in a death register may not be corrected without the approval of the appropriate medical examiner or senior coroner where the recorded cause had been confirmed under clause 20 or on discontinuance of an investigation under clause 4 (following post-mortem).

749. The majority of the remaining amendments relating to Part 1 pick up references to the term "inquest" in other legislation and replace these with references to "investigation" or pick up references to the 1988 Act and replace these with references to the provisions of the Bill.

750. The Treasure Act 1996 is amended by *paragraphs 35 to 39* of Schedule 19, streamlining the investigation and inquest process for Northern Ireland as well as England and Wales. There is an amendment to the Human Tissue Act 2004 relating to coroners' duties in respect of bodies prior to transplantation or other similar or related activities at *paragraphs 44 to 47*.

***Part 8 - Disqualification for Driving***

751. Sections 34A to 34C of the Road Traffic Offenders Act 1988 provide for a reduction in the period of disqualification for offenders convicted of drink-driving offences who successfully complete an approved driver retraining course. Similarly, sections 34D to 34G and 41B the Road Traffic Offenders Act 1988, when implemented, will provide for an offender convicted of a "relevant drink offence" to obtain a reduced period of disqualification for that offence by agreeing to participate, at his own expense, in an alcohol ignition interlock programme. Section 35 of the Road Traffic Offenders Act 1988 determines the minimum period of disqualification for a repeat offender. Section 37 of that Act deals with the effect of

the disqualification in terms of when the licence is revoked and comes back into effect, including disregarding any period of suspension pending an appeal. Section 42 provides for an application to be made to the court for the removal of disqualification after a certain period has expired.

752. *Paragraph 83* of Schedule 19 provides for the extension period to be disregarded in calculating any appropriate reduction in the length of the disqualification, the minimum period of disqualification and the time before an application can be made for removal of a disqualification under the Road Traffic Offenders Act 1988.

753. Section 54 of the Crime (International Co-operation) Act 2003 gives effect to mutual recognition of disqualification for driving so that drivers normally resident in one member State of the European Union who are disqualified from driving in another member State will also be disqualified in their state of residence. *Paragraph 86* of Schedule 19 inserts a new subsection, subsection (3A), into that section so that the extension period is disregarded for the purposes of the minimum period of disqualification which requires notification to a central authority.

754. *Paragraph 87* of Schedule 19 amends section 160 of the Powers of Criminal Courts (Sentencing) Act 2000. It substitutes subsection (2) of section 160 effectively repealing parts of it. But, where the Secretary of State makes an order under section 107(1)(e) specifying the types of accommodation that may be "youth detention accommodation", this order will still be subject to the negative resolution procedure. This paragraph also substitutes subsection (5) of section 160 to provide that an order under section 107(1)(e) may make different provision for different cases or classes of case.

**Schedule 20: Transitory, transitional and saving provisions**

755. Under *paragraph 1* of Schedule 20, the Lord Chancellor must make an order so that all existing coroners' districts will become coroner areas and will be known by the name by which the coroner's district was previously known (but ending coroner area rather than coroner's district). *Paragraph 2* of Schedule 20 provides that the relevant authority for each new coroner area will be the authority which had been the relevant council for the coroner's district from which it was derived.

756. *Paragraph 3* provides that any person who was a coroner for a district immediately before the 1988 Act was repealed will be treated as having been appointed as a senior coroner under paragraph 1 of Schedule 3 for the corresponding coroner area.

757. *Paragraph 3* also provides that any person who was a deputy coroner or assistant deputy coroner under the 1988 Act will be treated as having been appointed as an assistant coroner under paragraph 2(4) of Schedule 3 for the corresponding coroner area.

758. *Paragraphs 4 and 5* make transitional provisions in relation to clauses 11 and 12 (certification of inquests and intercept evidence). Paragraph 4 gives the Lord Chancellor power to make an order which provides for the 1988 Act to have effect subject to provisions set out in the order which are equivalent to that made in clause 11 of the Bill, and with any consequential modifications. An order made under this provision will apply in relation to inquests held under that Act that have begun, but have not been concluded, before the day on which the order comes into force.

759. *Paragraph 6* provides for the amendments to the 1959 Act made by paragraphs 3 to 5 of Schedule 9 (these amendments make equivalent provision to clause 11 but in relation to Northern Ireland) to have effect in relation to inquests that have begun, but have not finished, before the day on which the section comes into force.

**Clause 161 and Schedule 21: Repeals**
760. This clause introduces Schedule 21. That Schedule repeals existing legislative provisions which have been replaced by provisions in the Bill or otherwise are no longer required. In particular, it repeals the whole of the 1988 Act.

**Clause 163: Effect of amendments to criminal justice provisions applied for the purposes of service law.**
761. This clause provides that where criminal justice provisions are applied for the purposes of service law, they are to apply as amended by this Bill.

**Clause 164: Extent**
762. This clause sets out the extent of the provisions of the Bill. Details are in paragraphs 55 to 61 above.

**Clause 165: Commencement**
763. This clause provides for commencement. Details are in paragraphs 764 to 767 below.

**COMMENCEMENT**

764. The following provisions of the Bill come into force on Royal Assent:

- Clauses 38 and 39, which contain the interpretation provisions for Part 1 of the Bill and the transitional provisions in Part 1 of Schedule 19;

- Clause 61 (and associated repeals) which repeals section 29JA of the Public Order Act 1986 (protection of freedom of expression (sexual orientation));

- Clause 103 (and associated transitional provision and repeal) which removes the requirement for bills of indictment to be signed;

- Clause 127 (and associated minor amendment in paragraph 84 of Schedule 18 and repeal), which relates to the implementation of the E-Commerce and Services Directives;

- Clauses 135 and 136 and Schedule 16 which make provision in respect of criminal legal aid;

- In Part 9, clauses 159, 160(3) to (10), 162, 164, 165 and 166 and

- Paragraphs 59(3) and 87 to 91 of Schedule 19 (and associated repeals) which contain minor drafting corrections.

765. The following provision of the Bill will come into force two months after Royal Assent:

- Clause 124 (and associated transitional provision in paragraph 37 of Schedule 20) which adds certain terrorism offences to the list of offences in respect of which a public protection sentence may be passed in England and Wales.

766. Chapter 2 of Part 3, which repeals and re-enacts the provisions of the CEWAA, comes into force on 1st January 2010. (By virtue of section 14 of the CEWAA no new witness anonymity orders may be made under that Act after 31st December 2009.)

767. All other provisions will be brought in force by means of commencement orders.

## FINANCIAL EFFECTS OF THE BILL

768. The Bill is currently expected to result in gross costs of £17.1M/£55.6M/£58.7M for the financial years 2010-2011, 2011-2012 and 2012-2013 respectively and net costs (having regard to fee income in respect of the death certification and data protection provisions) of £8.6M/£10.6M/£13.7M. These figures are based on a number of assumptions about implementation which are subject to review.

769. In addition to the net savings identified above, the provisions in the Bill once fully implemented will result in a net increase of up to 300 in the requirement for prison places (at a cost of £60M capital and £12M resource). The estimated impact on the prison population of individual provisions in the Bill is:

- The reform of the law on homicide (clauses 42 to 48) - an increase of 200 places;

- Conspiracy (clause 60) - an increase of 15 places over 10 years;

- The investigation witness anonymity order (Chapter 1 of Part 3) - an increase of 50 places;

- Driving disqualification (clause 123 and Schedule 14) - an increase of 13 places; and

- Extension of public protection sentences for certain terrorist offences (clauses 124 and 125) - an increase of 30 places.

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

**Part 1 - Coroners etc**
771. The reform of the coroner service will have some effect on public expenditure. Local authorities will retain responsibility for funding their local coroner but, in line with Government policy, the Ministry of Justice is committed to funding any net additional costs that fall on local government which arise from changes made by the reforms. The best current estimate is that the initial start up costs for the reformed service will be £15M, with additional running costs in the region of £6M per annum.

772. There is the possibility of economies of scale savings to be made by local authorities when existing coroner areas are grouped together to produce larger ones. This has occurred previously where local authorities have voluntarily amalgamated.

773. The estimated annual cost of the proposed death certification system is £40M for each of the financial years 2010-2011 and 2011-2012. This compares with a cost of £45M for the existing system. The costs for both systems are funded by the payment of certification fees. There is a one-off set up cost of £1M which will fall in the financial year 2010-2011.

**Part 3 - Criminal Evidence, Investigations and Procedure**
774. The introduction of the investigation witness anonymity order will result in estimated costs to Her Majesty's Courts Service (HMCS) of £931K, the CPS of £367K and to the LSC of £727K for each of the financial years 2010-2011, 2011-2012 and 2011-2013.

**Part 4 - Sentencing**
775. The Sentencing Council for England and Wales is estimated to have annual running costs of £1.79M in 2010-2011 and £1.81M in 2011-2012; this compares with the combined annual running costs of the SAP and the SGC of £1.33M in 2009-2010. There will be set up costs for the Council of £130K in 2010-2011. In addition, the creation of the council will lead additional costs for HMCS of £306K for the financial year 2010-2011 and £162K for the financial year 2011-2012.

**Part 5 – Miscellaneous criminal justice provisions**
776. The creation of the post of Victims and Witnesses Commissioner will lead to additional cost of £250k in each of the financial years 2010-2011 and 2011-2012.

**Part 7 - Criminal Memoirs etc**

777. The creation of a civil scheme through which courts can order qualifying offenders to repay profits made from books and other publications about their crimes will result in estimated costs to HMCS of £67K and to LSC of £24K, in each of the financial years 2010-2011, 2011-2012 and 2012-2013. Costs to the Serious Organised Crime Agency are estimated at £280K per annum over the same period.

**Part 8 - Data Protection Act 1998**

778. The amendments to the 1998 Act will lead to additional costs to the Information Commissioner's Office of £8.5M in 2010-2011, £6M in 2011-2012 and £6M in 2012-2013. Notification fees paid by data controllers when registering with the Commissioner fund his data protections responsibilities and these additional costs will be met from a new funding structure being implemented under the existing legislation.

779. The other provisions of the Bill are largely cost neutral, or will result in minor savings.

## EFFECTS OF THE BILL ON PUBLIC SECTOR MANPOWER

780. Public service manpower will be affected by the reform of the coroner service in that the number of coroners will change as the service moves from approximately 110 coroners, working full and part time, to around 60 to 65 coroners working full time, along with locum assistants. However, the Government does not envisage that the number of coroners' officers who are employed by the police in the majority of cases, and local authorities in others, or the numbers of administrative staff will be affected by the changes in Part 1 of this Bill. The Government expects the office of the Chief Coroner to have 29 staff, although this only represents a net increase of 14 as the office will take on some current policy functions carried out within the Ministry of Justice. The death certification provisions will require some 240 (full time equivalents) medical examiners and an equal number of medical examiners' officers.

781. The Sentencing Council for England and Wales will have some 20.5 staff, compared with the 13 staff currently employed by the SAP and the SGC. The Office of the Information Commissioner currently has a staffing complement of some 261. The Government expects the increase in the Information Commissioner's inspection powers to result in an increase of 72 staff.

782. The Commissioner for Victims and Witnesses is expected to be supported by 3 staff.

783. No other provisions of the Bill are expected to have a net impact on public service manpower.

## SUMMARY OF IMPACT ASSESSMENTS

784. Eight impact assessments and one overarching impact assessments have been published alongside the Bill. The individual impact assessments deal with the following provisions

- coroners;
- death certification;
- homicide;
- establishment of the sentencing council;
- investigation anonymity orders;
- criminal legal aid;
- criminal memoirs; and
- enhancing the inspection powers of the Information Commissioner.

785. The provisions of the Bill impact mainly on the bereaved, victims, witnesses and the public who come into contact with the criminal justice system and the public sector (primarily medical practitioners, coroners, coroner's officers, local authorities, police, courts and other agencies within the criminal justice system and the coroners service, and public sector bodies in their capacity as data controllers). Where the private and voluntary sectors will be engaged, the business sectors affected are: funeral industry and crematoria; data controllers; financial services providers regulated by the Financial Services Authority; bodies regulated by the Department for Business, Enterprise and Regulatory Reform; internet service providers; and the media and publishing industry.

786. The costs of the Bill are outlined in paragraphs 768 to 779 of these explanatory notes.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

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

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

**Part 1: Coroners etc**

**Duty to investigate death where deceased died while in custody or otherwise in state detention**

788. Clause 1 sets out when the duty to investigate deaths applies. A senior coroner who is made aware that the body of a deceased person is within that coroner's area must conduct an investigation into the person's death if he has reason to suspect any of three things. The first two – that the deceased died a violent or unnatural death, or the cause of death is unknown - are broadly equivalent to section 8(1)(a) and (b) of the 1988 Act. The third – that the deceased died while in custody or otherwise in state detention – extends the statutory duty to investigate beyond the current duty to investigate deaths "in prison" (section 8(1)(c) of the 1988 Act). This enhances the UK's ability to meet the procedural requirements of Article 2 of the ECHR; "custody" would include prisons, police cells, court cells, young offender institutions and secure training centres. The requirement to investigate deaths in "state detention" will also mean that there will be an automatic investigation into, for example, the death of a person who is being detained by a constable without actually being taken into custody, a person who is being detained compulsorily under mental health legislation or immigration and asylum legislation, and a person in custody or a detained person in the above categories who is being transported from one place to another. It would also cover the case of children placed in secure accommodation. It will not matter whether the detention is lawful or unlawful.

**Purpose of investigation**

789. The purpose of an investigation is to ascertain who the deceased was, and how, when and where the deceased came by his or her death (clause 5(1)). Where necessary for the purpose of avoiding a breach of Convention rights, the purpose of an investigation includes ascertaining in what circumstances the deceased came by his or her death (clause 5(2)).

790. In *R v HM Coroner for the Western District of Somerset and another ex parte Middleton*[1], the House of Lords gave detailed guidance for the conduct in future of inquests into deaths in custody where Article 2 is engaged. This looked specifically at whether the statutory scheme under the 1988 Act and the 1984 Rules was compatible with the ECHR. They held that it was – but only because the word "how" was taken to mean "by what means and in what circumstances". The new provision makes the position expressly clear. The clauses therefore ensure that investigations into deaths under the Bill are compatible with the ECHR as determined by *Middleton.*

[1] [2004] 2 All ER 465, para 35.

791. In *Jordan v UK*[2], the European Court of Human Rights (ECtHR) set out the criteria required for an Article 2-compliant investigation. These include the need for an investigation that is capable of leading to a determination of whether any force used was justified, and the identification and punishment of those responsible for the death. The fact that clause 10 prevents a determination being framed in a way which determines criminal liability on the part of a named person does not mean that the coroner's investigation would not satisfy this requirement. The obligations arising from *Jordan* concern procedure rather than results. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. The obligation arising from *Jordan* is not that the result of the investigation will be the allocation of blame and the imposition of a punishment, but that the investigation is provided with the means of establishing what happened. In this respect, the Bill provides the coroner with powers to secure evidence from witnesses and to gather evidence, and this is dealt with below.

**Investigations concerning or involving a matter which should not be made public**

792. Article 2 requires not only an independent and effective investigation of the circumstances of the death but also provision of means to properly protect the interests of the deceased's family. There may therefore be Article 2 issues in any case where an investigation concerns or involves any matter which is not to be made fully public.

793. Proceedings at an inquest are not, at present, considered to be sufficient to meet Article 2 obligations where the inquest must be held with a jury but the material cannot be disclosed to jury members or to the public or interested persons. Clause 11 will address those concerns.

794. In terms of family involvement, the sole requirement – so far as Article 2 is concerned – stems from the decision in *Jordan* that the next-of-kin of the deceased must be involved in the procedure to "the extent necessary to safeguard their legitimate interests". Article 2 does not therefore give the public and next-of-kin an absolute right to be present at all times or to see all the material relevant to the investigation. The Government considers that the courts are very likely to accept that it is consistent with Article 2 for sensitive material not to be made public or disclosed to the next-of-kin where this is required by a substantial public interest.

795. This clause sets out the pre-conditions which will ensure it is only in such cases that material is not made public, and that such limitations apply only to the extent necessary. The clause relates to "certified" investigations. The main effects of certification are that the investigation will be conducted by a judge of the High Court nominated by the Lord Chief Justice, that such an inquest may be held without a jury, and that persons could be excluded from it. The power to exclude persons from a certified inquest is a separate power to that

[2] [2001] 37 EHRR 52, paragraphs 105-109.

which will be available to all senior coroners in a non-certified inquest to exclude persons from an inquest, or part of an inquest, in the interests of national security.

796. An investigation could be certified only if the Secretary of State considers that it will concern or involve a matter which should not be made public for certain limited reasons, and only if the Secretary of State is of the opinion that it is necessary for the inquest to be held without a jury to prevent no other measures would be adequate to prevent such matters being made public or unlawfully disclosed. Those reasons are:

- protection of the interests of national security, the relationship between the UK and another country, or preventing or detecting crime; or
- protection of the safety of a witness or other person.

797. Once the certification has effect the Secretary of State must inform the judge nominated to conduct the investigation what the protected matters are (clause 12 amends the Regulation of Investigatory Powers Act 2000 so that if the protected matter is intercept evidence this can be disclosed to the judge). The judge will then be required to consider the protected matters and decide whether it is possible to hold the inquest with a jury and for that inquest to be Article 2-compliant and at the same time prevent protected matters being made public.

798. It is also intended that Coroners rules under clause 36 will make provision conferring power on a judge holding an inquest as part of a certified investigation to give a direction excluding persons from all or part of the inquest. Those rules will also allow the judge to direct that a name should not to be disclosed, which will enable a witness to give evidence anonymously. These types of measures, and others such as redacting the protected material, will mean that the judge may choose to hold the inquest with a jury in which case the protected matters must not be revealed to the jury. There may be other cases when the judge is satisfied that a protected matter could be revealed to a jury without a risk of it being revealed beyond the jury. In that case the inquest would be held with a jury and the matter would be revealed to the jury. But if the judge thinks that the matter would be revealed beyond the jury then he or she would hold the inquest without a jury. These provisions will enable there to be full investigations of deaths even where there is a protected matter, including intercept material falling within section 17 of RIPA, which must be considered but which cannot be disclosed to a jury or to the wider public in the limited circumstances described above, or to the families of the deceased. This ensures compliance with Article 2 ECHR.

799. In addition, to help ensure that the interests of the next-of-kin are fully protected, the judge will be able to appoint independent counsel to the inquest. As a public authority, the judge will be required to appoint counsel to an inquest where necessary to avoid a breach of Convention rights. Counsel to the inquest will be able to see the material containing the protected matter and would be directed, by the judge, to take responsibility for testing the evidence which cannot be disclosed publicly or to the next-of-kin, acting in effect as special

advocate. Although counsel to the inquest would not be independent of the inquest, the Government considers that this is not vital since the judge will be independent – and for the purposes of complying with Article 2, "independent" means independent of those involved in the death.

800. Although the judge will have power to make a direction excluding persons from all or part of an inquest that is held without a jury, such a direction will only be necessary when the inquest is considering protected matters. The rest of the inquest will be able to take place in public ensuring public scrutiny of the investigation so far as possible.

801. There is a further safeguard in subsection (4) which prevents the certification from having effect until 14 days after it was issued or, if judicial review proceedings are begun in that 14 day period, until they are concluded. The Secretary of State will have a responsibility to notify the senior coroner of the certification and the senior coroner must then inform any interested person whose name and contact details are known to the coroner that the investigation has been certified and they will have time to consider whether to commence judicial review proceedings before the certification takes effect.

802. These provisions will affect a very limited number of cases in exceptional circumstances and the Government anticipates that there will be no more than an occasional inquest which needs to be held without a jury.

803. The Government is aware of at least one inquest which is stalled because the coroner and jury are unable to consider protected matters which are relevant to the investigation. The Bill therefore enables the Lord Chancellor by order to apply the equivalent of clause 11 to inquests which have already started under the 1988 Act before those provisions come into force (paragraph 4 of Schedule 20 to the Bill).

804. Clause 12 enables intercept evidence to be considered at an inquest although it will remain inadmissible in criminal proceedings. However there is no possibility of a coroner's investigation reaching a different conclusion to criminal proceedings. Criminal proceedings always take place before a coroner's investigation since the coroner is required to suspend an investigation under the Act until the outcome of criminal proceedings. A determination of a coroner's investigation resumed after criminal proceedings have concluded may not be inconsistent with the outcome of the criminal proceedings (paragraph 8(11) of Schedule 1). Equally a determination may not be framed in such a way as to appear to determine any question of criminal liability on the part of a named person (clause 10(2)(a)).

805. Provision equivalent to the certified investigation provisions described above will have effect in Northern Ireland by virtue of paragraph 3 of Schedule 9.

**Suspending and resuming investigations**

806. Investigations may be suspended and resumed (clause 13 and Schedule 1). In particular, a senior coroner must suspend an investigation where criminal proceedings may be brought (if the prosecution so request) or where they have been brought. A senior coroner must also suspend an investigation if an inquiry under the Inquiries Act 2005 is being held and the Lord Chancellor asks the coroner to do so because the cause of death is likely to be adequately investigated by the inquiry. There is also a general power for a senior coroner to suspend an investigation if he or she thinks it appropriate to do so.

807. An investigation suspended by a coroner may not be resumed unless, but must be resumed if, the senior coroner thinks that there is sufficient reason for resuming it.

808. There is no provision in the Bill requiring an investigation to be resumed in circumstances where it is needed to fulfil the requirements of Article 2. The need could arise because the criminal investigation did not examine all the material that the coroner is required to make findings on under Article 2, for example, because the defendant in the criminal proceedings pleaded guilty.

809. The Government considers that it is not necessary to make express provision in the Bill requiring an investigation to be resumed in these circumstances because the coroner would already be required by section 6(1) of the HRA 1988 to resume the investigation if that is in fact necessary to secure compliance with Article 2. Such provision would in any event be duplicative and so contrary to proper legislative practice.

**Post-mortem examination**

810. A coroner may ask a suitable practitioner to make a post-mortem examination of the deceased (clause 16). This would include any examination made after the death of the deceased, whether invasive or non-invasive, for example, using MRI since an invasive post-mortem involves dissection of the body it runs counter to certain religious beliefs and could therefore engage the deceased's family members' right to manifest religious belief under Article 9. The Government considers that an invasive post-mortem examination would be justified, even where it infringes their religious belief, where it contributes to the purpose of an investigation in promoting and protecting public safety and health.

811. In any event the Government considers that the provision is not disproportionate in effect. Regulations made under the Bill will enable the deceased's family members to make representations to the coroner about whether a post-mortem examination should take place. A coroner will be required to take into account representations from family members to use non-invasive procedures at a post-mortem although the final decision will be for the coroner.

812. In such a case the coroner will be able to order the removal of a body to any suitable place in England and Wales (clause 17), for example, if specialist pathology equipment or skills are available outside his area.

**Death certification**

813. Clauses 19 and 20 provide for the scrutiny and secondary certification of deaths not subject to investigation by a senior coroner. In particular, such scrutiny is to be carried out by a medical practitioner who will have the title "medical examiner". This reflects certain conclusions of the Third Report of the Shipman Inquiry.

814. Insertion of an additional step in the death certification process arguably could delay the disposal of bodies. This might give rise to concerns for various religious groups whose practices demand that disposal takes place as soon as possible after death and therefore bring into play Article 9(1). The ECtHR has held that the right to have a burial in accordance with the practice of a certain religion does come within Article 9(1) (*Islamic Community in Bosnia and Herzegovina v. Serbia (Burials and Cremation*). [3]

815. In the Government's view these provisions do not infringe Article 9(1). The procedures which will be put in place to enable the medical examiner to carry out the scrutiny will ensure that any additional delay will be kept to an absolute minimum. Indeed, given the use of electronic communications, it is entirely possible that there would be no additional delay at all. In any event, it is important to note that this procedure will apply only in the most straightforward cases – where the cause of death is known, natural and non-suspicious – and so it is in everyone's interest to expedite the certification process.

**Gathering of evidence**

816. Clause 25 and Schedule 4 set out the powers of a senior coroner. These include power to require people to attend and give evidence, to provide evidence by way of a written statement, and to produce documents and things.

817. These powers of compulsion could engage rights under both Article 8 and Article 1, Protocol 1 ("A1P1"). But unless a coroner (or, where relevant, jury) can ascertain all relevant facts and inspect all relevant material it will make it impossible to comply with the obligations under clauses 5 and 10 of the Bill. Powers to compel evidence are also a necessary corollary of the state's duty to discharge obligations under Article 2. In *Edwards v UK*[4], it was held that the lack of any power to compel witnesses diminished the effectiveness of the inquiry as a mechanism to investigate and establish the facts relevant to the death, and thereby to achieve one of the purposes required by Article 2.

818. Whether any interference with the right to privacy is justifiable will depend on the particular circumstances of the case and it will be for the coroner to ensure that he only exercises the powers in a way which ensures that any interference is in pursuit of a legitimate aim and proportionate to the aims, thus falling within Article 8(2).

[3] [2003] 10 IHRR 584
[4] [2002] ECHR 46477/99.

819. Interference with an A1P1 right may be justified if it is in the public or general interest. The Government is satisfied that any interference here will be justified in the public or general interest because an investigation of a non-natural death must reach conclusions based on all relevant information.

820. There are also safeguards in the Bill to ensure that any interference is not disproportionate. By paragraph 1(4) of Schedule 4, the person required to attend, or produce a document or thing may claim that compliance is either impossible or unreasonable, and the coroner has the power to vary or revoke the notice given. When considering whether to do so, the coroner must take into account the public interest (paragraph 1(5) of Schedule 4). This ensures that the coroner considers whether a fair balance will be struck between the competing interests whenever he considers whether to exercise the powers of compulsion.[5] Furthermore, a person may not be required to give, produce or provide any evidence or document if he or she could not be required to do so in civil proceedings (paragraph 2).

821. Procedural safeguards will also apply. In particular, any notice of compulsion must tell the person how to make a claim that he or she is unable to comply with the notice or that it is not reasonable to require him or her to comply (paragraph 1(3)(b) of Schedule 4). The coroner's decision will also be capable of challenge by way of appeal to the Chief Coroner.

822. Equivalent provision will have effect in Northern Ireland by virtue of paragraph 1 of Schedule 9.

**Search and seizure**

823. Coroners' new powers of search and seizure may engage Article 8 rights. A coroner may enter and search land and seize property or inspect and take copies of documents. He or she may retain seized property and may also use reasonable force in exercising these powers (paragraphs 3 and 4 of Schedule 4). Any inability to acquire evidence and material may inhibit the coroner's duty to conduct an effective investigation.

824. The Government considers that the powers are proportionate to the achievement of a legitimate aim. The power to enter and search may only be used if the Chief Coroner (or a senior coroner nominated by the Chief Coroner) has given authorisation (paragraph 3(1) of Schedule 4). Furthermore, authorisation may only be given if the coroner conducting the investigation has reasonable cause to suspect that there may be anything on the land which relates to a matter which is relevant to the investigation, and—

- it is not practicable to communicate with a person entitled to grant permission to enter and search the land,

- permission to enter and search the land has been refused,

[5] See for example *Sporrong, James v UK* [1986] 8 EHRR 123 and *Lithgow v UK* [1986] 8 EHRR 329.

- the coroner has reason to believe that such permission would be refused if requested, or

- the purpose of a search may be frustrated or seriously prejudiced unless immediate entry to the land is secured (paragraph 3(3) of Schedule 4).

825. The power to seize anything on the premises and inspect and take copies of documents may only be used if the coroner believes that it may assist the investigation and, in the case of seizure, only if it is necessary to prevent the item being concealed, lost, altered or destroyed (paragraph 4(1) of Schedule 4).

826. The power to seize articles may engage A1P1. The Government considers that any interference with such rights is justified in the public interest and is proportionate. Any items seized will only be retained for as long as is necessary in all the circumstances (paragraph 4(4) of Schedule 4). Regulations can also be made if necessary to further regulate practice and procedure in relation to investigations (clause 35), and regulations or rules may provide for functions of coroners other than judicial functions to be delegated, including to properly trained personnel (for example, coroners' officers, who are commonly police officers) (clauses 35 and 36).

827. It is intended to require a person conducting a search to provide a record of any item seized to the occupier of or person in control of premises from which it was seized. It is also intended that such a person will be allowed access to the item for the purpose of photographing it. Provision will also be made for the return of seized items. Any person aggrieved by the conduct of a search will be able to complain to the Chief Coroner.

**Exhumation**

828. A senior coroner may order the exhumation of a person's body (paragraph 5 of Schedule 4). Such an order could engage the deceased's family members' right to manifest religious belief under Article 9. The Government considers that the powers are not disproportionate since they may only be exercised if the coroner thinks that exhumation is necessary in order for the body to undergo post-mortem examination or examination for the purpose of criminal proceedings.

**Power to report if risk of future death**

829. Paragraph 6 of Schedule 4 applies where a senior coroner is of the opinion that there is a risk that other deaths will occur in the future and that action should be taken to prevent such deaths. If so, the coroner may report the matter to a person who the coroner believes has power to take action and such person is then required to give the coroner a written response to the report. Copies of reports and responses are required to be given to the Lord Chancellor (who will monitor them), and Coroner regulations under clause 35 will make provision for copies to be given to interested persons (within the meaning of the Bill) and any other person who may have an interest. The Lord Chancellor is required to include details of reports and response in his annual report to Parliament.

830. This will ensure that Article 2 is complied with – an Article which requires the State to take appropriate steps to safeguard the lives of those within their jurisdiction. The power to issue a report should not be a function of a jury. In *Scholes v Secretary of State for the Home Department*[6], Lord Justice Pill said that "as a fact finding tribunal, the jury is well established and valued for its part in the administration of justice in England and Wales. As such, it operated effectively in this case. Questions on factual issues will sometimes be helpful. However, the value of a jury's views as a tool for assessing and improving procedures is in my view limited in circumstances where further investigation of policies and administrative procedures, as distinct from facts, is required".

831. Recommendations are prohibited (by clause 5(3)) and neither the coroner nor the jury are permitted to express any opinion on any matter other than the questions or particulars mentioned in clause 5. This achieves an appropriate balance of ensuring the coroner's investigation focuses on the investigation of one particular death whilst also enabling a coroner to consider the possibility of future deaths and to make reports with a view to avoiding them.

**Power to make rules for holding inquests wholly or partially in private or for withholding names**

832. Clause 36 enables Coroners rules to provide for a senior coroner to allow a name or other matter to be withheld from the public in proceedings at an inquest. It also allows rules to confer power on a senior coroner (a) to exclude specified persons from an inquest, or part of an inquest, if the coroner is of the opinion that the interests of national security so require; and (b) to exclude specified persons from an inquest during the giving of evidence by a witness under the age of 18, but only if the coroner is of the opinion that doing so would be likely to improve the quality of the witness's evidence. Rules may also require a senior coroner to exclude persons from all or part of an inquest that is held without a jury because of clause 11. Subject to any such rules made under the above provisions, an inquest will be required by rules to be held in public.

833. The exercise of powers given by rules made under these provisions could engage Articles 2, 8 and 10, although Article 2 would only be engaged in relation to inquests carried out in order to fulfil obligations under that provision. In all cases the person making rules must do so in a way which respects Convention rights (section 6 of the HRA). The following therefore does not go to the compatibility of the Bill, but may be useful by way of context.

834. The key is the extent to which Article 10 includes the right to receive information. In *Leander v Sweden*[7] the ECtHR made it clear that Article 10 was understood to include a right to receive information that others wish to impart but it does not impose an obligation on any authority to provide any particular information. There are conflicting authorities in the UK, but the Government considers that the better view is that Article 10 is not engaged by a

[6] [2006] EWCA Civ 1343 at paragraph 70.
[7] [1987] 9 EHRR 433.

decision to hold a statutory inquiry in private, except possibly in the most special and unusual cases (the only example of which has been the Shipman inquiry).[8]

835. The Government's view is that it is most unlikely that Article 10 would be engaged by a decision to hold an inquest (or part of an inquest) in private in the interests of national security. In the event that Article 10 is engaged, this falls squarely within Article 10(2) ensuring that there will be no violation of Convention rights. If provision is made enabling a coroner to make a direction for persons to be excluded from the inquest while a person under the age of 18 gives evidence, further provision will be made so that one member of the Press will be entitled to remain to ensure that the proceedings may be reported (subject to any reporting restriction imposed in relation to the identification of the witness) and that there is no interference with Article 10 rights.

836. In relation to the withholding of names and other matter(s), at present coroners have power to regulate their own proceedings and so could order a name to be withheld, for example on the grounds that disclosure of the name would cause substantial harm to the public interest or on Article 2 grounds. Provision is made in subsection (2)(e) of clause 36 so that rules could enable coroners to withhold a name in other circumstances. The intention is that provision will be made dealing specifically with the withholding of the names of United Kingdom Special Forces personnel although this will not prejudice a coroner's common law powers to, for example, enable witnesses to give evidence anonymously where their safety is threatened. Once an order is made for the name of the deceased to be withheld, section 11 of the Contempt of Court Act 1981 will give the coroner power to direct that the name may not be made public. Where United Kingdom Special Forces family members' Article 2 rights are engaged, a balancing exercise must be undertaken by the coroner who will weigh carefully the arguments in favour of exercising the power against Article 2 and Article 8 considerations and the important public interest in open justice. Accordingly, the Government considers that any interference with Article 10 rights is justified in accordance with Article 10(2).

**Abolition of freehold office of coroner**

837. By paragraph 9 of Schedule 3, the offices of senior coroner, area coroner and assistant coroner will no longer be regarded as freehold offices. This provision may engage rights under A1P1 since a court could find that the right to hold or exercise the office of coroner is a "possession" for the purposes of this Article. Deprivation of property will ordinarily give rise to an obligation to compensate. The Government has not made any provision for the payment of compensation and considers that it is unlikely that the office of coroner would be considered a possession for the following reasons.

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[8] *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371; *R (on the application of Howard) v Secretary of State for Health, R (on the application of Wright-Hogeland) v Secretary of State for Health* [2002] EWHC 396, distinguishing *R v Secretary of State for Health, ex parte Wagstaff, R v Secretary of State for Health, ex parte Associated Newspapers Limited* [2001] 1 WLR 292.

838. A senior coroner, area coroner or assistant coroner must vacate office on reaching the age of 70. But this does not apply to persons who are appointed as coroners under the 1988 Act, who will be treated as appointed as either a senior coroner or an assistant coroner by virtue of this Bill (paragraph 3 of Schedule 20). The right to hold or exercise office as a coroner cannot be willed or sold and given that a coroner can continue to hold office after the age of 70, the fact that the office will no longer be regarded as a freehold office will have no practical effect, and. no material loss will be caused to anybody.

**Removal from office**

839. The Lord Chancellor, with the agreement of the Lord Chief Justice, may remove a senior coroner, area coroner or assistant coroner from office (paragraph 13 of Schedule 3). The Lord Chief Justice may, after consulting the Lord Chancellor, remove the Chief Coroner or a Deputy Chief Coroner from office (paragraph 3 of Schedule 7). Removing such a person from office may amount to a deprivation of property and engage rights under A1P1. However, any interference can only occur in the very restricted circumstances set out in those paragraphs, namely on the grounds of incapacity or misbehaviour, and it is subject to the procedural safeguards described. In these circumstances, it is the Government's view that removal would be in the public interest and strike a fair balance between the interests of the office-holder and those of the public.

**Part 2: Criminal Offences**

**Murder and Infanticide**

840. Clauses 42 to 48 reform the law in relation to the partial defences of diminished responsibility and provocation and the law on infanticide (which operates both as a partial defence and an offence in its own right). Where a partial defence to murder is established, the defendant is liable to be convicted of the offence of manslaughter instead of murder. These provisions potentially engage the right to life under Article 2 and the right to a fair trial under Article 6.

841. The current definition of the partial defence of diminished responsibility will be replaced with a modernised definition. The partial defence will be available where the defendant was suffering from an abnormality of mental functioning arising from a recognised medical condition which substantially impaired their ability to understand the nature of their conduct, form a rational judgment or exercise self control, and the abnormality provided an explanation for their conduct. It will be for the defendant to establish on the balance of probabilities that the partial defence applies.

842. The existing partial defence of provocation will be abolished and replaced. A partial defence will instead apply where the defendant's conduct resulted from a loss of self-control which had a qualifying trigger and a person of the defendant's age and sex with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted in the same or similar way to the defendant. A loss of self-control has a qualifying trigger if it was attributable to fear of serious violence from the deceased or another identified

person; to a thing or things said or done which constituted circumstances of an extremely grave character and caused the defendant to have a justified sense of being seriously wronged; or to a combination of both of the above. Where sufficient evidence is adduced to raise an issue as to the partial defence, the prosecution must disprove it to the criminal standard.

843. These clauses will also amend section 1 of the Infanticide Act 1938 and Infanticide Act (Northern Ireland) Act 1939 respectively. The effect of the amendment is to make clear that the offence and defence of infanticide will only apply in circumstances where the defendant would otherwise be liable to be convicted of murder or manslaughter.

844. Article 2 requires states to take appropriate steps to safeguard life. While much of the Strasbourg case law is concerned with killings by law enforcement officers who are agents of the state, the State also has a positive obligation to protect the lives of citizens from unjustifiable deprivation by other individuals. In this context, the state must secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches.

845. The partial defences to murder form part of a comprehensive legal framework of homicide offences that are supported by suitable law enforcement machinery for the prevention and punishment of such offences. The Government considers that its proposals for reform of provocation, diminished responsibility and infanticide do not lower the high level of protection for the right to life afforded by these existing legal and procedural frameworks. In particular, the effect of successfully pleading a partial defence to murder is that a person stands convicted of manslaughter, itself a very serious offence carrying a maximum sentence of life imprisonment. A conviction for infanticide also carries a maximum sentence of life imprisonment.

846. The proposals in relation specifically to the partial defence of diminished responsibility would not alter the current position under which the burden of proof lies on the defendant to establish the defence on a balance of probabilities. The Government considers this reverse legal burden is compatible with Article 6(2). Whilst reverse legal burdens constitute an interference with Article 6(2), such a burden will be compatible with the Convention where imposed in pursuance of a legitimate aim and proportionate to achieving it. The Government considers that the reverse burden does pursue a legitimate aim – namely ensuring that a person who kills another person with the relevant intent should be convicted of the offence of murder unless his or her mental state at the time was such as to diminish his or her responsibility. Establishing diminished responsibility is predominantly a matter for defence evidence and it would be extremely difficult for the burden to be placed on the prosecution to prove the contrary, particularly in the light of the fact that an accused cannot be required to submit to a medical examination. It is therefore proportionate. The existing reverse legal burden relating to diminished responsibility was found by the Court of Appeal in *R v Lambert and Ali* [2002] QB 1112 to be compatible with Article 6(2). The same conclusion

was reached by the European Commission on Human Rights in *Robinson v UK*, Application 20858/92 (unreported, 5th May 1993).

**Encouraging or Assisting Suicide**

847. Clauses 49 and 50 amend the Suicide Act 1961 and the Criminal Justice Act (Northern Ireland) 1966. They replace the offences of aiding, abetting, counselling and procuring suicide and of attempting to do so (under the Criminal Attempts Act 1981) with a single offence cast in modernised statutory language. The offence will apply where a person does an act capable of encouraging or assisting a suicide or attempted suicide intending to so encourage or assist. The scope of the existing law (when section 2 is read with the Criminal Attempts Act 1981) will not be changed.

848. Human rights arguments in respect of the current law have been considered by the domestic and Strasbourg courts since the HRA came into force. In Pretty v Director of Public Prosecutions (Secretary of the Home Department intervening) [2002] 1 A.C. 800, the House of Lords held that none of the claimant's Article 2, 3, 8, 9 or 14 Convention rights were engaged but that if any were infringed, there were ample grounds to justify it.

849. The claimant took her case to the ECtHR (*Pretty v United Kingdom* (2002) 35 EHRR 1). The Strasbourg court found that the applicant's rights under Article 2, 3 and 9 were not engaged at all. The court did not make a clear finding as to whether Article 8 was engaged, holding that it was *"not prepared to exclude"* that the prohibition on assisted suicide constituted an interference with her right to respect for private life. On that conditional basis, the court considered Article 8(2), which permits an interference if done in accordance with law and if necessary in a democratic society for particular interests, including the protection of the rights and freedoms of others. "Necessity" implies a pressing social need and an interference that is proportionate to the legitimate aim pursued; and States are entitled to regulate activities which are detrimental to the life and safety of other individuals. It concluded that the domestic law here is designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. The court considered that the ban on assisted suicide was not disproportionate to this aim; it was not arbitrary for the law to reflect the importance of the right to life by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence. Any interference with Article 8 was therefore justified.

850. Accordingly, the Government considers that the proposal in respect of encouraging and assisting suicide is compliant with the Convention.

**Prohibited images of children**

851. Chapter 2 of Part 2 makes new provision in relation to certain pornography images involving children. At its centre is a new offence of possessing prohibited images of children. These are images which are pornographic; grossly offensive, disgusting or otherwise obscene; and which have certain prescribed content. Its does not include photographs or pseudo-photographs: the main intention is to regulate obscene pornographic drawings (typically computer generated) or "cartoons".

852. Whether an image is pornographic depends on whether, considered both alone and in context, it must reasonably be assumed to have been produced solely or principally for the purposes of sexual arousal. This means, for example, that a scene from a film which taken on its own may well be found to be pornographic may be found not to be pornographic if possessed in its original context as part of that film. The prescribed content includes images which focus solely or principally on a child's genitals, or involve certain sexual acts (clause 52(7)). The new offence does not apply to indecent photograph, or indecent pseudo-photograph, of a child. These are subject to other controls.

853. The maximum penalty for possession of a prohibited image of a child is 6 months on summary conviction, and three years on conviction on indictment (clause 56). The maximum penalty for summary conviction will rise from 6 months to 12 months on the commencement of section 154 of the 2003 Act. Paragraph 59 of Schedule 19 provides for the offender to become subject to notification requirements under the Sexual Offences Act 2003 if the offender was aged over 18 at the time and was sentenced to a term of imprisonment for at least 2 years. It also provides for the offence to be added to the list of child sex offences for the purposes of provisions about disclosure of information to the public under Schedule 34A to the 2003 Act.

854. These clauses could constitute an interference with Convention rights under Articles 8 and 10, but the Government considers that such interference is plainly justified. It is intended to achieve a legitimate aim and is necessary to meet that aim. The provisions are a proportionate response to a pressing social need and any consequent interference with Convention rights would be in accordance with the law, and necessary in a democratic society for the prevention of crime, for the protection of morals, and for the protection of the rights and freedoms of others.

855. The publication of such material could already contravene the Obscene Publications Act 1959. However, the use of the internet has meant that controls on the circulation of this material are easier to by-pass as sources may be from outside the UK or in circumstances where prosecution for publication is not feasible. As a result this material has a potentially wide public circulation.

856. There are examples of such images having been advertised as a "legitimate" alternative depiction of child sexual abuse. Viewing such images can desensitise the viewer to

acts of child abuse, and reinforce the message that such behaviour is acceptable. Banning its possession is justified in order to establish clearly and in accordance with the law that it is not. The material is frequently found alongside illegal collections of images depicting real abuse, but currently is returned to the owner after the illegal collections have been forfeited.

857. The offence is required to protect children. The images can be used as a grooming tool, preparing children for acts of abuse. The images can also be used to catalogue real abuse of real children. Moreover, the provisions protect children or vulnerable adults who are more likely to come across this material involuntarily because of the amount of this material on the internet.

858. The material to be covered by this offence is at the extreme end of the spectrum of material which is likely to be thought abhorrent by most people. The three requirements for an image to be prohibited by this offence (the image is pornographic, it is of one of the prescribed acts, and it is grossly offensive, disgusting or otherwise of an obscene character) sets a high threshold. The threshold is significantly higher than that required for photographs, pseudo-photographs (and derivatives of photographs and pseudo-photographs) of children under the Protection of Children Act 1978 and the Criminal Justice Act 1988, which must be indecent. Moreover, many of the images will depict illegal acts. Prosecutions must be instituted by or with the consent of the Director of Public Prosecutions.

859. Clause 54 sets out defences to the offence. These are the same as those available for the offence of the possession of indecent images of children in section 160(2) of the Criminal Justice Act 1988 and the offence of possession of extreme pornographic images in section 65 of the 2008 Act. The Government considers that placing a legal burden on the defendant is compatible with the presumption of innocence contained in Article 6(2). Offences of strict liability do not violate Article 6(2) providing that the prosecution retains the burden of proving the commission of the offence which will be the case here.

860. These are matters which will be peculiarly within the knowledge of the defendant, who will be in a position to explain, for example why he or she was in the possession of the image if he is relying on the defence of legitimate reason, or that he or she had not seen the image, nor did he or she know or believe it to be a prohibited image. The particular circumstances concerning how and why the defendant came into possession of the images will be peculiarly within the defendant's own knowledge, and it does not place an onerous burden upon him or her to prove it. He or she will have ready access to such information. As with all such cases, the standard of proof will be the balance of probabilities.

861. There is also an exclusion for unaltered versions of films which have been classified by the body designated under the Video Recordings Act 1984, currently the BBFC. This exclusion extends to versions of such films recorded from the television, and includes recordings with, for example, advertisements or other breaks in transmission. This will provide protection and certainty for those people purchasing or recording such films that they are not committing an offence so long as they do not alter the film in any way.

862. Clause 59 extends the defence of marriage and other relationships in section 160A of the Criminal Justice Act 1988 and section 1A of the Protection of Children Act 1978 to indecent pseudo-photographs. These each give rise to an issue under Article 6(2). In each case, the Government considers that placing a legal burden on the defendant is compatible with the presumption of innocence. In particular, the prosecution retains the burden of proving the commission of the offence. These are matters which will be peculiarly within the knowledge of the defendant, and it does not place an onerous burden upon him or her to prove it. He or she will have ready access to such information. As with all such cases, the standard of proof will be the balance of probabilities. The defences are as follows:

- As for indecent photographs, the defendant must prove that the pseudo-photograph was of the child aged 16 or over, and that at the time of the offence the child and he were married or civil partners of each other or lived together as partners in an enduring family relationship. The pseudo-photograph must not show a person other than the child and the defendant. Under section 160A of the Criminal Justice Act 1988, the defendant must also show that there is enough evidence to raise an issue as to whether the child consented to the pseudo-photograph being in the defendant's possession or as to whether the defendant reasonably believed that the child consented. If these conditions are met the prosecution must prove that the child did not consent and that the defendant did not reasonably believe that the child consented.

- For offences under section 1(1)(a) of the Protection of Children Act 1978, the defendant must also show that there is enough evidence to raise an issue as to whether the child consented to the pseudo-photograph being taken or made or as to whether the defendant reasonably believed that the child consented. If these conditions are met the prosecution must prove that the child did not consent and that the defendant did not reasonably believe that the child consented. For an offence under section 1(1)(b) the prosecution must prove the showing or distributing was to a person other than the child.

- For an offence under section 1(1)(c) of that Act the defendant must also show there is enough evidence to raise an issue as to whether the child consented or the defendant reasonably believed the child consented to the pseudo-photograph being in the defendant's possession, and whether the defendant had the pseudo-photograph in his possession with a view to distributing or showing it to a person other than the child. If these conditions are met the prosecution must prove that the child did not consent, that the defendant did not reasonably believe that the child consented or that the defendant had the pseudo-photograph in his possession with a view to its being distributed or shown to anyone other than the child.

**Hatred against persons on grounds of sexual orientation**

863. Clause 61 amends Part 3A of the Public Order Act 1986 by removing section 29JA (protection of freedom of expression). That section relates to the offences of stirring up hatred on grounds of sexual orientation. It provides that that "for the avoidance of doubt" discussion

or criticism of sexual conduct or practices or urging others to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

864. The Government considers that the offences of stirring up hatred on grounds of sexual orientation are compatible with Conventions rights regardless of section 29JA.

865. The offences engage in particular the right to freedom of thought, conscience and religion under Article 9(1) and the right to freedom of expression under Article 10(1). The Government considers that interference with these rights is justified under Articles 9(2) and 10(2) respectively. The offences are prescribed by law, and so capable of being justified if they have a legitimate aim and are a proportionate response to a pressing social need to advance that aim. The legitimate aims are the protection of the rights of others to be free from abuse, and the protection of public order.

866. As was made clear when the offences were created (by the 2008 Act), the Government considers that a compelling case can be made that there is a pressing social need because of the evidence of hatred against homosexual people being stirred up by, amongst others, some extreme political groups and song lyrics, and of widespread violence, bullying and discrimination against homosexual people. The Government considers that legislation which prohibits the stirring up of hatred will deter such behaviour and send a message that it is unacceptable, leading to homophobic hatred becoming less widespread and in turn reducing the number of incidents of violence, bullying and discrimination.

867. Examples of written material appearing to incite hatred in the form of homophobic lyrics, leaflets and magazines was provided to the Government at the time of the creation of the offence. In addition, oral evidence to this effect was provided to the Public Bill Committee by the gay rights lobby organisation Stonewall on 16th October 2007 (Official Report col. 74 to 86). The Government believes it is widely accepted that incidences of homophobic behaviour (including violence, bullying and discrimination) are relatively commonplace. It has also received representations from Stonewall (including "The School Report", 2007, on bullying in schools) and the Lesbian, Gay, Bisexual and Transgender community safety organisation Galop. The Joint Committee on Human Rights (paragraph 1.62, Fifth Report, session 2007-08) agreed that there is considerable evidence that homosexual people in particular are often the subject of material inciting people to violence against them.

868. The Government remains persuaded that there is a link between the availability of material liable to incite homophobic hatred and levels of homophobic violence, and considers that the offences fill a gap that existed in the law in that incitement which is directed at stirring up hatred against the community as a whole rather than specific offences against individuals was not covered.

869. In relation to the offences being a proportionate response to the need, the offences are modelled on the existing offences of incitement to racial and religious hatred. The latter have only relatively recently been brought into force, but the former are relatively long-standing

provisions whose ECHR compatibility has not been successfully challenged. Moreover, in two key respects the sexual orientation offences represent a lesser interference with the Convention rights than the racial hatred offence. First, they apply only to "threatening" conduct rather than "threatening, abusive or insulting" conduct, and secondly they apply only to conduct "intended" to stir up hatred rather than conduct intended or "likely" to stir up hatred. The offences of stirring up racial hatred have been prosecuted only rarely with a total of 84 prosecutions (resulting in 60 convictions) between 1988 and 31st August 2007, and it can reasonably be anticipated that the figures will be even lower for the new, narrower offences.

870. The Government considers that the "protection of freedom of expression" provision in section 29JA is unnecessary for achieving compliance with Article 10. The HRA ensures that an appropriate balance is struck between freedom of speech and the prevention of homophobic incitement, and there is no need in an offence which applies only to "threatening" conduct intended to stir up hatred for a saving for discussion and criticism of sexual conduct or practices or urging others to refrain from or modify such conduct or practices. The Government also notes that the section is expressly stated to be "for the avoidance of doubt".

871. The Government notes that the Government's original proposals for the offences introduced in the Criminal Justice and Immigration Bill did not include the provision that now forms section 29JA. The Joint Committee on Human Rights' conclusion on the Government's original proposals in respect of protection for freedom of speech was that "[w]e welcome the fact that the new offences concerning incitement to hatred on grounds of sexual orientation are narrowly defined so as to apply only to threatening words or behaviour intended to incite hatred against people on the basis of their sexuality. In our view this provides an appropriate degree of protection for freedom on speech" (paragraph 1.64, Fifth Report, session 2007-08). The original proposals were also welcomed by the Chair of the Equality and Human Rights Commission, who observed "It's essential we balance freedom of speech against any need for anti-incitement legislation. Having looked at the government's proposals we think they have struck the right balance, the Commission is persuaded the proposals are fair and needed".

872. It is also relevant to note that, as with the existing offence of incitement to racial hatred, any prosecution in relation to homophobic hatred will require the consent of the Attorney General. In taking this decision the Attorney General as a public authority will be obliged by the HRA to consider the ECHR. Similarly, in a prosecution for homophobic incitement courts will be required to act in a way that is compatible with Convention rights and interpret legislation as far as is possible compatibly with such rights. The Government considers that the offences and, in particular, the term "hatred" can, and will, be interpreted by the courts in a way that respects Convention rights.

873. In considering the offence the Attorney and the courts would have regard to Articles 9, 10 and 17. Article 9 includes a right to manifest one's religion. This includes the right to proselytise which the Government considers can be carried out without stirring up hatred.

874. The effect of Article 17 is to deprive people of the freedom of expression under Article 10 insofar as they use that freedom in a matter which is "incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination", as the ECtHR held in *Norwood v United Kingdom* 89 (Application No. 23131/03, decision of 16 November 2004, unreported). The Government notes the Joint Committee on Human Rights' previous conclusion that "Where words, signs, etc., are used with the intention of stirring up religious hatred, we cannot imagine circumstances in which such behaviour would fall outside Article 17" (paragraph 2.61, Eighth Report, session 2004-05) and considers that this view has equal force in respect of the new offence, which, as previously noted, will apply only in cases of intentional incitement.

**Part 3: Criminal evidence and procedure**

**Anonymity in investigations**

875. Chapter 1 of Part 3 creates a new kind of anonymity order intended to apply to a witness during the investigation of a gang-related homicide caused by gun or knife. The order is different in kind to a witness anonymity order obtained for the purposes of a trial. The purpose of the new order is to encourage witnesses to come forward and give information to investigators where they would not otherwise do so because of a fear of repercussions should it become known they have been in touch with investigators.

876. It is arguable that this Chapter gives rise to issues under Articles 2, 6 and 10. However, in the Government's view either those rights are not engaged or there is sufficient protection such that no impermissible interference with the right will occur.

877. Tackling gang-related gun and knife crime is a top priority for the Government. Whilst gang-related violence remains a rare and localised problem in the country as a whole, for the communities and families affected it is devastating. The Government's Action Plan for Tackling Violence 2008-11, published in February 2008, includes a commitment to reduce gun and knife crime and gang related violence. An important element in the Government's approach is to ensure that those tasked with investigating or prosecuting certain offences have the right tools to do so and that the perpetrators are brought to justice as soon as possible.

878. Witnesses are vital in providing assistance to the police and in giving evidence at trial. However, there is increasing concern about the difficulty in investigating and prosecuting the perpetrators of gang-related gun and knife crime because of the reluctance of witnesses to come forward through fear of reprisal. In some cases this has resulted in serious crimes remaining unsolved or violent perpetrators remaining at large for longer than they should because of lack of evidence to identify a suspect or to bring charges. This is a particular problem in gang related gun crime. Police investigations into the shooting of Jesse James in Moss Side in Manchester and Rhys Jones in Croxteth in Liverpool, for example, were hindered by the reluctance of witnesses to provide information to the authorities. The

intention of the provisions is to provide further tools to investigators and further protection for witnesses in addition to what is already available.

879. Clauses 62 to 64 make an investigation anonymity order available only for an investigation into a qualifying criminal offence. The offences are limited at this stage to gang-related murder or manslaughter caused by gun or knife. In addition, the order may only be granted once the conditions set out in clause 66 have been satisfied, further limiting their availability. The conditions in clause 66 seek to capture the concept of a "gang". There will, however, be a power to extend the offences where, or circumstances in which, the order might be available.

880. The availability of an investigative tool in relation to some deaths but not others arguably gives rise to certain Article 2 issues. That Article engages not only the State's negative obligation to refrain from taking life but also a positive obligation on the State to protect life. In that regard the law must ensure that unlawful killing is subject to criminal sanctions, but, more importantly in the context of these proposals, that all deaths are properly investigated. There is an argument that relatives of those who have died (who would be regarded as victims for the purposes of Article 34) could complain that the absence of an investigative tool which, if it were available, could assist in the investigation of the death of their relative amounts to an interference with their Article 2 rights because the State has failed to conduct a proper investigation into the death.

881. In the Government's view, such an argument is very unlikely to succeed. Nothing in the Bill affects the continuing duty of the State to investigate all deaths. Current investigative standards will not be lowered. The investigative order is an additional tool to assist in an increasingly difficult gang-related problem. The Government does not consider that the availability of an additional tool by implication means that all investigations which do not have that tool at their disposal do not comply with Article 2. In considering whether or not the State has complied with its Article 2 obligations a court must consider the case on its merits. A thorough investigation without the use of an investigative anonymity order is entirely capable of meeting Article 2 standards.

882. An investigation anonymity order continues to have effect in relation to an individual until it is discharged. However, if the individual is to be called as a witness at trial the order will not be sufficient to allow the witness to give anonymous evidence. In such circumstances a trial anonymity order under the provisions of Chapter 2 of Part 3 of the Bill will need to be sought. In the Government's view, the Article 6 considerations which apply to trial anonymity orders will not apply to investigation anonymity orders. If it has not been possible to obtain a trial anonymity order in relation to a witness in whose favour an investigation anonymity order is in force, but that witness is compelled to give evidence in his or her real identity the investigative order will not operate to prevent such compulsion.

883. An order will be breached where a person knows the witness has been in contact with investigators and that an investigation anonymity order has been made in that witness's

favour, discloses to another person information likely to lead that person to identify the witness as having assisted or been willing to assist in that investigation (clause 64). Breach will be punishable under a new criminal offence. Where the investigation anonymity order has been breached but it is nevertheless to continue in favour of the witness (that is, it is not discharged) Article 6 is likely to be engaged during the prosecution of the breach if the court in which the breach is being prosecuted is to maintain anonymity (for example by a hearing in camera, or the imposition of reporting restrictions) because for example the exception – that disclosures required by law will not breach an investigation anonymity order – cannot be relied upon.

884. Article 6 provides an accused in criminal proceedings with the right to be tried in a public court (*Deweer v Belgium* (1980) 2 EHRR 439). This right will conflict with the witness in whose favour the investigation anonymity order has been made. However, the right to a public hearing is subject to the restrictions in Article 6(1). There will be no explicit provision to the extent that an accused's hearing must not be in open court, so it will be for the court to decide – as it is required to do – whether restricting the right to a public hearing complies with Article 6(1). Where the prosecution considered that an investigation anonymity order must be maintained it would seek to argue that the right to a hearing in public may be abrogated "to the extent strictly necessary… in special circumstances where publicity would prejudice the interests of justice". Where a court decided that it was not necessary the prosecution would need to consider whether to proceed. It may also be possible for the court to use common law powers to order that the witness should be referred to by a pseudonym, as in blackmail proceedings.

885. Article 6 also requires that there be "equality of arms" between the parties in order to strike a fair balance and not put one party at a disadvantage compared to the other. This principle may be engaged by the fact that investigation anonymity orders will not be available to the defence. The Government's view is that as investigative orders are designed to assist criminal investigations, which are conducted only by the prosecution, an application by the defence is unlikely. The Government does not consider that the defence is put at any disadvantage by the absence of being able to apply for an investigation anonymity order. In any event, the defence will be able to apply for a trial anonymity order where appropriate.

886. Article 10 guarantees the right to freedom of expression and is a qualified right. It is usually a natural consequence of the making of an investigation anonymity order in respect of a witness that the press or others will be prevented from learning, during the course of the investigation, the identity of a witness. In addition it will prevent the individual in whose favour the order has been made from disclosing information in certain circumstances. Only a judge may make such an order and in accordance with the conditions set out in clause 66 which include that the safety of the informant would be at risk should it become known that informant had been in contact with investigators. The Government is satisfied that the making of orders under such conditions meets the qualifications of Article 10 under which the exercise of responsibilities may be restricted in the interests of national security, public safety, for the prevention of disorder or crime or for the protection of the rights of others.

887. The Bill also makes provision for the discharge of orders for example, where the order is no longer necessary or to enable a witness to publicise their involvement in a particular investigation (clause 68). The court may do so on application by the police or prosecutor, or by the informant to whom the order applies, giving all those who may apply for discharge the opportunity to make representations. This safeguard of judicial control enables the court to consider the general desirability of discharging the order including whether there would be a continuing risk to the informant's safety were the order discharged. To the extent Article 10 is engaged, the Government considers that this mechanism is necessary in pursuance of one or more of the considerations outlined above in Article 10(2) and safeguards the rights of the witness and others in conjunction with rights to freedom of expression.

**Anonymity of witnesses**

888. Chapter 2 of Part 3 concerns the use of anonymous witness evidence at trial. The CEWAA received Royal Assent on 21st July 2008. That Act was brought forward on an emergency basis following the House of Lords' judgment in *R v Davis [2008] UKHL 36* handed down on 18th June 2008. The appeal concerned the use of anonymous witness evidence at trial governed by the common law. The Act provides for the making of witness anonymity orders in criminal proceedings where witnesses are intimidated or where disclosure of identity will cause real harm to the public interest. The purpose of the Act was to replace the rules of the common law considered in the House of Lords judgment with a statutory framework to secure anonymity of witnesses in those proceedings, where to do so will be compatible with the defendant's right to a fair trial guaranteed by Article 6.

889. As the CEWAA was brought on an emergency basis the Government undertook to re-enact its provisions to allow further and fuller Parliamentary debate. (Section 14 of CEWAA made provision concerning the expiry of power to make witness anonymity orders under that Act.) This Chapter fulfils that undertaking.

890. Article 6 is clearly engaged by the provisions of the Bill in relation to criminal trials. The core provisions are substantially the same as those in CEWAA.

891. *R v Davis* concerned the use of anonymous witness evidence at trial governed by the common law. The Court of Appeal's judgment on 19th May 2006 had previously approved the practice of granting anonymity to fearful or intimidated witnesses and held that the Crown Court's inherent jurisdiction at common law to control its own process extended to permitting witnesses to give evidence anonymously. It also concluded on a review of the Strasbourg authorities that witness anonymity is not inconsistent with the right to a fair trial, as guaranteed by Article 6. But the House of Lords held that:

- The erosion of a defendant's right to be confronted by his accusers, as represented by the anonymising measures taken in that case, is not permitted by the common law;

- The use of anonymous evidence in the particular case of *Davis* did not satisfy the requirements of Article 6;

- The use of anonymous evidence which implicates the accused where the anonymity of the witness limits the challenge to the evidence by cross-examination can only be permitted by legislation and not by the courts alone.

892. In his opinion, Lord Bingham cited the common law principle that –

> "Subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence".

893. Their Lordships' judgment makes clear that the courts had gone too far under the common law and had arrived at a position which was irreconcilable with long-standing principle and that any changes in the law on the way that witnesses give their evidence was to be achieved by primary legislation, and cannot be achieved through developments on the common law.

894. The CEWAA therefore replaced the common law rules relating to the power to make an anonymity order in relation to a witness in criminal proceedings with a statutory framework. That framework restored to the criminal courts the power to consider case by case whether it is appropriate and compatible with the requirements of Article 6 for an order for anonymised evidence to be made. This framework draws on the model provided by the New Zealand legislation cited by Lord Bingham in his opinion where the New Zealand legislature has permitted anonymised evidence to be admissible in certain circumstances.

895. Like the CEWAA, the present clauses provide for a "witness anonymity order". This is an order that requires specified measures to be taken to ensure that the identity of the witness is not disclosed, as long as certain conditions, specified in the Bill, can be met. These conditions are –

- the order is necessary –

- to protect the safety of the witness or another person or to prevent serious damage to property ; or

- to prevent real harm to the public interest;

- the effect of the order is consistent with the defendant receiving a fair trial; and

- the importance of the witness's testimony is such that, in the interests of justice, the witness should testify, and the witness would not testify if the order were not made or

there would be real harm to the public interest if the witness were to testify without the order being made.

896. Of fundamental importance to Article 6 are the specific guarantees in the criminal context. Article 6(3)(d) guarantees the right of the accused to examine or have examined against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him. This right applies to prosecution witnesses and to any co-accused of the defendant.

897. Although their Lordships found, on the facts of *Davis*, that the measures taken in the specific circumstances of that case infringed Article 6, the statutory framework in CEWAA and in this Bill include safeguards to the exercise of this statutory power which in the Government's view will ensure that the defendant's right to a fair trial will not be prejudiced. These conditions are discussed below. Lord Mance in his conclusions in *Davis*, noted that "It may well be appropriate that there should be a careful statutory modification of basic common law principles. It is clear from the Strasbourg jurisprudence discussed in this judgment that there is scope within the Human Rights Convention for such modification".

898. The ECtHR approach is that "the admissibility of evidence is primarily a matter for regulation by national courts" (*Davis*, paragraphs 25 and 66). The key factor is whether "the proceedings as a whole, including the way in which evidence was taken, was fair" (paragraph 75 and considering *Doorson v The Netherlands* (App No 20524/92) (1996) 22 EHRR, paragraph 67, *Van_Mechelen v The Netherlands* (App Nos 21363/93,21364/93 and 22056/93) (1997) 25 EHRR 647, paragraph 50 and *PS v Germany* (App No 3390/96) 2001) 36 EHRR 1139, paragraph 19).

899. The House concluded that "[t]he Strasbourg Court has repeatedly stated that the use of anonymous evidence is 'not under all circumstances incompatible with the Convention'". Importantly, Lord Mance held that it is not certain that "there is an absolute requirement that anonymous testimony should not be the sole or decisive evidence, or whether the extent to which such testimony is decisive may be no more than a very important factor to balance the scales" (paragraph 89). He also cautioned against "treating the Convention, or apparently general statements by the Strasbourg courts in different contexts, as containing absolutely inflexible rules" (paragraph 90).

900. Accordingly the CEWAA provided, as do these new clauses, a statutory framework for the consideration of the use of anonymous evidence, where the court seized of the matter, which is in the best position to assess the impact on the case, is satisfied that the safeguards are met. An application can be made in respect of a prosecution witness or in respect of a defence witness.

901. The Government considers that the Bill is compatible with the Convention. One of the principal conditions which must be satisfied if an order is to be granted is that taking

measures must be consistent with the defendant's right to a fair trial (clause 75(2) and (4)). In addition, the Bill also –

- sets out the only circumstances where consideration can be given to a witness anonymity order. These are –

    - where the court is satisfied that order is necessary to protect the safety of a person or to prevent any serious damage to property. This is intended to address what the House of Lords described as the "undoubted – and there is reason to think growing – threat to the administration of justice posed by witness intimidation" (*Davis* paragraph 98); or

    - where the court is satisfied that the order is necessary to prevent real harm to the public interest. This is intended to address the situation where it is vital for their security or for ongoing operational effectiveness that the identity of undercover police officers or agents is withheld.

- requires that the Court is satisfied that the importance of the testimony is such that in the interests of justice the witness ought to testify. This means that in addition to ensuring that the defendant receives a fair trial the court must also consider an interests of justice test.

902. The Bill also sets out the relevant considerations to which the Court must have regard before deciding that the statutory conditions are met, and for deciding what measures might be appropriate. Of particular relevance to the Article 6 specific guarantee, and the House of Lords' judgment on the facts of *Davis*, are the considerations dealing with –

- the witness' credibility; and

- the extent to which the witness' evidence can be properly tested (whether on the grounds of credibility or otherwise).

903. These considerations are designed to ensure that the trial court considers whether the specific guarantee in Article 6(3)(d) can be met in the circumstances of the particular case before it if a witness anonymity order is to be made.

904. The Bill also requires that a warning is given to the jury (or to the members of a service court) where evidence has been given pursuant to a witness anonymity order. The judge is required to warn the jury is such terms as he or she considers appropriate to ensure that the defendant's right to a fair trial is not prejudiced.

905. There is a possibility that a particular order might engage Article 10. However, even if it does, the Government takes the view that any interference is justified in order to protect the safety of the witness or others or in order to prevent real harm to the public interest. In any

event, the court remains under the general duty to respect Convention rights and so there is no question of incompatibility.

906. The Bill also makes provision for the discharge or variation of orders giving the parties and witness the opportunity to make representations (clause 79). This safeguard of judicial control enables the questions of safety to the witness and others and the public interest to be considered before discharge of an order, for example to enable a witness to publicise their involvement in a particular trial. To the extent Article 10 is engaged, in the opinion of the Government, this mechanism is necessary in pursuance of one or more of the considerations outlined above in Article 10(2) and safeguards the rights of the witness and others in conjunction with rights to freedom of expression.

**Vulnerable and intimidated witnesses**

907. Clause 91 confers a power for a court to make a direction that provides for examination of a defendant during trial to be conducted through an intermediary, that is, a person who is able to help the accused understand questions put to him or her and to communicate to the person asking the questions the answers the defendant gives. The provision applies in relation to vulnerable defendants, that is to say those under 18 whose ability to participate effectively in the proceedings as a witness in court is compromised by his or her level of intellectual ability, or those over 18 who suffer from a mental disorder or who otherwise have significant impairment of intelligence and social function.

908. The court has power to make such directions on the application of the accused. It may grant such direction only if satisfied that the conditions of vulnerability are met and that the making of the direction is necessary in order to ensure the accused receives a fair trial. This trigger linked as it is to those cases where such direction is necessary to ensure a fair trial secures the rights of the defendant and is compatible for the purposes of the HRA and ECHR.

**Live links**

909. Clause 93 amends the Crime and Disorder Act 1998 in relation to the use of live video links for the purposes of preliminary hearings where the accused is at a police station, for continued use of a live link for a sentencing hearing following a preliminary live link hearing, and for sentencing hearings following conviction where it appears to the court before which a person is convicted that he will be likely to be in custody at the time of the sentencing hearing. The amendments remove for the purposes of all three sections the earlier requirement that the accused must consent to the use of a live link for his hearing and the removal of the requirement that the accused must consent to giving oral evidence by live link.

910. Article 6 is engaged in relation to the removal of consent requirements. The Government is however satisfied that the provisions, as amended, are compatible with Article 6:

- For the purposes of these provisions, the accused is to be treated as present in court when, by virtue of a live link direction he attends a hearing through a live link and there is nothing to stop the accused participating effectively in the conduct of his case. (It is also of note that section 57B which concerns the use of a live link for a preliminary hearing where the person is in custody is not subject to any need for consent).

- The court in all three cases retains a discretion whether to give live link directions or hear oral evidence via live link.

- As a further safeguard the court may rescind a live link direction at any time during the hearing.

- Clause 93 also adds to section 57C an interests of justice requirement so that in all situations covered by sections 57C, 57D and 57E the court may not give or continue a live link direction (and in respect of section 57D and 57E hear oral evidence by live link) unless satisfied that it is not contrary to the interests of justice to give the direction. Having an interests of justice test on the face of the Bill acts as a further safeguard.

911. Clause 95 inserts into the Police and Criminal Evidence Act 1984 new provision concerning the search of accused persons attending a police station to attend live link bail. Section 54 of the 1984 Act does not apply to such persons as for the purposes of live link bail they are not to be treated as in police detention. However those attending live link bail do need to enter secure areas in police stations (police custody areas in which the video links are generally found are secure areas) and this provision set outs the powers of constables in that regard.

912. The provision, concerning as it does the search of persons and, where appropriate, the seizure of items, engages Article 8. The provision enables a constable or detention officer to search a person or seize items rather than obliges him to. The Government is satisfied the provision is compatible with Article 8. It enables constables to search in accordance with the law. In the Government's opinion such power is necessary in the interests of the matters referred to under Article 8(2). The clauses also make provision for personal dignity reasons to ensure that the constable carrying out the search must be of the same sex as the person being searched and no intimate searches are permitted.

913. As far as seizure and retention of items are concerned this also engages A1P1. The clauses build in safeguards in this respect. The power is limited to circumstances in which the constable "reasonably believes a thing in the possession of the person ought to be seized" on one or more grounds. Those grounds are that the thing:

- may jeopardise the maintenance of order in the police station,

- may put the safety of any person in the police station at risk, or

- may be evidence of, or in relation to, an offence.

914. The power to retain articles is limited up until the time the person from whom the article was seized leaves the police station save that:

- a constable may retain an article in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence; or

- a constable may retain an item where that item may be evidence of, or in relation to an offence, whether it was seized for that purpose initially or not, for use as evidence at a trial for an offence or for forensic examination or for investigation in connection with an offence, unless a photograph or copy would suffice for that purpose.

915. The clause also preserves the power of a court to make an order under section 1 of the Police (Property) Act 1897. The Government is satisfied the provision is compatible with A1P1, it allows for deprivation of possessions in the public interest and subject to the conditions provided for by law.

**Evidence of previous complaint**

916. Clause 99 amends section 120(7) of the 2003 Act to remove the requirement that "hearsay" statements of complaint concerning an alleged offence need to have been made "as soon as could reasonably be expected after the alleged conduct".

917. Article 6 is engaged. The Court of Appeal has already considered the compatibility of section 114 of the 2003 Act (hearsay statements) with Article 6 in the case of *R v Xhabri* [2006] 1 Cr.App.R. 26, in the context of considering the admissibility of a statement adduced under section 120(7) or in the interests of justice under section 114(1)(d). The proposed amendment has been considered in the light of that judgment. The Court there found no breach of Article 6.

918. The Government considers that these clauses do not affect the compatibility of section 120(7) with Article 6 for the following reasons:

- Statements of complaint would still only be admissible if the maker of the statements is available for cross-examination. This acts as safeguard to the rights of the defence.

- The admission of such statements would also be subject to exclusion by the court under section 126 of the 2003 Act. This acts as a further safeguard.

- Nothing in the clause precludes the court from considering the question of the timing of the statement in deciding what fairness demands from case to case.

919. The fact the court in *R v Xhabri* considered that even if the evidence in that case was not admissible under section 120(7), it would have been admissible anyway under the court's general discretion to admit evidence under section 114(1)(d), also reinforces the view that the proposed relaxation of section 120(7), having regard to the court's power to exclude evidence, is compatible with Article 6.

**Bail**

920. Clause 101(2) would add a further test to be applied by the courts in deciding whether to grant bail to a person charged with murder. In the Government's view, the new provision is consistent with Article 5. That Article, amongst other things, sets out the circumstances in which a person may be detained pending trial. This provision does not affect most of those circumstances, it simply adds a test in murder cases in relation to a particularly serious category of prospective further offences – those which would, or would be likely to, cause harm. The similar test in section 25 of the Criminal Justice and Public Order Act 1994 (as amended) was found by the House of Lords in *O (FC) v Crown Court at Harrow* [2006] UKHL 42 to be compatible with Article 5 rights.

921. Clause 102 would require all decisions on bail in murder cases to be made by a judge of the Crown Court. This would not affect Article 6 rights, and in the Government's view could only give rise to an Article 5 point to the extent that it would mean that a person could be remanded in custody by a magistrates' court without consideration of bail pending their appearance before a Crown Court judge. This sort of approach was found expressly to comply with Article 5 by the Grand Chamber of the ECtHR in *McKay v UK (2007)* 44 EHRR 41, and in any event the Bill makes added provision (unlike in *McKay*) limiting the duration of any further period of remand before bail must be considered. The compatibility of the proposed provision is reinforced by two further points. First, that the discretion of the court to make bail decisions in light of all the circumstances of the case remains largely untouched. Secondly, that reservations expressed by some members of the court in Harrow about the impermissibility of placing a burden of proof on the defendant do not arise here, because the burden here would fall on the Crown. In the Government's view, this provision is therefore compatible with Convention rights.

**Part 5 Miscellaneous criminal justice provisions**

**Treatment of convictions in other member States etc**

922. Clause 128 and Schedule 15 insert new provisions in various Acts to implement the EU Framework Decision 2008/675/JHA of 24th July 2008 on taking account of convictions in the member States of the European Union in the course of new criminal proceedings.

923. The purpose of the Framework Decision is to establish a minimum obligation for member States to take into account convictions handed down in other member States where

such convictions would be taken into account under national law. By virtue of Article 3.2, this requirement applies at the pre-trial stage, during the trial itself and at the time of execution of the conviction, particularly as regards the rules on provisional detention (essentially our bail law), the definition of the offence, the type or level of sentence and the rules governing the execution of the decision.

924. These provisions constitute the UK implementation of certain international obligations. The Framework Decision is a decision by the Council of the European Union. Recital (12) also provides that "This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty of European Union and reflected in the Charter of Fundamental Rights of the European Union". The Government agrees.

**Criminal Justice Act 2003 sections 103 and 108(2)**

925. These sections concern previous convictions that can be taken into account in establishing a person's "bad character". Changes have been made to this Act only to clarify the ambit of the existing provisions for the purposes of implementation, rather than to alter them.

926. Courts already are able to have regard to previous EU convictions (*R v Kordasinski* [2006] EWCA Crim 2984). Because the Government considers that these changes only clarify the Act, rather than amend it substantively, there should be no ECHR issues arising. In matters of evidence generally, the ECtHR has adopted the principle that the rules for admissibility of evidence are primarily a matter for domestic law and that the question is whether the trial as a whole has been fair as required by Article 6. There are existing safeguards in the 2003 Act for the courts to exclude evidence of a defendant's bad character if the interests of justice so require.

**Criminal Justice and Public Order Act 1994 section 25**

927. This section places a limitation on the general right to bail in respect of those both charged with and previously convicted of certain offences. The existing section limits the previous convictions to those in the UK. Paragraph 3(2) of the Schedule extends the provision to equivalent convictions elsewhere in the European Union. Article 5 is engaged, but the present changes do not affect the pre-existing position in domestic law, which is that this provision is applied in a way which is consistent with Convention rights (*O(FC) v Harrow Crown Court* [2006] UKHL 42).

**Retention of knives surrendered or seized**

928. Part 4 of the Courts Act 2003 and Schedule 3 to the Justice (Northern Ireland) Act 2004 provide for items carried by individuals entering court to be seized by or surrendered to court security officers. Items are seized or surrendered on safety and security grounds but returned when the individual leaves court, unless the item may be evidence of, or in relation to, an offence. Clauses 130 and 131 amend those provisions by introducing a new scheme that will enable court security officers to retain knives that have been surrendered or seized (clause

132 enables like provisions to those contained in Part 4 of the Courts Act 2003, as amended, to be made in respect of tribunal buildings). The Lord Chancellor is required by regulations to make provision for the procedures to be followed when retaining a knife; the procedure for requesting the return of a knife and the procedure for returning a retained knife. Regulations setting out the period for which unclaimed knives need to be kept before being disposed of and the procedure for disposal can be made under the Courts Act 2003 and Justice (Northern Ireland) Act 2004.

929. Under the new regulations, knives that may be evidence of, or in relation to, an offence, will continue to be brought to the attention of the police who may seize it. A knife that is not seized by the police will remain in the possession of the court until a request for return which complies with the regulatory requirements is received, as will knives that are not unlawful to carry (referred to here as "lawful knives").The scheme which will be set out in regulations, will require that lawful knives are returned within a short period of time of a valid request for return being received, a maximum of 28 days from receipt of the request, thus minimising the period of time that a person is unable to use their knife.

930. Clauses 130 and 131 engage A1P1 since they enable court security officers to retain a person's knife unless and until a request for the return of the knife is received. Since this scheme will enable individuals to retrieve lawful knives that have been retained, it constitutes a "control of use" rather than deprivation. In *Handyside v United Kingdom*[9] the ECtHR held that:

> "The seizure complained of was provisional. It did no more than prevent the applicant, for a period, from enjoying and using as he pleased possessions of which he remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal.
>
> In these circumstances, the Court thinks that the second sentence of the first paragraph of Article 1 does not come into play in this case. Admittedly the expression 'deprived of his possessions', in the English text, could lead one to think otherwise but the structure of Article 1 shows that the sentence, which originated moreover in a Belgian amendment drafted in French, applies only to someone who is 'deprived of ownership'…".

931. A control of use is justifiable if it is done in accordance with law, for the "general interest", and in a way which is proportionate to that policy objective. The Government's view is that the proposals are justified.

932. The policy objective arises from the significant government, public and media concern about knife crime. The core legal policies for tackling knife crime involve policing and sentencing. It is inconsistent with that concern, and with the protection of the public and discouragement of carrying knives and knife crime, for the carrying of knives in and around

[9] (1976) 1 EHRR 737

premises used for the purposes of the criminal justice system to go unregulated. A substantial number of knives are seized or surrendered at courts and the Government wants to discourage people from carrying them when they come to court in whatever capacity.

933. In the Government's view, the proposals would strike a fair balance between individuals' rights and the general interest. This scheme will enable an individual to apply for and retrieve their knife within a short period of time, and so any interference with an individual's property rights is both minor and considered justified since it would be prescribed by law and be proportionate in pursuit of legitimate aims.

934. It is HMCS policy that concealed kirpans (ceremonial swords or daggers worn by Sikhs) with an overall length of not more than 6 inches and a blade length of not more than 4 inches are not seized from individuals entering court. The Government does not consider therefore that Article 9 is engaged by these provisions.

**Part 6: Legal Aid**

935. Clause 133 widens the existing power to make pilot schemes in relation to the CLS. This engages Article 14 on discrimination when taken together with Article 6 on fair trial rights, because the effect of the clause is that legal aid may be available on a different basis in, for example, one area or type of court, or for people selected on a random sampling basis. However, the Government takes the view that the public interest in ensuring that a scheme works well for everyone justifies a pilot scheme which results in different people being treated differently, provided that the scheme is proportionate to the aims and that it lasts only for as long as is necessary to enable the new scheme to be tested and assessed. The Government will have regard to these considerations when making pilot schemes under the new power.

936. The Government also takes the view that although pilot schemes for the CDS are limited to an 18 month period, a 3 year period for CLS pilots is justified and proportionate; as such pilots may involve a wide range of civil cases, many of which will typically last for up to 3 years.

937. Clause 134 clarifies that matters arising from a proposal to establish a business, or a termination or transfer of a business, as well as those arising from the carrying on of a business, are excluded from the scope of funding as part of the CLS. This engages Article 6 in cases where legal assistance is regarded as necessary to a fair hearing. However the Government considers that whilst business cases should not be a priority for legal aid, the availability of exceptional funding for such cases is sufficient to satisfy any concerns.

938. Clause 135 amends the provisions on information requests in the Access to Justice Act 1999 under which the LSC may obtain information from other government departments for the purposes of applying the financial eligibility test for public funding in criminal cases in

magistrates' courts. Those provisions were inserted by section 57 of the 2008 Act and were similar to those in the 2007 Act. The clause extends the power to cases in which information is required for the purposes of contribution orders under section 17A of the Access to Justice Act 1999 and also makes minor amendments such as making it possible for requests to seek information about an individual's past benefit status and employment.

939. The Government takes the same position on this clause as on the similar provisions in the 2007 and 2008 Acts. Although the clause engages Article 8, the Government considers that the disclosure is in pursuit of a legitimate aim within Article 8(2), that is to say the right of the state, for the economic well-being of the country, to require people who can afford to contribute to the cost of legal services provided for them to do so. It also believes that the measure is proportionate by reason of the safeguard of the criminal sanction against using the information for purposes other than those permitted by the clause.

940. Clause 136 and Schedule 16 deal with the enforcement of orders requiring individuals to contribute to the legal aid costs of their Crown Court cases. There is one aspect of these provisions, the introduction of motor vehicle orders, which engages A1P1. A motor vehicle order is an additional method of enforcement under which a vehicle belonging to an individual who has failed to pay his contribution may be clamped and sold, with the proceeds of sale being applied to discharge his liability. The clamping and sale of a vehicle would amount to a control of the use of property and deprivation of property. The Government is of the view that a sale is a deprivation of property "in the public interest" under the first paragraph of A1P1 and that a clamping order is a control of use "in accordance with the general interest" under the second paragraph of A1P1, because they relate to the payment of a debt and because of the underlying policy justification of contribution orders, that those who are able to pay for or contribute towards the cost of their publicly funded representation should do so.

941. Further, the second paragraph of A1P1 also permits a state to enforce such laws as it considers necessary to secure the payment of taxes "or other contributions". "Contributions" includes compulsory contributions to state benefits (*Van Raalte v Netherlands* [1997] 24 EHRR 503) and in the Government's view it would be reasonable to treat contributions towards the costs of a person's legal aid in the same way.

942. Although the whole of A1P1 has to be read in the light of the principle of fair balance and proportionality, in the Government's view the restriction to cases in which a court has to be satisfied that the individual has wilfully refused to pay or been culpably negligent in not paying renders the provisions proportionate (see the relevance of the fault of the owner of the property in cases of seizure of property referred to in *AGOSI v UK* [1987] 9 EHRR 1). Motor vehicle orders may only be made by a court, which has a discretion whether or not to make an order in the light of the defendant's circumstances. It would also be possible to seek judicial review of the court's decision or to appeal by way of case stated. Similar provisions are contained in the Courts Act 2003 in respect of the non-payment of fines.

**Part 7: Criminal memoirs etc**

943. Part 7 empowers an enforcement agency to apply to the High Court for an "exploitation proceeds order" in respect of qualifying offenders who have obtained any benefit from the exploitation of material pertaining to a relevant criminal offence. The provisions also apply to Scotland and Northern Ireland. In the case of Scotland an application for an Order would be made to the Court of Session. In Northern Ireland, the application is made to the High Court in Northern Ireland. If made, an Order would require the offender to pay such benefits to the enforcement agency, which must pay the sum into the Consolidated Fund. Interest is payable on sums not received by the required date. These proposals are likely to engage Article 10 and A1P1.

944. A qualifying offender is a person who has been convicted of an offence by a UK court or has been found not guilty by reason of insanity or found to be under a disability when committing the offence. A UK national or resident convicted of an offence abroad where that offence would have been an offence in the UK both at the time it was committed and when the application for the order is made is also included, as are convictions for a UK service offence and their foreign equivalents.

945. A relevant offence is (a) the offence by which the person is a qualifying offender, (b) an offence which was taken into consideration by a court in determining the sentence of an offence within (a), or (c) an offence committed by another person which is associated (in a prescribed way) with an offence within (a) or (b).

946. The exploitation of material pertaining to a relevant offence may be by any means, including publication of any material in written or electronic form, the use of any media from which visual images, words or sounds can be produced and live entertainment, representation or interview. The person is to be regarded as having derived a benefit if they secure the benefit either for themselves directly, or for another person.

947. If it makes an order, the court has a discretion as to the "recoverable amount". But this must not exceed the lesser of the total value of the benefits identified and the "available amount". The latter is the aggregate value of the respondent's relevant assets, any benefits secured for third parties and the value of such relevant gifts made by the respondent as the court considers it just and reasonable to take account of. The recoverable amount may be nominal.

948. In deciding whether to make an order and in setting the recoverable amount, the court must consider certain specified matters and may take account of any other matters that it considers relevant. The former include the nature and purpose of the exploitation, the degree to which the relevant material was integral or of central importance to the activity or product, the extent to which the activity or product is in the public interest, any social, cultural or educational value, the seriousness of the offence in question and the extent to which the victim of the offence, their family or the general public is offended by the exploitation.

949. Existing powers of investigation under Part 8 of POCA will apply. The enforcement agency will be able to use production orders, search and seizure warrants, disclosure orders, customer information orders and account monitoring orders. The scheme also allows the court making an exploitation proceeds order to make an additional proceeds reporting order if the likelihood of the respondent obtaining further exploitation proceeds from a relevant offence is sufficiently high to justify it.

950. It is arguable that Article 10 could be engaged because the scheme might deter people from writing or speaking etc about their offences, thus limiting that person's freedom to impart information and the rights of others to receive it. If Article 10 is engaged, the Government considers that any interference is justified. Article 10 is a qualified right and may be subject to restrictions that are prescribed by law and necessary in a democratic society in pursuance of a legitimate aim.

951. These proposals will be prescribed by law with precision in primary legislation. Preventing criminals from profiting from their crimes by receiving benefits for, for example, writing books has the legitimate aim of protecting the rights of others (including the victims of those crimes and their families) and protecting morals. They meet the pressing social need to allay public concern about criminals profiting from their criminal behaviour, and are both necessary to achieve that aim and proportionate in doing so. The scheme only relates to those who have committed crimes and would not prevent publication of relevant material but provide for a means for the benefit of publication to be recovered. Only the High Court can make an order and determine the amount payable under an order on an application. In doing so it must not only act in a way which is consistent with Convention rights, but will be expressly required to consider factors including any public interest in the publication and any social, cultural or educational value, and may also consider other relevant factors.

952. Any order would engage the A1P1 rights of the person against whom it is made. However, the Government considers that the interference would not infringe those rights. States have a broad margin of appreciation in determining the balance between an individual's peaceful enjoyment of his possessions and the interests of society generally. For the reasons given above, the Government considers that the proposals strike a fair balance between the right of the individual and the general principle that a criminal should not profit from his or her own crime.

953. These provisions are therefore consistent with Convention rights.

**Part 8: Data Protection Act 1998**

954. Clause 156 amends the 1998 Act to confer power on the Information Commissioner to conduct mandatory assessments of compliance with the data protection principles. On commencement, only Government departments can be the subject of such assessments – a term which covers both ministerial and non-ministerial departments. Other public authorities such as local authorities, certain NHS bodies and certain police bodies can be brought within

the remit of assessment notices through the order-making power provided by section 41A(2)(b).

955. The clause requires the Information Commissioner to issue guidance, that must be approved by the Secretary of State, on how he will exercise these new powers. It is likely that the Information Commissioner's new powers will involve the employees of a public authority having to provide information or answer questions. As those employees act as the agents of the public authority, who itself does not enjoy human rights, it is unlikely that the human rights of the employee will be engaged. No employee will be required to answer questions and so there is no risk of infringing the privilege against self-incrimination. However, if an employee is asked questions about or asked to provide information about his or her work within the public authority this may in rare cases engage Article 8. If Article 8 is engaged it is considered that any interference can be justified under Article 8(2). The provisions will appear in the 1998 Act and so this will satisfy the requirement of being in accordance with the law. The Government further considers that any interference that did occur would solely be the result of the pursuit of the legitimate aim to provide the most comprehensive protection of the data rights of others as the Information Commissioner will be considering whether there has been compliance with the data protection principles by the public authority. The data protection principles are compulsory rules on the handling of personal data that are essentially aimed at the protection of the Article 8 rights of individuals. Finally, it is considered that the powers are necessary in a democratic society, in that they are a proportionate response to a legitimate aim. The reasons for this are as follows. First, the Information Commissioner's powers will be limited: he will not be able to force entry to premises, search premises, take material or equipment away or retain it. Secondly, employees will be asked questions and to provide information in their role as an employee of the public authorities rather than personally. Thirdly, employees will not be obliged to answer questions or provide information. Fourthly, the Information Commissioner is a public authority that must act in accordance with the HRA.

956. Clause 158 and Part 3 of Schedule 18 provide for the amendment of the Information Commissioner's powers to serve "Information Notices" and "Special Information Notices" under sections 43 and 44 of the 1998 Act respectively.

957. Under the 1998 Act as currently enacted the Information Commissioner can require data controllers to provide him or her with certain specified information as a part of the Information Commissioner's role of enforcement of the 1998 Act. The provisions of this bill set out above modify these powers.

958. Sections 43 and 44 of the 1998 Act currently restrict the Information Commissioner to requiring information of a type the Information Commissioner has "specified" in an Information Notice. Thus whilst the Information Commissioner could request that the information is provided orally, the current mechanics of the system are such that any oral answers given are likely to be scripted replies to the "specific" information requested in the notice. This proposal allows the Information Commissioner in the Information Notice to

request either that specific information is provided to him, or that the data controller is to furnish the Information Commissioner with information falling within a category of information specified or described in the information notice.

959. Secondly the current powers do not give the Information Commissioner explicit power to specify the time or the place that the information requested must be given. The Information Commissioner can only request that an Information Notice be satisfied before the expiry of a certain period. This amendment will allow the Information Commissioner to specify a time or a place in addition to the existing power that the Information Commissioner can require that an information notice should be satisfied within a specific period of time.

960. Article 8 is arguably engaged in relation to these amendments to the 1998 Act. The powers being amended apply to data controllers as a group. Some data controllers are natural persons, and so the ability to require information to be provided by those persons at a specific time and place could impinge upon a person's right to a private and family life because it requires the presence, participation and answering of questions by that person[10]. Even where the data controller is not a natural person, it is still arguable that Article 8 is engaged because it is the employees of the data controller who will be obliged to actually satisfy the requests for information. They benefit from Article 8 in their own right and so it is arguable that Article 8 is engaged, not because of the effect of the provision on the data controller but because of the effect upon his or her employees.

961. Because the powers provided by sections 43 and 44 will continue to be exercisable only when the Office of the Information Commissioner is either acting upon a request to investigate particular processing or is investigating compliance with the data protection principles, the Government considers that any interference with an individuals' private and family life is proportionate and necessary in the interests of the protection of the rights and freedoms of others because it is a necessary part of the data protection regulatory and enforcement regime.

962. As is clear, the power to request information in the circumstances described is already in existence. The effect of the clause here is limited to altering the manner in which the power can be used. Though Article 8 is engaged by the fact that potentially the satisfying of the request involves interfering with the right to a private and family life, such interference will be in accordance with the law.

963. Any interference would also only be the result of the pursuit of the legitimate aim to provide the most comprehensive protection of the data rights of others and the prevention of data crimes such as the wrongful disclosure of confidential information. First, we believe that

[10] The ECtHR has found Article 8 to be engaged in the compulsory questioning of individuals which does not lead to a criminal charge (*McVeigh v UK* 8022/77 18th March 1981), the compulsory requirement to provide information to a census (9702/82 (Dec.) October 6, 1982, 30 DR 239), and the legal obligation to provide information in response to specific queries of a tax authority (9804/82 (Dec) December 7, 1982 31 DR 231).

the amended section is necessary in a democratic society for the purpose of the protection of the rights and freedoms of others. It is only by ensuring that the Information Commissioner has a sufficient range of enforcement powers that the public can be sure that the personal data of individuals within our society is sufficiently protected from and safeguarded against the negligent and/or the malicious use of that information to the detriment of the public. This is part of a package of enhancements to the enforcement and compliance powers of the Information Commissioner that were assessed as being both desirable and necessary in a recent public consultation.[11] Secondly we consider this extension to be necessary in a democratic society for the purposes of preventing and prosecuting crime. The power to ask un-scripted questions that must be answered gives the Information Commissioner a powerful investigatory tool, that can act both as a deterrent as well as a practical mechanism supporting enforcement actions and prosecutions (whilst restricted to only directly providing evidence for a very limited category of prosecutions).

964. This enhancement to the powers of the Information Commissioner is necessary and proportionate for a number of reasons. First, it remains the case that these powers can only be used by the Information Commissioner in the limited circumstances where he has either received a request to investigate or where he has reasonable requirement to determine whether there has been a breach of the data protection principles. Consequently the extended powers are equally restrained in application to these limited scenarios, where their use is entirely appropriate.

965. Secondly, because the amendments do not alter the governing structure of these powers their exercise by the Information Commissioner is subject to appeal to the Information Tribunal. The third reason that this matter can be considered proportionate, is that the Information Commissioner is a public authority and so his actions (including the exercise of these new extended powers) are subject to the usual public law scrutiny of the HRA and the process of Judicial Review. Thus the use of these powers is properly scrutinised by both the Tribunal and the Courts, thus ensuring that they are only used appropriately. Fourthly, the Bill specifically recognises these provisions raise issues in relation to the privilege against self-incrimination, by making explicit statutory safeguards for this principle. Lastly, this particular amendment can be considered to be both proportionate and necessary because of the fundamental obligation upon the Information Commissioner to protect the privacy rights of the public generally. Therefore when balancing the potential infringement of the Article 8 rights of the limited number of individuals who will be subjected to this new power, against the public interest in ensuring that the Information Commissioner is provided with sufficient and appropriate tools so that he is able to properly protect personal data, it is clear that this clause represents a proportionate and necessary amendment to the 1998 Act.

966. Therefore the Government considers that the extension of these existing powers is proportionate and necessary in order to bring the Information Commissioner's powers in line

[11] http://www.justice.gov.uk/docs/information-commissioner-consultation-responses.pdf

with that of other regulators and to provide him with the proper tools to enforce the data protection regime.

967. A1P1 is also engaged. It is established legal principle that items of intellectual property such as licences[12] and trademarks[13] can be considered property in relation to this right. Therefore it is possible for specific types of information to amount to property within the meaning of the ECHR. As the Information Commissioner under the provisions can request the provision of "information", it is possible depending on the nature of the information that A1P1 would be engaged. Because the 1998 Act requires the Information Commissioner to be "furnished" with the information requested it is possible (particularly if there is only one copy of the information or if it is of particular significance) that satisfying the Information Commissioner's request could amount to an interference with the owners right to peaceful enjoyment of his possessions. In the majority of cases the Information Commissioner will be provided with a copy of the information and no issue is likely to arise. However where an interference has arisen, we argue that the interference would be justified as the enforcement of a law deemed "necessary to control the use of property in accordance with the general interest". The amendment to this section does not in anyway expand the effect this section already has on the A1P1 rights of individuals; additionally it can be considered a proportional measure under that Article in relation to the provisions of Article 8. Therefore the Government considers that the amended section remains compatible with A1P1.

968. Clause 158 and Part 4 of Schedule 18 make various amendments to the 1998 Act. These include necessary consequential amendments relating to the expanded questioning powers granted to the Information Commissioner. They are all aimed at protecting the Article 6 rights of individuals who are questioned by the Information Commissioner under his extended powers. Using those extended powers a person could be required by the Information Commissioner to provide written or oral information that could incriminate themselves.

969. Paragraphs 9(1) to (3), 10(1) to (3) and 11 of Schedule 18 provide for additional specific exceptions to be made to the general rule against self incrimination. Under the existing legislation a data controller served with an information notice, a special information notice, and/or a subject access request is not obliged to provide information to satisfy the notice or request if the revelation of that information would potentially incriminate the data controller. However, under the existing legislation the data controller cannot withhold the information under this section if the potential incrimination relates to an offence under the 1998 Act. The paragraphs of the Bill set out above widen this exception to also include the offence of false statements made otherwise than on oath (as well as the Scottish and Northern Irish equivalent offences). The extension of the exception is necessary because were such information excluded from being evidence it would necessarily be impossible to prosecute this offence where the offence came to light as a result of the use of the Information

[12] See *Von Maltzan and others, Von Zitizewitz and others and Man Ferrostal* and *Alfred Topfer Stiftung v Germany* 71916/01 2nd March 2005.
[13] See *Anheuser-Busch Inc v Portugal* 73049/01 [2007] 45 EHRR 36

Commissioner's powers. The false statement offences can be committed by a Data Controller making a false declaration on his registration form. If this is suspected the Information Commissioner could issue an Information Notice requesting information as to the Data Controllers processing activities to discover the true situation. Were the Data Controller able refuse to comply with the Information Notice, it would be largely impossible for the offence to ever be successfully prosecuted. The reason being that the information concerned is an essential part of the offence, without that information being available the offence could not exist. It is therefore proportionate and strictly necessary that in such cases the information concerned is capable of being used as evidence in prosecuting these limited offences.

970. The other paragraphs in Part 4 of Schedule 18 provide that any statement provided to the Information Commissioner under the amended powers in sections 43 and 44 of the 1998 Act to require the provision of information under coercion, cannot be used as evidence in prosecuting the maker of that statement for any offence under the 1998 Act[14] unless the maker gives evidence inconsistent with the statement and evidence is either adduced or a question is asked relating to it by or on behalf of the maker of the statement. The paragraphs are therefore aimed at protecting a person's privilege against self-incrimination, by placing restrictions upon the use of information obtained under this power. There is a line of domestic case law that suggests that the privilege against self incrimination is only brought into play at the point when evidence might be used in a criminal trial,[15] however the Government takes the view that having proper regard to the case law of the ECtHR[16] this is incorrect and the privilege in fact exists prior to that point.

971. The protection afforded by those paragraphs is restricted to statements made by individuals directly questioned by the persons executing the power. This avoids undermining the principle that certain evidence obtained from the defendant, that has an existence independent of the defendant, does not engage the privilege against self incrimination at all.[17]

972. The statements concerned here are also allowed under the operation of this clause to be used in evidence where the individual concerned seeks in proceedings to give evidence inconsistent with that of the statement and that person or others acting on his behalf also adduce evidence or ask a question relating to that statement. The exception essentially provides that a defendant loses his or her privilege if he or she, or his or her agents, seek to mislead the court as to the nature of his or her initial statement.[18] This is an equitable provision that seeks to ensure that a defendant is unable to misuse this 'shield' to benefit himself or herself in such a way that he can assert that he made an entirely different and

[14] Except for the section 47 offence of failing to comply with a notice requiring the provision of information.
[15] See *R v Herefordshire County Council ex parte Green Environmental Industries* [2000] 1 All ER 773 HL
[16] In particular the previously cited case *of Funke v France* 1993, and *Shannon v UK* 6563/03 4th January 2006
[17] See for example the case of *Saunders v UK* 19187/91 17th December 1996 where the ECtHR drew a distinction between evidence which is directly obtained from the defendant and that which has an existence independent of the defendant (For example a pre-existing record). This case was followed in domestic law with the case of Attorney General's Reference (No. 7 of 2000) [2001] 1 WLR 1879
[18] See again *Stott v Brown* ibid

exculpatory statement. The clause here is almost identical to that found in operation in a number of other pieces of legislation currently in force.[19]

973. Clause 158 and Part 6 of Schedule 18 expand the Information Commissioner's existing warrant power so that in addition to the existing powers to enter, search, inspect, examine, operate and seize; the Information Commissioner would also be enabled "to require any person on the premises to provide an explanation of any document or other material found on the premises" and "to require any person on the premises to provide such other information as may reasonably be required for the purpose of determining whether the data controller has contravened or is contravening the data protection principles".

974. This limited expansion specifically empowers the Information Commissioner to ask questions of those present at the site of the search. Article 8 is engaged by the fact that the compulsory questioning of individuals can involve interfering with their right to a private and family life, by requiring them to provide information they would otherwise be at liberty to keep confidential. However, such an interference will be in accordance with the law and, in any event, the majority of such questioning would be unlikely to engage the right to a private and family life, considering that the questioning will almost always be of employees about the business practices of their employer who will usually be a legal rather than a natural person that does not benefit from the protection afforded by the right to a private and family life.

975. The Government further considers that any interference that did occur would solely be the result of the pursuit of the legitimate aim to provide the most comprehensive protection of the data rights of others and the prevention of data crimes such as the wrongful disclosure of confidential information. The expanded warrant power to include the ability to compulsorily question individuals is necessary in a democratic society for the purpose of the protection of the rights and freedoms of others. The Information Commissioner's range of statutory powers needs expanding in order that the Information Commissioner can ensure that the personal data of individuals is sufficiently safeguarded against misuse. By enlarging the search powers to specifically include questioning powers the Information Commissioner is provided with a practical investigatory and enforcement tool, that together with the other enhancements to his powers provided in this bill guarantee that the Information Commissioner is properly empowered to protect the data rights of the public. Because the misuse of personal data can result in the causing of substantial damage to individuals, the Government considers that this limited measure to improve the effectiveness of the Information Commissioner's enforcement powers is proportionate to the aim of protecting the rights of others.

976. As set out above, it is established legal principle that items of intellectual property can be considered property for the purposes of A1P1. The Schedule 9 warrant power allows for seizure of items which would clearly engage that Article. However this element of the power remains unchanged.

[19] See for example section 15 of the Serious Crime Act 2007

977. The new element introduced in this Bill are that the Information Commissioner, will be able to require the explanation of any document or require the provision of such other information as may reasonably be required. As discussed above, it is possible depending on the nature of the information that A1P1 would be engaged. It is also possible that satisfying the IC's request could amount to an interference with the owner's right to peaceful enjoyment of his possessions, for example, because the information's value was based on it being confidential. In the majority of cases it is unlikely that an issue will arise. However where an interference has arisen, the Government's view is that the interference would be justified as the enforcement of a law deemed "necessary to control the use of property in accordance with the general interest". The amendment to this section does not in anyway expand the general effect this section already has. In fact the provision of answers to specific questions is likely to be the element of a search least likely to impact upon the property rights of individuals. Therefore the Government considers that the section amended as proposed, remains compatible with A1P1.

978. Article 6 is also engaged. The questions asked of persons present at the scene of the search are compulsory in that intentional obstruction of and failing to give reasonable assistance to the persons executing the search are existing offences under paragraph 12 of Schedule 9 to the 1998 Act. This Part further adds that in relation to this particular extension of the warrant power, it is also an offence if a person deliberately or recklessly makes a statement in response to such questioning which they know to be false or misleading in a material way.[20] Consequently the individuals concerned are obliged under threat of criminal sanction to answer the questions put to them This engages the Article 6 right already discussed against self-incrimination, and so new paragraph 16 of Schedule 9 to the 1998 Act (inserted by paragraph 12(4) of Schedule 18 to the Bill) is included to safeguard this right by providing that any statement provided to the Information Commissioner under the amended warrant powers, cannot be used as evidence in prosecuting the maker of that statement unless one of the following exceptions apply.

979. The information obtained can be used for a prosecution for the offence provided at paragraph 12 of Schedule 9 to the 1998 Act. This is because were the contents of the statement made by the individual excluded from being evidence it would necessarily be impossible to prosecute this offence. The reason being that what was or was not said in answer to the request is an essential part of the offence, without that information being available the offence could not exist. It is therefore proportionate and strictly necessary that in such cases the statements are capable of being used as evidence.

980. The information obtained can also be used in relation to the offence under section 5 of the Perjury Act 1911 (and the parallel offences in Scotland and Northern Ireland)) of making false statements otherwise than on oath. The reason for this exception is identical to that set out above for the paragraph 12 of Schedule 9 offence.

[20] See new paragraph 12(c) of Schedule 9 to the 1998 Act

981. Lastly such information can be used as evidence against the maker of the statement where the maker gives evidence inconsistent with the statement and evidence is either adduced or a question is asked relating to it by or on behalf of the maker of the statement. As set out above, this exception is of a standard form that essentially provides that a defendant loses his privilege against self-incrimination if he or his agents seek to mislead the court as to the nature of his initial statement. This is an equitable provision that seeks to ensure that a defendant is unable to misuse this 'shield' to benefit himself in such a way that he can assert that he made an entirely different and exculpatory statement to the one he in fact did, and thereby seek to profit from his malfeasance. Because of its very specific purpose limitation and application the Government considers that this exception to the privilege against self-incrimination is both proportionate and necessary in a democratic society.

982. Therefore the Government considers that this specific and limited extension of this existing power is proportionate and necessary in order to provide him with the proper tools to enforce the data protection regime, thus protecting the rights of others.

**ANNEX A**

**GLOSSARY**

| | |
|---|---|
| 1933 Act | Administration of Justice (Miscellaneous Provisions) Act 1933 |
| 1953 Act | The Births and Deaths Registration Act 1953 |
| 1957 Act | Homicide Act 1957 |
| 1959 Act | Coroners (Northern Ireland) Act 1959 |
| 1976 Act | Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 |
| 1984 Rules | Coroners Rules 1984 |
| 1988 Act | Coroners Act 1988 |
| 1996 Act | Treasure Act 1996 |
| 1998 Act | Data Protection Act 1998 |
| 1999 Act | Youth Justice and Criminal Evidence Act 1999 |
| 2000 Act | Powers of Criminal Courts (Sentencing) Act 2000 |
| 2003 Act | Criminal Justice Act 2003 |
| 2005 Act | Serious Organised Crime and Police Act 2005 |
| 2007 Act | Tribunals, Courts and Enforcement Act 2007 |

| | |
|---|---|
| 2008 Act | Criminal Justice and Immigration Act 2008 |
| A1P1 | Article 1, Protocol 1 of the European Convention on Human Rights |
| BBFC | British Board of Film Classification |
| BERR | Department for Business, Enterprise and Regulatory Reform |
| CDS | Criminal Defence Service |
| CLS | Community Legal Service |
| CASC | Constitutional Affairs Select Committee |
| CEWAA | Criminal Evidence (Witness Anonymity) Act 2008 |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| E-Commerce Directive | Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market |
| FSA | Financial Services Authority |
| HMRC | Her Majesty's Revenue and Customs |
| HMCS | Her Majesty's Courts Service |
| HRA | Human Rights Act 1998 |
| ISS | Information society services |
| LHB | Local Health Board |

| | |
|---|---|
| LSC | Legal Services Commission |
| MCCD | Medical Certificate of Cause of Death |
| MRI | Magnetic Resonance Imaging |
| PCT | Primary Care Trust |
| POCA | Proceeds of Crime Act 2002 |
| RIPA | Regulation of Investigatory Powers Act 2000 |
| SAP | Sentencing Advisory Panel |
| SGC | Sentencing Guidelines Council |
| Services Directive | Directive 2006/123/EC on Services in the Internal Market |

# CORONERS AND JUSTICE BILL

# EXPLANATORY NOTES

*These notes refer to the Coroners and Justice Bill*
*as brought from the House of Commons on 25th March 2009*
*[HL Bill 33]*

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*Ordered to be Printed,*
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