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Criminal Justice and Courts Bill

Bill No 169 of 2013-14

RESEARCH PAPER 14/8 20 February 2014

This Bill would make a number of changes to aspects of the criminal justice system including sentencing; cautions; prisoners' release and recall; and the detention of young offenders. It would also reform court proceedings and costs; establish a new system of strict liability in contempt proceedings; create new offences for juror misconduct; make changes to the conduct and funding of judicial review claims; and amend the law on extreme pornography.

The Bill is due to have its second reading in the House of Commons on 24 February 2014.

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Research Paper 14/8

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Summary

The *Criminal Justice and Courts Bill* will receive its second reading in the House of Commons on 24 February 2014. It covers a number of policy areas, summarised below.

Part 1 of the Bill contains a variety of provisions to do with criminal justice:

- Clause 1 would increase the maximum sentence for certain terrorism-related offences to life imprisonment. Clause 2 would add a number of offences to the list of serious sexual and violent offences which are subject to the dangerous offenders sentencing scheme.

- Clause 4 would tighten up release arrangements for offenders with Extended Determinate Sentences. Clause 5 would introduce a new "special custodial sentences for certain offenders of particular concern", including those convicted of terrorism offences and child sex offences.

- Clause 6 would allow the Secretary of State to make an order to require compulsory electronic monitoring of offenders in the community.

- Clauses 7-11 deal with recall to prison for offenders on licence. They would end automatic re-release after 28 days for those considered highly likely to breach conditions, and make a new offence of remaining unlawfully at large following recall.

- Clause 14 would introduce restrictions on police simple cautions, following concerns that some were being issued inappropriately to serious or repeat offenders.

- Clause 16 would ban the possession of extreme pornographic images depicting rape and other non-consensual sexual penetration.

Part 2 of the Bill contains provisions relating to the detention of young offenders and youth cautions:

- Clause 17 would amend the *Prison Act 1952*, by adding secure colleges to the list of types of establishment that the Secretary of State may provide. Clause 18 would allow for contracting-out the provision and running of secure colleges and the certification of secure college custody officers. Clause 19 would enable the Youth Justice Board for England and Wales to enter into agreements for the provision of accommodation for young offenders serving certain sentences.

- Clause 20 would provide that an appropriate adult must be present where a youth caution or conditional caution is given to a 17 year old.

- Clauses 21 to 23 would remove the current duty on courts to revoke an existing referral order in circumstances where the offender is convicted of further offences, provide courts with the power to allow the order to continue if the courts consider it appropriate and provide for alternatives to revocation of a referral order.

Part 3 of the Bill introduces provisions about the proceedings of courts and tribunals and the creation of a criminal courts charge:

- Clauses 24 to 28 and Schedule 5 would provide for the single justice notice procedure. A single magistrate would have the power to deal with summary-only, non-imprisonable offences where the accused is an adult, has been served with a written charge and single justice procedure notice and has not entered a plea of not

guilty or requested an oral hearing. These cases would be dealt with on the papers, in the absence of the parties, with no obligation for the case to be heard in open court.

- Clause 29 would require courts to impose a charge in respect of the costs of the criminal courts on all adult offenders convicted of a criminal offence. Clause 30 would introduce a duty on the Lord Chancellor to undertake a review of the new provisions after an initial period.

- Clause 31 would allow an offender to apply to a fines officer for the payment or reserve terms of a collection order to be varied at any time. A fines officer would also be able, with the offender's consent, to vary such terms in a way which is less favourable to the offender.

The Bill would introduce reforms in two areas which would apply to all civil proceedings: leapfrog appeals and wasted costs orders. Leapfrog appeals are appeals which move directly to the Supreme Court, missing the Court of Appeal. The Bill would expand the criteria for such appeals; remove the requirement for all parties to consent; and provide for leapfrog appeals from more courts and tribunals. The Bill would also require the court to consider whether to notify either the legal representative's regulator and/or the Legal Aid Agency when making a wasted costs order (which imposes personal liability for certain costs on a legal representative).

Part 3 of the Bill would also introduce a new system of strict liability in contempt proceedings, as recommended by the Law Commission. Briefly, material made available to the public prior to active proceedings (whether by a publisher or distributor), but which is still available during active proceedings, can be considered as contempt of court, but a publication will not be treated as being in contempt where it is first made available before the proceedings are active. However, if the Attorney General gives the person a notice informing the person that there are active proceedings in respect of which the publication may be contemptuous, this defence ceases to be available.

The Bill would create new statutory offences for juror misconduct in actively researching and sharing information relevant to the case they are trying. There are new powers for a judge to order a jury member to surrender an electronic communication device.

The upper age limit for jury service would be increased from 70 to 75.

Part 4 of the Bill makes changes to the conduct and funding of judicial review claims, following the Ministry of Justice consultation *Judicial Review: proposals for further reform,* held between September and November 2013. These include: a new test which would require the court to refuse permission or a remedy where the alleged failure was highly unlikely to have affected the outcome of the decision; new rules to ensure that interveners and third party funders can be made liable for costs in certain circumstances; limitations on the availability of orders which would limit claimants' costs liability; and a new permission filter in challenges to certain planning decisions.

1 Introduction

The *Criminal Justice and Courts Bill* had its first reading in the House of Commons on 5 February 2014. Its second reading is expected on Monday 24 February. It is Bill 169 of 2013-14. The Bill has five parts and has eight schedules, covering:

- Criminal justice changes, including sentencing, cautions, and prisoners' release and recall;
- Secure colleges for young offenders;
- Possession of extreme pornographic images;
- Courts and tribunal changes, including contributions towards court costs from convicted criminals;
- New provisions on contempt of court by the media and misconduct by jurors;
- Changes to the conduct and funding of judicial review claims

The Ministry of Justice published a series of Factsheets, Impact Assessments and Overarching documents at the same time as the Bill. These include a memorandum on the European Convention on Human Rights and a Memorandum prepared for the Delegated Powers and Regulatory Reform Committee. They may be found on the gov.uk website.[1] The *Explanatory Notes* appear on the parliamentary website, along with the Bill.

1.1 Scrutiny of the Bill

Some of the provisions of the Bill extend to the UK, but most to England and Wales. Details are set out in clause 61. There is provision for the extension of some provisions to the Channel Isles, Isle of Man and British overseas territories in clause 62 for specified elements of the Bill. The Bill is designed to come into effect following a series of commencement orders

The Government Memorandum on Delegated Powers notes aspects of the Bill where delegated legislation is particularly significant. One example is Clause 30, where the Lord Chancellor is given powers to repeal the provisions in clause 28 requiring offenders to make a contribution to the costs of running the criminal courts, following a post-legislative review.

A programme motion has been tabled, which sets out that the Public Bill Committee stage of scrutiny will be finished by 1 April 2014. A carry-over motion has also been tabled, enabling scrutiny to continue in the next parliamentary session. Further details are given in Library Standard Note 3236 *Carry-over of Public Bills*.The *Deregulation Bill* and the *Consumer Rights Bill* have been the subject of carry-over motions so far this session. No date has yet been published for the opening of the new session with the Queen's Speech.

As yet, considered reaction to all the detailed provisions of the Bill has not been evident in time for the publication of this Research Paper. There is likely to be further comment at the time of second reading. Where there has been reaction, the Paper refers to it under the relevant part.

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1 https://www.gov.uk/government/collections/criminal-justice-and-courts-bill#overarching-documents

2 Maximum life sentence for certain terrorism related offences

2.1 Background and current law

In January 2014 it was reported in the media that the Government was considering increasing the maximum sentences for certain offences involving training in terrorist techniques. The *Telegraph* reported that a Whitehall source had said:

> By increasing the maximum sentence to life, offenders like these won't get out of prison until the Parole Board judges them to no longer be a risk.
>
> Even when they're out, we'll still be keeping an eye on them and they can go straight back to prison if they break their life licence. [2]

The current maximum sentence for the offence of making or possession of explosive under suspicious circumstances is fourteen years imprisonment.[3] The current maximum sentence for each of the offences of weapons training for terrorist purposes and training for terrorism is ten years imprisonment.[4]

The Ministry of Justice fact sheet produced regarding clauses 1 to 3 notes that, of the terrorism related offences identified as being of concern, these three offences are the ones that do not currently have a life sentence available. The Government states that increasing the maximum penalty for these offences to life will ensure that "courts can impose robust sentences on the most serious and dangerous terrorists in a wide range of cases".[5]

The impact assessment prepared for these clauses says that no offenders were convicted for either of the offences of weapons training for terrorist purposes or training for terrorism in the years ending June 2012 and June 2013.[6]

2.2 The Bill

Clause 1 would increase the maximum sentence on indictment for the following three offences to life imprisonment:

- Making or possession of explosive under suspicious circumstances;
- Weapons training for terrorist purposes; and
- Training for terrorism.

This change would apply to England and Wales, Northern Ireland and Scotland for the offences of weapons training for terrorist purposes and training for terrorism, and to England and Wales and Northern Ireland for the offence of making or possession of explosive under suspicious circumstances. The new life sentence would only be available where the offence was committed on or after the day on which this provision was brought into force.

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2 See, for example," Life terms plan for terrorists in training", *Telegraph*, 9 January 2014
3 Section 4 of the *Explosive Substances Act 1883*
4 Section 54(6) of the *Terrorism Act 2000* and section 6(5) of the *Terrorism Act 2006*
5 Ministry of Justice, *Criminal Justice and Courts Bill: Fact sheet: Adding certain terrorism-related offences to the enhanced dangerous offender sentencing scheme, and increasing maximum penalties*
6 Ministry of Justice, *Changes to the framework for the sentencing and release of serious and dangerous sexual and violent offenders*, IA No: MoJ006/14, 5 February 2014, p5

3 Sentencing of certain serious offences

3.1 Background and current law

Schedule 15 of the *Criminal Justice Act 2003* sets out a list of serious sexual and violent offences which are subject to provisions regarding the sentencing of dangerous offenders.

Life sentence for a serious offence

An offence being listed in Schedule 15 is relevant for the purposes of the duty to impose a life sentence for a serious offence.[7] An offence is serious if it listed in Schedule 15 and is punishable by life imprisonment or a prison sentence of ten years or more.[8] Section 225 of the *Criminal Justice Act 2003* provides that, where an adult offender is convicted of a serious offence where the maximum sentence is life imprisonment and the court considers there is a significant risk to the public of serious harm from further specified offences, the court must impose a life sentence unless it cannot be justified by the seriousness of the crime.[9] A specified offence is an offence which is listed in Schedule 15.[10]

Extended determinate sentences and life sentences for a second serious offence

These sentences were introduced by the *Legal Aid Sentencing Punishment of Offenders Act 2012* to replace sentences of Imprisonment for Public Protection (IPPs) and Extended Sentences for Public Protection (EPPs).

The Labour Government introduced IPPs in 2005. Like life sentences, these were indefinite sentences, where the person would only be released once they had completed their tariff and where the Parole Board considered they were safe to release into the community. The key difference is that people with life sentences are on licence indefinitely after release, whilst those on IPPs can apply for their licence to be terminated after ten years. IPPs were highly controversial sentences. Some of the debate surrounding them is discussed in Library Standard Note 6086, *The abolition of sentences of Imprisonment for Public Protection*.

The 2012 Act repealed the provisions covering IPPs and replaced them with two new sentences:

- life sentences to be imposed on conviction for a second serious offence; and
- Extended Determinate Sentences

Life sentences for a second serious offence

The new automatic life sentences apply where a person aged 18 or over is:

- convicted of an offence listed in Part 1 of the new schedule 15B[11] which is serious enough to justify a sentence of imprisonment of 10 years or more; and
- that person has previously been convicted of an offence listed in any Part of Schedule 15B and was sentenced to imprisonment for life or for a period of 10 years or more in respect of that previous offence

Schedule 15B sets out particularly serious sexual or violent offences.

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7 Section 225 or 226 of the *Criminal Justice Act 2003*
8 Section 224 of the *Criminal Justice Act 2003*
9 Section 226 of the *Criminal Justice Act 2003* contains similar provisions for offenders under the age of 18
10 Section 224 of the *Criminal Justice Act 2003*
11 which was added to the *Criminal Justice Act 2003*

Extended Determinate Sentence

Offences listed in Schedule 15 are eligible, in certain circumstances, for an extended determinate sentence (EDS). This sentence is comprised of a custodial term and an extended licence period of up to five years for violent offences and eight years for sexual offences.[12] An EDS can be imposed where:

- an offender is convicted of a specified offence;
- the court considers that there is a significant risk to members of the public of serious harm from the offender committing further specified offences;
- the court is not required to impose a sentence of imprisonment for life;[13] and
- one of the following two conditions is met:

  condition A, that at the time the offence was committed the offender had been convicted of an offence listed in Schedule 15B of the *Criminal Justice Act 2003* (which sets out particularly serious sexual or violent offences); or

  condition B, that the appropriate custodial term for the current offence would be at least 4 years.

3.2 The Bill

Clause 2 would add the offence of making or possession of explosive under suspicious circumstances (section 4 of the *Explosive Substances Act 1883*) and the offence of encouraging or assisting the commission of an offence of murder and incitement to murder (Part 2 of the *Serious Crime Act 2007*) to Schedule 15.

Clause 2 would also remove the offence of keeping a brothel (under section 33 of the *Sexual Offences Act 2003*) from Schedule 15 and add the offence of keeping a brothel used for prostitution (under section 33A of the same act) to the schedule.

Adding these offences to Schedule 15 would make them specified offences and eligible, in certain circumstances, for extended determinate sentences.

The provisions of clause 2 would generally apply where an offender was sentenced after the commencement of the provisions, regardless of when the offence was committed.[14] However, for the purposes of the duty to impose a life sentence for a serious offence,[15] the addition of these offences to Schedule 15 would only apply where a person was sentenced for an offence committed on or after the date on which this provision came into force.[16]

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12 Section 226A (for offenders aged 18 or over) and 226B (for offenders under 18) of the *Criminal Justice Act 2003*

13 Under section 224A or 225(2) of the *Criminal Justice Act 2003*

14 Clause 2(8)

15 Section 225 or 226 of the *Criminal Justice Act 2003*

16 Clause 2(10)

4 Release arrangements for dangerous offenders and "other offenders of particular concern"

4.1 Background and current law

Why don't prisoners serve their whole terms in prison?

There are many reasons why prisoners are released before they have served their full sentence. They include:

- To aid rehabilitation, by having a period where the offender is supervised on licence in the community but subject to recall if they misbehave
- To aid pressures on the prison estate
- To encourage good order and discipline in prisons

The current system

Until 1992, there was a system of allowing prisoners remission for good behaviour. The *Criminal Justice Act 1991* abolished remission and set out new arrangements for early release. Since then the systems have changed many times, and because these were normally not retrospective, the total picture is complex. However, there have been attempts to reduce the complexity in recent years.

Broadly speaking:

- Most offenders given determinate sentences (i.e. fixed term sentences) will be released automatically at the half way point of their sentences without any involvement from the Parole Board. Those with sentences of a year or more will be supervised until the rest of their sentences expire.[17]
- People given indefinite sentences, such as life sentences, become eligible to apply for release at a certain point in their sentence, but they won't actually be released unless the Parole Board recommends this.
- There are some groups, such those convicted of certain violent or sexual offences, who have been given various types of extended sentences. Some of these will be released automatically at the appropriate point in their custodial term, whilst others will be released at the discretion of the Parole Board.[18]

In particular, a person on an Extended Determinate Sentence must serve at least two thirds of their custodial period. What happens next depends on the seriousness of the case:

- Where the custodial period is ten years or more, ***or*** is for an offence listed in schedule 15B of the *Criminal Justice Act 2003*, the offender will only be released at the discretion of the Parole Board
- Where the custodial period is both less than ten years ***and is not*** for a schedule 15B offence, then the offender will be automatically released at the two thirds point.

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17 Probation supervision is going to be extended to prisoners serving less than a year under the *Offender Rehabilitation Bill* – see Library Research Paper 13/61, prepared for the Bill's Second Reading in the Commons

18 An overview of these is provided in Prison Service Instruction 13/2013, *Sentence Calculation – Determinate Sentenced Prisoners*, 31 July 2013 paragraph 2.3

The announcement of the changes

On 4 October 2013, the Justice Secretary Chris Grayling announced in a press release that early release rules would change for two groups of offenders:

> In a radical overhaul of sentencing, the Justice Secretary Chris Grayling today announced that criminals convicted of rape or attempted rape of a child or terrorism offences will no longer be automatically released at the half-way point of their prison sentence.
>
> Alongside this, criminals who receive the new tough Extended Determinate Sentence (EDS) will no longer be released automatically two-thirds of the way into their custodial sentence. This means that many of them will end up spending significantly more time in prison.
>
> Under the proposals announced today these criminals will only be released before the end of their custodial term under strict conditions at the discretion of the independent Parole Board. Before the Parole Board releases any criminal they must be convinced they no longer pose a threat to society and that they have engaged with, and continue to engage with, their own rehabilitation. Unless they address their offending behaviour criminals can expect to serve their entire custodial term in prison.[19]

In brief, the changes are:

- Various terrorism and terrorism related offences are to be added to schedule 15B of the *Criminal Justice Act 2003*;
- All prisoners who receive an EDS will have to apply to the Parole Board for release, not just the more serious cases;
- Offenders convicted of certain terrorism and child sex offences will receive a new form of custodial sentence. Instead of being released automatically half way through their sentence, they will have to apply to the Parole Board for release between the halfway point and the end point of the custodial term.

The Impact Assessment on these clauses of the Bill estimates that the changes will eventually result in an increase in the prison population of around 1,000 places and an increase of around 1,100 Parole Board Hearings, with the full impact reached by 2030.[20]

4.2 The Bill

Clause 3 of the Bill would add various terrorism-related offences to Schedule 15B of the *Criminal Justice Act 2003*. As discussed above, Schedule 15B is relevant for:

- Eligibility for the automatic life sentence for a second Schedule 15B offence
- Availability of an EDS

Clause 4 would change release arrangements for EDSs. In all cases where the sentence was imposed after the Bill comes into force, the Parole Board will have to be satisfied that it is no longer necessary for the protection of the public to detain the prisoner before he or she can be released. This currently only applies to the most serious cases.

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19 Ministry of Justice, *Automatic 'early release' axed for child rapists and terrorists*, 4 October 2013

20 Ministry of Justice, *Changes to the framework for the sentencing and release of serious and dangerous sexual and violent offenders*, IA No: MoJ006/14, 5 February 2014, p3

Clause 5 and **Schedule 1** would introduce a new "special custodial sentences for certain offenders of particular concern". Relevant offences are listed in new Schedule 18A of the 2003 Act, and include terrorism and terrorism related offences; two child sex offences; and related offences such as aiding, abetting or conspiring to commit those offences. The new sentences would only apply to adult offenders, where the court has not imposed a life sentence or an EDS. The new sentence must consist of a custodial term and a one year period of licence. The offenders will be subject to discretionary release by the Parole Board between the halfway point and end point of the custodial term.

The Secretary of State would be able to amend new Schedule 18A by adding, varying or omitting offences by order subject to affirmative procedure.

4.3 Comment

The BBC reported comments from the Parole Board and the Howard League for Penal Reform:

> In a statement, the Parole Board said that it supported "a more consistent approach to release arrangements" for the offenders who would be covered by the changes.
>
> It added: "Protecting the public is the primary concern of the Parole Board and any measures that ensure offenders are only released from custody following a rigorous assessment of risk are welcomed."
>
> **'Public not safer'**
>
> But Andrew Neilson, of the Howard League for Penal Reform, said: "Today's announcement may grab headlines but it will not make the public safer.
>
> "When prisoners are released early, they do at least receive supervision from the probation service for the remainder of their sentence, with the threat of recall to prison always present.
>
> "We fear this move will only serve to further clog up the Parole Board, which is already under-resourced and over-burdened."[21]

5 Electronic monitoring following release on licence

Clause 6 and schedule 2 would allow the Secretary of State to make an order to require compulsory electronic monitoring of offenders.

5.1 Background and current law

What kind of monitoring takes place at present?

Electronic monitoring of offenders has been used in England and Wales since 1999.[22] There are wide discretionary powers for such monitoring to be used in a variety of situations. However, its use has been mainly confined to enforcing curfew requirements in relation to:

- Bail
- Home Detention Curfew (which allows short-term prisoners to be released early on a curfew)[23]

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21 "Early jail release to be curtailed under government plans", *BBC News*, 4 October 2013

22 The *Criminal Justice Act 1991* first provided for electronically monitored curfews, but this was not brought into force immediately. Since 1999, certain short-sentence prisoners have been released early on Home Detention Curfew, and the *Powers of Criminal Courts (Sentencing) Act 2000* provided for court-ordered electronically monitored curfews from 2000.

- Community sentences

The reason electronic monitoring is mainly used for enforcing curfews is to do with the technology. Most monitoring is done by means of an ankle tag and a home monitoring unit, using Radio Frequency systems to monitor a person's distance from that fixed location. The equipment does not currently make use of Global Positioning System (GPS) technology in England and Wales, except in relation to the very small number of people being monitored under the *Terrorism Prevention and Investigation Measures Act 2011* (TPIMS).[24]

Recent problems with contracts

The monitoring of these curfew requirements is contracted out to private companies. There has been controversy in recent months about the current contract holders, G4S and Serco. Both companies investigated by PricewaterhouseCoopers (commissioned by the Ministry of Justice) after disputing some of the charging practices of the providers. They are currently being investigated by the Serious Fraud Office.[25] Justice Secretary Chris Grayling commissioned a review of Ministry of Justice contracts in the wake of this,[26] and the Cabinet Office also conducted a review of major contracts.[27]

On 12 December 2013, the Government announced that, as an interim measure, Capita would manage the delivery of the electronic monitoring service using systems supplied by Serco and G4S until April 2014, and, along with Buddi, Astrium and Telefonica, would have preferred bidder status for the next generation of electronic monitoring contracts.[28] In a Written Ministerial Statement on 19 December 2013, Chris Grayling said:

> In the light of these developments, both G4S and Serco have decided to withdraw from the MOJ competition for rehabilitation services. This means that neither company will play a role as a lead provider of probation services in England and Wales in this competition.[29]

Satellite tracking of offenders

There have been various proposals over the past decade to introduce satellite tracking to monitor offenders' whereabouts at all times rather than simply to enforce a curfew.[30] The Home Office ran pilots of satellite tracking in 2004 and 2005, and the Ministry of Justice published an evaluation in 2007.[31] Its findings are summarised on the Government's Impact Assessment on these provisions in the Bill.[32] It cites qualitative evidence that this kind of Electronic Location Monitoring (ELM) was helpful, including in acting as a deterrent to reoffending. However, the report also noted technical problems, offender compliance issues

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23 See Library Standard Note 5199, *Early Release of Prisoners: An Overview*, 15 May 2013

24 See for example, *Terrorism Prevention And Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* by David Anderson Q.C., Independent Reviewer of Terrorism Legislation, March 2013, p8

25 National Audit Office, *The Ministry of Justice's electronic monitoring contracts*, 19 November 2013 and "Serco wins first UK government contract since ban lifted", *Financial Times*, 10 February 2014

26 Ministry of Justice, *Contract Management Review*, December 2013

27 HM Government, *Cross Government Review of Major Contracts*, Autumn 2013

28 Ministry of Justice, *Capital to deliver interim tagging contracts*

29 HC Deb 19 December 2013 c129WS

30 See for example " Satellite tags to track criminals round the clock", *Sunday Telegraph*, 23 February 2003

31 Ministry of Justice, Stephen Shute, *Satellite tracking of offenders: a study of the pilots in England and Wales*, 2007, Deposited Paper DEP 07/2233

32 Ministry of Justice Impact Assessment, *Electronic monitoring of whereabouts as a compulsory licence condition*, IA No MoJ004/14, 5 February 2014, pp6-7

and concerns from probation staff and others, including that "tracking units were 'intrusive and infringed civil liberties'".[33]

The Impact Assessment also discusses quantitative evidence from the US which, it says, shows that ELM based on Global Positioning Systems "typically has more of an effect on reducing failure to comply than Radio Frequency Systems".[34]

Electronic monitoring in community orders: The Crime and Courts Act 2013

Schedule 16 of the 2013 Act broadened courts' powers to impose electronic monitoring requirements as part of community orders, including enabling monitoring of an offender's whereabouts. As with this Bill, it included provision for a code of practice on the retention, use and sharing of such data.

Announcement of the change

In January 2012 the *Telegraph* reported that the Government was considering the use of GPS technology to track prisoners released on licence and offenders with community sentences:

> A similar plan was shelved four years ago because of high costs and technological glitches that meant signals could be blocked if offenders stood by tall buildings or even trees.
>
> But advances in technology and a decline in costs has led ministers to revive the idea as part of a wider review of community sentences.[35]

In May 2013, the *Independent* reported that Police and Crime Commissioners were urging reform:

> More than two-thirds of the PCCs have written to the Government demanding a multi-million-pound upgrade of the present system of "curfew tagging" to improve monitoring of the most persistent criminals.
>
> The Global Positioning System (GPS) devices, labelled "chav nav" by some supporters, are credited with slashing crime rates in countries where they are already used.[36]

On the same day the Government issued a press release announcing wider rehabilitation reforms, and also the introduction of GPS tracking:

> We will also be introducing the most advanced GPS satellite tracking of offenders in the world, allowing us to keep a much closer eye on them in the community.[37]

The accompanying consultation response document on rehabilitation of offenders set out the Government's proposals to ensure offenders' compliance:

> We want to use our new and existing licence provision to ensure offenders engage with rehabilitation and to incentivise compliance. This will benefit the public and empower service providers. In doing so, we are mindful of the possibility that extending licences to more offenders may place more burdens on other partners in the justice

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33 Ministry of Justice, Stephen Shute, *Satellite tracking of offenders: a study of the pilots in England and Wales*, 2007, p13

34 US Department of Justice, *Electronic monitoring reduces recidivism*, September 2011

35 "Tagged criminals may be tracked by GPS satellite 24 hours a day", *Telegraph*, 30 January 2012

36 "PCCs lead calls for satellite tags on offenders", *Guardian*, 9 May 2013

37 Ministry of Justice, *12 months supervision for all prisoners on release*, 9 May 2013

> system, for example the police. We will implement a system of escalating sanctions, so that breaches can be robustly, but effectively, dealt with.[38]

Neither this response document nor the original consultation document discussed electronic monitoring in any detail. The consultation said that the Government was working with the Information Commissioner over developing a code of practice[39] (see **clause 6(c)(5)**). The response document did not mention GPS tracking technology as such, but it did say that the Government would be introducing technical changes to the legislation so that:

- delivery of an order can be the responsibility of either the public sector probation service or a contracted provider, depending on who is responsible for managing the offender;
- issuing a warning can be the responsibility of either the public sector probation service or contracted provider; but
- laying information before a court to enforce the breach (and the decision in these cases on whether the breach was reasonable) would be reserved to the public sector probation service.[40]

Consultation on electronic monitoring of offenders in Scotland

The Scottish Government carried out a consultation between September and December 2013 seeking views on the future development of the electronic monitoring service in Scotland to include new options such as use of satellite tracking. Depending on the options chosen, reforms could require primary or secondary legislation.[41]

5.2 The Bill

Clause 6 would amend section 62 of the *Criminal Justice and Court Services Act 2000* to allow for compulsory electronic monitoring. The main change is in new section 62A which clause 6(3) would insert. This provides an order-making power, subject to negative resolution procedure, to make electronic monitoring compulsory for offenders released from custody on licence. The Secretary of State would be able to:

- require electronic monitoring in particular cases
- specify the duration of the compulsory monitoring (which might be different for different groups of offenders)
- specify which offenders will be subject to electronic monitoring

The Explanatory Notes give an idea of how the power may be used:

> New section 62A(3) allows for the Secretary of State to specify which offenders will be subject to electronic monitoring by reference to whoever is monitoring the offender. It also allows the Secretary of State to make provision by reference to whether a person specified in the order is satisfied of a matter. For example, it might refer to cases in which the Secretary of State is satisfied that the offender has a physical or mental health problem which renders the offender unsuitable for the licence condition, or

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38 Ministry of Justice, *Transforming Rehabilitation: A strategy for reform*, May 2013

39 Ministry of Justice, *Transforming Rehabilitation: A revolution in the way we manage offenders*, Consultation Paper CP1/2013, January 2013, p27

40 Ministry of Justice, *Transforming Rehabilitation: A strategy for reform*, May 2013, p23

41 Scottish Government, *Development of Electronic Monitoring in Scotland: A Consultation on the Future Direction of the Electronic Monitoring Service*, September 2013

> cases in which a person is satisfied that it is impossible to make arrangements for the offender to recharge the battery in the tag. The Secretary of State may prescribe which offenders must be subject to compulsory electronic monitoring; for example, he may specify groups of offenders by type of offence, such as all burglars, or by type of sentence, such as all those serving an Extended Determinate Sentence.[42]

Schedule 2 makes consequential amendments, including allowing a compulsory electronic monitoring licence condition to be imposed on a life sentence prisoner without a recommendation or direction from the Parole Board.

Clause 6(2) would provide that any electronic monitoring condition must also state who is responsible for electronic monitoring. An order making power, subject to negative resolution procedure, would allow the Secretary of State to specify what description of person may be responsible for monitoring.

6 Release and recall of prisoners

6.1 Background and current law

Recalls to prison and further release

When a prisoner has been released on licence, he or she can be recalled to prison. This might be because the offender's behaviour indicates that they present an increased risk of harm or further offending, or because contact has broken down.[43] Once the offender is back in prison, the question arises as to when they should be re-released.

In the context of longer licence terms and increases to the prison population, the *Criminal Justice and Immigration Act 2008* introduced **fixed term recall** (or "automatic release after recall") for a fixed period of 28 days for low risk offenders.[44]

Other offenders, including those serving sentences for violent or sexual offences, are subject to "**standard recall**". This means they are liable to remain in prison for the rest of their licence, or until the Secretary of State or the Parole Board deems them suitable for release. Some further changes were made by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* to allow "greater professional discretion to decide when lower risk prisoners who have been recalled to prison may be re-released on licence."[45]

Other types of recall are emergency recall, where there is a need to recall the offender more quickly than usual; indeterminate recalls of prisoners serving life sentences or sentences of Imprisonment for Public Protection; and recall for prisoners on Home Detention Curfew.

New absconding offences

There are various offences to do with being unlawfully at large, but there is no separate offence of absconding while on licence after the offender has served the custodial part of their sentence. The person's licence may be revoked and the offender returned to custody, but if they have not committed any further offences whilst unlawfully at large, they can only be required to serve the outstanding part of their sentence.

Chris Grayling's announcement of the changes in the Bill was widely reported in the press on 18 January 2014, for example in this BBC News article:

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42 Explanatory Notes, paragraph 118

43 The law on this is contained in sections 255A to 256A of the *Criminal Justice Act 2003*, as amended. Full details are in Prison Service Instruction 17/2013, *Recall Review and Re-Release of Recall Offenders*.

44 Background is on pages 29-31 of Library Research Paper 07/65, *Criminal Justice and Immigration Bill*

45 Ministry of Justice, *Breaking the Cycle: Government Response*, Cm 8070, June 2011, p12

> The government plans to introduce legislation that will create an offence of being unlawfully at large following recall to custody, which will carry a maximum two-year sentence.
>
> The Ministry of Justice said about 800 criminals a year could face prosecution.
>
> It is already against the law to escape from jail, not to surrender to custody when on bail, and not to return from release on temporary licence.
>
> Making the announcement earlier, Justice Secretary Chris Grayling said: "It is unacceptable that criminals who disregard the law and attempt to evade the authorities are able to do so with impunity.
>
> "I am today sending a clear message to those people that if you try to avoid serving your sentence you will face the consequences when you are caught.
>
> "From my first day in this job I have been clear that punishment must mean punishment.
>
> "We're on the side of people who work hard and want to get on and my message is simple - if you break the law, you will not get away with it."[46]

6.2 The Bill

Clause 7 of the Bill provides that an offender will not be suitable for automatic release after recall if the Secretary of State considers it inappropriate because that the person is "highly likely to breach a licence condition". It also provides a new statutory release test for the Parole Board to apply when considering the release of recalled determinate sentenced prisoners, which covers not just public protection but also whether it would be highly likely that the offender would breach their licence. **Clause 8** would give the Secretary of State the power to change this test.

The Impact Assessment for these provisions says that the new test is "designed to ensure that offenders who persistently and wilfully refuse to comply with their licence conditions can be recalled to prison for the remainder of their sentence (rather than short fixed periods of recall):

> Based on published statistics, over the period 1999 to June 2013, a total of 630,000 offenders were released from prison on licence supervision. Between April 1999 and June 2013 around 160,000 of those released on licence were recalled to custody for breaching the conditions of their licence, e.g. failing to report to their probation officer.[47]

Clause 10 introduces a new offence of remaining unlawfully at large after recall, with a maximum sentence of two years on indictment (i.e. in the Crown Court), or six months in the magistrates' court.[48]

Clause 11 increases the maximum sentences for the existing offence of remaining unlawfully at large after temporary release.[49] At present this is triable only in the magistrates' court, with

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46 "Fugitives face extra jail time under new law", *BBC News,* 18 January 2014

47 Ministry of Justice Impact Assessment, *Introduction of a new statutory test for release after recall of determinate sentence prisoners*, MoJ007/14, 5 February 2014

48 Section 154 of the *Criminal Justice Act 2003* would allow this to rise to 12 months if commenced

49 Under section 1 of the *Prisoners (Return to Custody) Act 1995*

a maximum sentence of six months. The Bill would make it an "either way" offence[50] with a maximum sentence of two years in the Crown Court.[51]

6.3 Comment

The BBC quoted Labour's shadow justice secretary, Sadiq Khan, as saying:

> David Cameron's government would be better focusing its energies on stopping criminals escaping in the first place. Because of their justice on the cheap, a Category A criminal - the most serious held in our prisons - escaped on their watch, something that never happened during Labour's thirteen years. [52]

7 Restricting the use of simple cautions

7.1 Background and current law

The practice of cautioning juvenile offenders was developed by the police and encouraged by a series of Home Office police circulars published from 1978 onwards. Although used initially for juveniles (in respect of whom they were replaced by a statutory scheme of reprimands and final warnings set out in the *Crime and Disorder Act 1998*), the practice was also used for adult offenders.

Simple cautions are one of a number of "out of court disposals" which can be given. Other examples are fixed penalty notices, penalty notices for disorder, and conditional cautions, which were introduced by the *Criminal Justice Act 2003*. Unlike these, simple cautions are not set out in statute. They are administered by the police using their own discretion when the following conditions apply:

- The offender must admit guilt, and agree to the caution being administered;
- There must be sufficient evidence to provide a realistic prospect of prosecution;
- It must be in the public interest to dispose of the offence by way of caution rather than prosecute.

Simple cautions form part of the offender's criminal record and may, in certain circumstances, be disclosed in future proceedings or to an employer.

How many police cautions are issued?

The use of out of court disposals generally in England and Wales, and police cautions in particular, peaked in 2007. In the year ending June 2007, around 363,000 offenders received cautions, with around 207,000 of these being for indictable offences – the more serious offences triable in the Crown Court. Since then, the number of cautions has decreased each year. In the year ending June 2013, around 187,000 offenders received cautions, with around 98,000 of these being for indictable offences:[53] Ministry of Justice quarterly statistics provide some context:

> Until the introduction of Penalty Notices for Disorder (PNDs) in 2004 and formal warnings for possession of cannabis in 2005[4], the only out of court disposal available to police was a caution. Since the 12 months ending June 2003, the use of out of court disposals increased rapidly and peaked in the 12 months ending June 2007, before

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50 i.e. triable either in the magistrates' court or the Crown Court

51 Again, Section 154 of the *Criminal Justice Act 2003* would allow this to rise to 12 months if commenced.

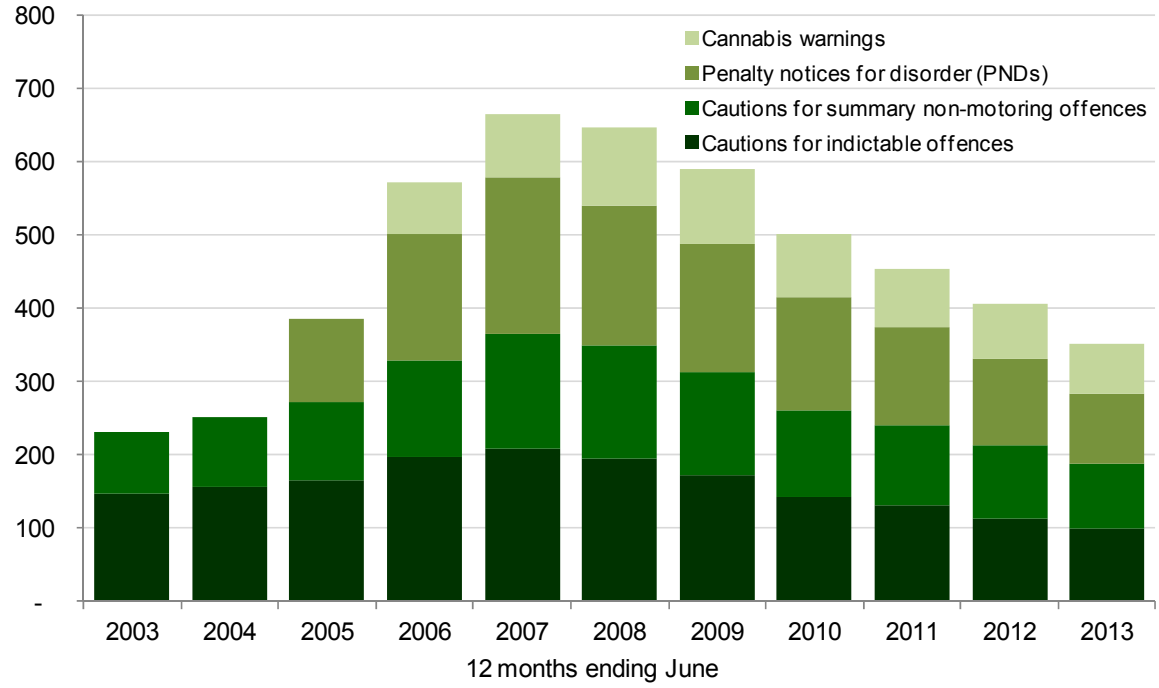
52 "Fugitives face extra jail time under new law", *BBC News,* 18 January 2014

53 Ministry of Justice, *Criminal justice statistics quarterly: June* 2013, *Out of Court Disposals - June 2013,* November 2013,Table Q2.3

decreasing year on year – with 352,500 individuals issued an out of court disposal in the latest year. The increase to the 12 months ending June 2007 coincided with the introduction in 2001 of a target to increase offences brought to justice, and the decrease coincided with the replacement in April 2008 of the target with one placing more emphasis on bringing serious crimes to justice. The latter target was subsequently removed in May 2010.[54]

Out-of-court disposals issued, by type of disposal, England and Wales

Persons issued an out-of-court disposal (thousands)



Source: *Ministry of Justice, Criminal Justice Statistics Quarterly Update to June 2013*, table Q1.5

Controversy about the use of simple cautions

There has been controversy about police use of simple cautions to deal with apparently serious offending behaviour. In January 2013, the chairman of the Magistrates' Association reportedly wrote to Chris Grayling calling for an inquiry into the police use of cautions, saying that the practice had "got out of hand".[55] The shadow Home Secretary Yvette Cooper argued that police cautions should not be used for serious offences, and linking their use to cuts in police budgets.[56] Labour was also very critical of the use of police restorative justice measures, "community resolutions", to deal with serious crimes. Unlike cautions, these do not result in a criminal record.[57]

The Government's review

In response to such concerns, in April 2013, the Government launched a review of simple cautions. In a Written Ministerial Statement, Chris Grayling said that the review would look at the way in which simple cautions are currently used, and consider the need for any changes

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54 Ministry of Justice, *Criminal justice statistics quarterly: June 2013*, *Criminal Justice Statistics Quarterly Update to June 2013*, November 2013, p5

55 Use of police cautions has 'got out of hand', magistrates warn, *Telegraph*, 27 January 2013

56 Labour Party, *Police cautions should not be used for very serious offences – Rt Hon Yvette Cooper MP*, 27 January 2013

57 *Cooper: More offenders are being let off serious and violent crimes as Government police cuts bite* 30 April 2013

to policy or practice to ensure that there was public confidence in the use of simple cautions as a disposal.[58]

Chris Grayling announced the results of this review on 19 November 2013 in a Written Ministerial Statement:

> While the imposition of a caution is an operational policing matter we believe there is a compelling case for forces to review strategy and usage of cautions and other out of court disposals on an annual basis. Particular scrutiny should attach to the question of cautions for serious and repeated cases. There is clear potential for police and crime commissioners to play an active role in providing transparency and assurance for the public on this issue.[59]

The report of the review noted that, whilst the total number of cautions administered was at its lowest level for nearly 30 years, " there remains concern about their use for serious violent and sexual crimes and repeat offenders and the lack of scrutiny and accountability regarding decision making." It recommended that restrictions should be introduced either through legislation or guidance, and that a wider review of Out of Court disposals be conducted:

> The Government should remove the availability of simple cautions for indictable only offences unless there are very exceptional circumstances and the caution has been approved by a chief officer, whilst continuing to allow the use of the conditional caution for these offences. This can be achieved either through toughening the guidance or through legislating. We will also seek to restrict the use of simple cautions for particularly serious either way offences which would ordinarily attract custodial sentences or high end community orders if the offender is found guilty following a trial.
>
> We should also restrict the use of simple cautions for repeat offenders beyond the position as set out in the guidance.
>
> We believe there is a compelling case for simplification and consolidation of the existing guidance. We also recommend further strengthening the existing guidance regarding cautioning in serious cases.
>
> While this review has limited itself to adult simple cautions, it has concluded that in view of wider concerns which have been voiced during the review, there would be a good case for conducting a wider review of other statutory and informal out of court disposals for both adults and youths to ensure that the framework is rational, understood by all practitioners, and maintains public confidence, and that there are no inadvertent effects from any changes to the simple caution regime in isolation.[60]

Accordingly, the Government published revised guidance on simple cautions[61] and a consultation document on the wider out of court disposals framework.[62] The consultation closed on 9 January 2014.

7.2 The Bill

Clause 14 places restrictions on the circumstances in which cautions may be used. The restrictions are greater the more serious the offence. Offences can be indictable only (triable

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58 HC Deb 15 April 2013 c19WS
59 HC Deb 19 November 2013 cc50-51WS
60 HM Government/College of Policing, *Report of the Simple Cautions Review*, November 2013, p5
61 Ministry of Justice, *Simple Cautions for Adult Offenders*,14 November 2013
62 HM Government/College of Policing, *Consultation on out of court disposals*, November 2013

in the Crown Court); summary (triable in the magistrates' court); of "either-way" (triable in either type of court. Under clause 14:

- For the most serious offences (**indictable only**), a police officer would not be able to give a caution except in exceptional circumstances relating to the person or the offence, and with the consent of the Director of Public Prosecutions.

- If the offence is an **either-way offence specified by order**, a police officer could only give a caution in exceptional circumstances relating to the person or the offence, (but would not need the permission of the DPP).

- For **repeat offenders**, where a person has been convicted of, or cautioned for, an offence in the previous two years, restrictions will also apply if the offence is summary, or either-way but not specified in an order. A police officer could only give a caution in exceptional circumstances relating to "the person, the offence admitted or the previous offence". This two year period could be changed by an order subject to affirmative resolution procedure.[63]

It will be up to an officer of a rank to be specified by order to decide whether exceptional circumstances apply in any of the cases outlined above.

Under **clause 15**, the order specifying which either-way offences the restrictions will apply for will be subject to negative resolution procedure.

8 Possession of pornographic images of rape and assault by penetration

8.1 Background and current law

In August 2005 a joint Home Office/Scottish Executive consultation sought views on whether to make it illegal to possess extreme pornography featuring adults.[64] This was in response to the widespread availability of such material on the internet and to increasing public concern, particularly after the murder of a young woman by a man who had accessed extreme pornographic websites.[65]

Following the consultation, the *Criminal Justice and Immigration Act 2008* (the 2008 Act) made it an offence to possess "extreme pornographic images". An image is pornographic if it is reasonable to assume that it was produced solely or principally for the purpose of sexual arousal.[66] An image is extreme if it is grossly offensive, disgusting or otherwise obscene, and explicitly and realistically depicts any of the following:

- an act which threatens a person's life;

- an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals;

- an act which involves sexual interference with a human corpse; or

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63 Clause 15(4)

64 Home Office/ National Offender Management Service and Scottish Executive, *Consultation on the possession of extreme pornographic material*, August 2005, pp1-2

65 Ibid, p6

66 Section 63 (3) of the *Criminal Justice and Immigration Act 2008*

- a person performing an act of intercourse or oral sex with an animal (whether dead or alive).[67]

In Scotland, the *Criminal Justice and Licensing (Scotland) Act 2010* also made it an offence to possess extreme pornographic images. However the Scottish offence goes further than the 2008 Act in that it extends to obscene pornographic images which *realistically depict rape or other non-consensual penetrative sexual activity, whether violent or otherwise*.

The Westminster legislation has been criticised by Clare McGlynn and Erika Rackley of Durham Law School. They have argued that the 2008 Act fails "to recognise and address material which contributes to cultural harms in our society which contribute to the prevalence and maintenance of sexual violence"[68] and is "under-inclusive by excluding the vast majority of pornographic images of rape."[69]

Rape Crisis South London has been campaigning against "rape pornography".[70] The End Violence Against Women website includes further information on the campaign.[71] This includes a June 2013 letter to the Prime Minister asking him "to urgently close a loophole" in the 2008 Act "which allows the lawful possession of pornographic images depicting rape which promote sexual abuse of women and girls in England and Wales".[72] The letter was signed by over 100 academics, women's groups and other campaigners.

In July 2013, the Prime Minister announced that the Government would make it an offence to possess pornography depicting rape.[73]

Further background to the current position can be found in Library note, *Extreme pornography* (SN/HA/5078, 12 September 2013).

8.2 The Bill

Clause 16 of the Bill would ban the possession of extreme pornographic images depicting rape and other non-consensual sexual penetration. It would do so by extending the definition of an extreme image, set out in section 63 of the *Criminal Justice and Immigration Act 2008*, to include an image portraying, in an explicit and realistic way:

- an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, or

- an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else

According to a Ministry of Justice factsheet on the Bill, there is "some evidence" that viewing such images can have an effect on young people's attitudes to sexual and violent behaviour

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67 Section 63 (7) of the *Criminal Justice and Immigration Act 2008*

68 McGlynn, Clare and Rackley, Erika (2009), "Criminalising extreme pornography: a lost opportunity", *Criminal law review,* (4), pp245-260

69 McGlynn, Clare & Rackley, Erika (2013), "Criminalising Extreme Pornography: lessons from England & Wales", *Durham Law School Briefing Document*, Durham University

70 Rape Crisis South London, *Closing the Loophole on Rape Pornography*, Undated [accessed 17 February 2014]

71 End Violence Against Women website, Campaign to ban 'rape porn' [accessed 17 February 2014]

72 Rape Crisis South London, Open letter to the Prime Minister to ban the possession of 'rape porn', 7 June 2013

73 "The internet and pornography: Prime Minister calls for action", Prime Minister's Office, 22 July 2013

and that exposure to violent pornography can make some men more aggressive towards women.[74]

8.3 Comment

Rape Crisis South London said that clause 16 was a "significant step forward in challenging the eroticisation of violence against women and girls."[75] The End Violence Against Women Coalition also welcomed the Government's action,[76] as did Professors Clare McGlynn and Erika Rackley.[77]

9 Secure colleges for young offenders

9.1 Background and current law

For a wider-ranging discussion of policy towards young offenders and youth crime in recent decades, see the Library standard note *Young offenders: what next?*[78]

The growth of the prison population and some of the ensuing questions about reoffending and rehabilitation are discussed in the Library Research Paper *Reducing reoffending: The "what works" debate*.[79]

Transforming Youth Custody: Putting education at the heart of detention

The Coalition document[80] announced a review of sentencing and the consultation (green) paper on punishment and rehabilitation, promised to "break the cycle" of reoffending.[81]

In February 2013, the Ministry of Justice published a further consultation (green) paper *Transforming Youth Custody: Putting education at the heart of detention*, which put forward proposals based around the concept of secure colleges. The paper argued that, as so many young offenders in custody had been excluded from school or had few skills and qualifications, the key to solving the problem of youth crime was education.[82] The paper went on to set out the Ministry of Justice's vision for secure colleges:

> These facilities will have education at their heart, equipping young offenders with the skills and qualifications, self-respect and self-discipline to turn their backs on crime for good. Young people in Secure Colleges should return to the community more focused on and engaged with the opportunities that an improved education has made available to them.

The Ministry of Justice foresaw a mixed market of providers.[83]

Plans for a secure college for young offenders were announced in January 2014.[84,85] The "infographic" attached to the Ministry of Justice and Deputy Prime Minister's Office press

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74 Ministry of Justice, *Factsheet on the Criminal Justice and Courts Bill - Extension of the offence of Extreme Pornography (clause 16)*, February 2014, p1
75 "Extreme Porn: Women's Groups welcome criminalisation in new Justice Bill", End Violence Against Women News, 5 February 2014
76 Ibid
77 "Durham Law professors welcome reforms to extreme pornography law", Durham University News, 6 February 2014
78 SN/HA/5896, 23 October 2013
79 RP12/71, 22 November 2012
80 HM Government, *The Coalition: our programme for government*, May 2010
81 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010
82 Ministry of Justice, *Transforming Youth Custody: Putting education at the heart of detention*, February 2013, Cm 8564, p13
83 Ibid, p17

release remarked that "the current system [was] not working".[86] In his statement to the House of Commons, the Lord Chancellor and Secretary of State for Justice, Chris Grayling, confirmed that education would be central to the Government's plans and there would be a competition for new education contracts in publicly-run young offender institutions.[87]

The Ministry of Justice's impact assessment referred to the "key monetised benefits by 'main affected groups'":

> We expect a pathfinder Secure College to deliver net savings by facilitating withdrawal from some dated and expensive youth custodial provision. If the pathfinder proves successful, the subsequent development of a network of Secure Colleges would lead to significant net savings. In addition, the Secure College and the improvements to existing youth custodial provision and resettlement aim to contribute to reductions in re-offending; through improvements in the educational engagement and attainment of young people in custody, the holistic multi-disciplinary delivery of services to tackle offending behaviour, and the more effective resettlement of young people on release.[88]

It referred too to "other key monetised benefits":

> Reductions in re-offending among those young people held in custody have the potential to reduce the costs to YOTs and probation services, to reduce court waiting times and to allow for savings to legal aid provision. In addition, the resultant reduction in crimes committed would lead to reduction in the harm caused to society from offending. There is also some evidence that improved education in custody is associated with increased earnings in the future for certain groups, and increased employability. Any improvements in employability of those released from custody would lead to significant wider economic benefits.[89]

It also pointed to some assumptions, sensitivities and risks:

- It has been assumed that the custodial population will not increase significantly above current levels.
- The Secure College model will be able to accommodate 12-17 year olds, including younger and more vulnerable children in custody as well as those aged 15-17 and currently accommodated in YOIs. Should this not be the case, the savings from the consolidation of the youth custodial estate would be reduced.
- The Secure College model has never previously been tested. There is, therefore, some uncertainty over the level of operating costs we would expect to achieve through a competition.[90]

Justice Committee report on youth justice

The Justice Committee published its report on youth justice in March 2013. In its conclusions, the Committee argued for a "fundamental shift" of resources from custody to early intervention with young people at risk of offending.[91]

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84 Ministry of Justice and Deputy Prime Minister's Office press release *Young criminals must be punished, but education is the cure,* 17 January 2014

85 Dominic Casciani, " 'Secure college' plans for young offenders revealed", *BBC News*, 17 January 2014

86 *Transforming Youth Custody* at http://www.flickr.com/photos/ministryofjustice/11994281706/

87 HC Deb 17 January 2014 c40-1WS

88 Ministry of Justice, *Transforming Youth Custody Impact Assessment*, 17 January 2014, p3

89 Ibid

90 Ibid

91 Justice Committee, *Youth Justice*, 14 March 2013, HC 339 2012-13, p62

The Committee did not scrutinise the proposals in *Transforming Youth Custody: Putting education at the heart of detention* because it was published after the inquiry ended. It did, though, cast doubt on the Ministry of Justice's emphasis on secure colleges, remarking that the average time in custody was 79 days and that most young offenders would not be in custody long enough to improve their basic skills:

> 128. (...)The greater focus should be on improving transition between custody and the community — and we therefore strongly support those parts of the consultation relating to this issue — and on improving provision in the community and ensuring as far as possible that young people leaving custody can resume their education, preferably at their original place of study. This may require incentivising schools and colleges to take back difficult students. We also draw the attention of schools and colleges to the need to provide information to secure institutions regarding the educational levels of young offenders, so that their educational progress is not impeded while they are in custody.[92]

The Government response to that report was published in May 2013.[93] In broad terms, the Government welcomed the Justice Committee's report:

> 4. The Ministry of Justice and the YJB welcome the report's focus on tackling the over-criminalisation of young people in the care system, as this is an issue that we are keen to tackle with partners across Government in the year ahead. We also welcome the focus on improving the collection and dissemination of effective practice. The YJB has taken significant strides to develop effective practice, and we are encouraged by the Committee's recognition of its importance and the steer on next steps.[94]

9.2 The Bill

This section of the paper examines the main provisions of the Bill as they relate to secure colleges for young offenders. These provisions would apply in England and Wales.

In addition to the Explanatory Notes, the Ministry of Justice has published a factsheet on the relevant clauses.[95]

Clause 17 would amend the *Prison Act 1952*, by adding secure colleges to the list of types of establishment − young offender institutions, remand centres and secure training centres – that the Secretary of State may provide. It introduces **Schedule 3**, which makes further amendments to the *Prison Act 1952* and others.

Clause 18 introduces **Schedule 4**, making provision for contracting-out the provision and running of secure colleges, certification of secure college custody officers and contracting-out functions at directly-managed secure colleges. The Schedule would give various powers to the Secretary of State and make certain provisions, including:

- The Secretary of State could enter into a contract with another person, for that person to provide or run a secure college (or part of one), or both. The running of the college could be sub-contracted (**paragraph 1**).
- A contracted-out secure college must be run in accordance with the Schedule, the *Prison Act 1952* as it applies to contracted out secure colleges and secure college rules made under the *Prison Act 1952* (**paragraph 2**).

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92 Justice Committee, *Youth Justice*, 14 March 2013, HC 339 2012-13, p57
93 Ministry of Justice, *Government response to the Justice Committee's Seventh Report of Session 2012-13: Youth Justice*, Cm 8615, May 2013
94 Ibid, p3
95 Ministry of Justice *Criminal Justice and Courts Bill: Fact sheet: Secure Colleges (clauses 17 – 19)* [undated]

- A contracted-out secure college would have a principal (with certain requirements for the appointment of the principal and their functions) and a monitor (who would have reviewing, investigatory and reporting functions) (**paragraphs 4** and **5**).

- Officers of a contracted-out secure college would not have the constabulary powers of prison officers (**paragraph 6**). **Paragraph 7** states who may be an officer of a contracted-out secure college who performs custodial functions.

- **Paragraphs 8** to **11** set out officers' duties and powers, including those in relation to good order and discipline (**paragraph 8(c)**) and well-being (**paragraph 8(d)**).

- If authorised to do so by secure college rules, a secure college custody officer could use reasonable force "where necessary" in (amongst other things specified in **paragraphs 8** and **9**) preventing escape from lawful custody, preventing the commission or attempted commission of unlawful acts, ensuring good order and discipline or searching persons in the college (**paragraph 10**).

- The Secretary of State could intervene to replace the principal of a contracted out secure college in certain situations (**paragraph 12**).

- For a person to be certificated as a secure college custody officer, they would have to satisfy the Secretary of State that they were a fit and proper person to perform custodial functions at secure colleges and had received training to such standard as the Secretary of State considered appropriate (**paragraph 17**). Such certificates could be suspended (**paragraph 18**) or revoked (**paragraph 19**).

- Secure college custody officers could carry out functions at a directly-managed secure college, if the Secretary of State entered into such a contract (**paragraph 20**).

Clause 19 would enable the Youth Justice Board for England and Wales to enter into agreements for the provision of accommodation for young offenders serving a sentence of detention for public protection, an extended determinate sentence of detention, an extended sentence of detention for public protection and the *Armed Forces Act 2006* equivalents.

9.3 Comment

The Children's Rights Alliance for England has argued that the Bill's provisions for secure colleges pose various problems and raise concerns about child protection:

> Instead of acting on this evidence [that children who are sent to prison are vulnerable and damaged children and have very complex problems], the Government's "secure college" will hold 320 children in an establishment ill-equipped to meet their needs.
>
> There are also child protection problems with the plan, with a very low number of younger children (as young as 12) and girls (only a small number of girls go to prison) to be incarcerated with a vast number of older boys.[96]

The Unlocking Potential blog asked whether secure colleges might mean the end of secure children's homes:

> They almost certainly mark the death knell of secure children's homes - the small local units which provide high quality but expensive care for the most troubled young people.

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[96] Children's Rights Alliance for England, *Criminal Justice and Courts Bill represents a huge step backwards for children's human rights* [undated]

> But we know almost nothing about these proposed new institutions other than that they'll be larger and cheaper than what they replace. Defining institutions as educational is no guarantee of desirability let alone success as Approved Schools and Community Homes with Education proved in years gone by.[97]

The inclusion of powers in relation to the use of "reasonable force" by secure college custody officers has attracted particular comment. The website Children and Young People Now referred to the controversy about the use of restraint in young offender institutions. Justice Minister Jeremy Wright was quoted there as saying that restraint would be used only as a last resort and that no decision had been made about its use in secure colleges:

> We are clear that restraint should only ever be used against young people as a last resort where it is absolutely necessary to do so and where no other form of intervention is possible or appropriate.
>
> The Bill published today does not contain proposals to allow children to be restrained for 'good order and discipline'.
>
> No decisions have been made yet on the use of restraint in secure colleges.
>
> We have recently rolled out a new system of minimising restraint in young offenders institutions and secure training centres which is independently assessed.
>
> We will build on these positive developments when looking at how restraint will be used in the new establishment.[98]

The website Community Care reported the concerns of the Howard League for Penal Reform about the use of restraint:

> Frances Crook, chief executive of the Howard League for Penal Reform, said: "This scandalous proposal to allow prison officers to restrain children violently, simply if they don't follow orders, turns back the clock to a deadly time for children in prison.
>
> "Court rulings have made clear that restraining a child for 'good order and discipline' is illegal and inquests into the deaths of children have shown that such violent practices contributed to their deaths.
>
> "We trust that such a dangerous proposal will be challenged in Parliament and, if needs be, in the courts." [99]

10 Youth cautions and conditional cautions: appropriate adult

10.1 Background and current law

The *Legal Aid Sentencing and Punishment of Offenders Act 2012* abolished reprimands and final warnings and replaced them with a new system of youth cautions and youth conditional cautions which came into force on 8 April 2013.[100]

Guidance produced by the Ministry of Justice and Youth Justice Board for the police and Youth Offending Teams explains what youth cautions are:

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97 Rob Allen, *Unlocking Potential*, 5 February 2014

98 Neil Puffett, "Critics attack 'illegal' plan to use force in secure colleges", *Children and Young People Now,* 6 February 2014

99 Tristan Donovan, "Prison reformers warn of 'scandalous' government plans for restraint in youth jails", *Community Care*, 5 February 2014

100 For background see *Library Research Paper, Legal aid, Sentencing and Punishment of Offenders Bill, RP11/53,* section 12.8

> Youth cautions are a formal out-of-court disposal that can be used as an alternative to prosecution for young offenders (aged 10 to 17) in certain circumstances. A youth caution may be given for any offence where the young offender admits an offence, there is sufficient evidence for a realistic prospect of conviction but it is not in the public interest to prosecute.[101]

Youth conditional cautions are explained in the *Ministry of Justice Code of Practice for Youth Conditional Cautions*:

> A youth conditional caution allows an authorised person (usually a police officer) or a relevant prosecutor (usually a member of the CPS) to decide to give a caution with one or more conditions attached. When a young person is given a conditional caution for an offence, criminal proceedings for that offence are halted while the young person is given an opportunity to comply with the conditions. Where the conditions are complied with, the prosecution is not normally commenced. However, where there is no reasonable excuse for non-compliance, criminal proceedings may be commenced for the original offence and the conditional caution will cease to have effect.[102]

Currently legislation states that an appropriate adult must be present when a youth caution or youth conditional caution is given to a 10 to 16 year old.[103] An "appropriate adult" may be a parent, guardian, local authority social worker, from a voluntary organisation or some other responsible adult aged 18 or over who is not a police officer or employed by the police.

An amendment was moved during the committee stage of the *Legal Aid Sentencing and Punishment of Offenders Bill* which would have required that an appropriate adult be present when a youth caution was given to a 17 year old.[104] At that time the Government said that it was not unsympathetic to the suggestion, that work was already under way to consider that matter, but that resource implications would have to be overcome before any change could be made. The Government noted that the *Police and Criminal Evidence Act 1984* (PACE) and its codes of practice did not, at that time, require an appropriate adult to be present for a person aged under 17 from the outset when, for example, the young person was informed of the grounds of their detention, informed of their rights or interviewed.

The *PACE* Code C is a code of practice for the detention, treatment and questioning of persons by police officers. In the case of *HC vs. (1) Secretary of State for the Home Department and (2) Commissioner of Police for the Metropolis,* the Administrative Court held that it was unlawful for 17 year olds to be treated in the same way as adults when in detention.[105] The Government, following consultation,[106] implemented changes to PACE Code C in order, amongst other things, to ensure compliance with this judgment. The changes included extending the requirement for an appropriate adult contained in Code C, with modifications, to 17 year olds.[107]

The Ministry of Justice fact sheet for this clause *Youth cautions and conditional cautions: involvement of appropriate adults* states that clause 20 would make "a minor and technical

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101 Ministry of Justice and Youth Justice Board, *Youth Cautions: Guidance for Police and Youth Offending Teams*, 8 April 2013, para 1.4

102 Ministry of Justice, *Code of Practice for Youth Conditional Cautions: Crime & Disorder Act 1998 (as amended by the Criminal Justice & Immigration Act 2008 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012)*, 8 April 2013, para 2.1

103 Sections 66ZA(2) and 66B(5) of the *Crime and Disorder Act 1998*

104 PBC Deb 13 October 201 c791

105 *HC vs. (1) Secretary of State for the Home Department and (2) Commissioner of Police for the Metropolis* [2013] EWHC 982 (Admin)

106 Gov.uk: *Consultation outcome: Revised PACE codes of practice: C and H* [accessed 12 February 2014]

107 Police and Criminal Evidence Act 1984 Code C, para 1.5A

change to the new formal youth out-of-court disposal legislative framework in light of the judgment" in the case of *HC vs. (1) Secretary of State for the Home Department and (2) Commissioner of Police for the Metropolis*.[108]

10.2 The Bill

Clause 20 would amend the *Crime and Disorder Act 1998* to provide that an appropriate adult must be present where a youth caution or conditional caution is given to a 17 year old.

11 Youth offenders: referral orders

11.1 Background and current law

Referral orders were introduced by the *Youth Justice and Criminal Evidence Act 1999* and, after pilots, were implemented nationally in April 2002. They require young people to attend a Youth Offender Panel, which is made up of two local volunteers and a Youth Offending Team member. The panel, with the young person, their parents or carers and the victim (where appropriate) agree a contract lasting between three and 12 months with the aim of preventing reoffending.

Further information about referral orders and youth offender panels can be found in the statutory guidance, published jointly by the Ministry of Justice and the Youth Justice Board.[109]

There is currently no limit on the number of referral orders which a repeat offender can receive. The *Legal Aid Sentencing Punishment of Offenders Act 2012* removed a previous restriction on offering referral orders to young offenders with previous convictions.[110] The change was intended to promote the use of referral orders for the delivery of restorative justice conferencing.

The Ministry of Justice fact sheet on these clauses, *Referral Orders*, states that minor technical issues have arisen as a result of the change made by the *Legal Aid Sentencing Punishment of Offenders Act* 2012. It states:

> Where a referral order has been breached or further offences committed, the court must revoke the order, which results in important ongoing work under the contract being lost. This can act as an obstacle both to the effective use of restorative justice principles by youth offender panels and addressing offending behaviour by children.[111]

11.2 The Bill

Clauses 21 to 23 of the Bill aim to address the technical issues that have arisen since the change was made by the *Legal Aid Sentencing Punishment of Offenders Act 2012*. Currently, where a referral order is breached, or further offences committed, the court must revoke the order. This, the Government says, results in ongoing work under the contract being lost.

Clause 21 would amend Schedule 1 to the *Power of Criminal Courts (Sentencing) Act 2000* and provide for alternatives to revocation of a referral order where the court finds the terms of the youth offender contract have been breached. A court would be able to impose a fine up

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[108] Ministry of Justice, *Criminal Justice and Courts Bill, Youth cautions and conditional cautions: involvement of appropriate adults - Clause 20*, February 2014

[109] Ministry of Justice and Youth Justice Board, *Referral Orders and Youth Offender Panels: Guidance for the courts, Youth Offending Teams and Youth Offender Panels* , December 2012

[110] Section 79. For background, see *Library Research Paper, Legal aid, Sentencing and Punishment of Offenders Bill RP11/53*, p52

[111] Ministry of Justice, *Criminal Justice and Courts Bill: Referral orders* , February 2014

to a maximum of £2500, or extend the youth offender contract up to a maximum overall length of 12 months.

Clause 22 would amend Schedule 1 to the *Power of Criminal Courts (Sentencing) Act 2000* to give courts the power to extend a second or subsequent referral order where the child or young person has been convicted of additional or further offences. The Ministry of Justice fact sheet explains the reason for the clause:

> As it is possible to receive more than one referral order, it makes sense to remove this restriction and allow extension to any subsequent referral order to provide greater flexibility to the court and support the delivery of restorative justice within the referral order.[112]

Clause 23 would give the court a discretion as to whether to revoke an existing order for further or additional offences. This would replace the current duty to revoke an existing referral order in circumstances where the offender is convicted of further offences. The court would consider whether it appeared to be in the interests of justice to revoke the order.

12 Trial by single justice on the papers

12.1 Background and current law

Section 29 of the *Criminal Justice Act 2003* provides for the written charge and requisition procedure, a method of commencing criminal proceedings. A public prosecutor may institute criminal proceedings against a person by issuing a written charge, which charges the person with the offence. Where the public prosecutor issues a written charge a requisition must also be issued at the same time. This requires the accused to appear before a magistrates' court to answer the written charge.

The *Magistrates Court Act 1980* provides that if the accused fails to appear and is 18 or over, the court must proceed in his absence, unless it appears contrary to the interests of justice to do so.[113] Where the proceedings were commenced by written change and requisition, it must be proved that to the satisfaction of the court that the requisition was served on him a reasonable time before the hearing. If the accused does not appear, and the conditions for proceeding in his absence are satisfied, a not guilty plea is entered on his behalf and the burden is on the prosecution to prove the case, whether by calling oral evidence or reading out written statements served on the accused.[114]

In *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System*, the Government stated that it intended to legislate to allow the majority of high-volume, low-level, 'regulatory' cases to be dealt with away from traditional magistrates' courtrooms.

> We need to end the situation where three magistrates, a legal adviser and a prosecutor (all supported by a court usher) read out elements of a case to an otherwise empty courtroom before imposing an entirely predictable penalty.[115]

The Strategy and Action Plan noted other measures being taken with the aim of streamlining the system of summary justice, including regarding traffic courts and police-led prosecutions.[116]

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[112] Ministry of Justice, *Criminal Justice and Courts Bill: Referral orders*, February 2014
[113] Section 11
[114] *Blackstone's Criminal Practice 2014*, para D22.13
[115] Ministry of Justice, *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System*, June 2013, p16
[116] Ibid

Proposals for streamlining summary justice were previously considered in 2006 in the document *Delivering Simple, Speedy ,Summary Justice*, produced by the Home Office, Department for Constitutional Affairs and the Attorney General's Office.[117]

The Government's reasons for the changes proposed in the Bill are given in the Ministry of Justice's fact sheet, *Trial by single justice on the papers*, which states:

> The Government believes it is unacceptable that valuable time in magistrates' courtrooms is taken up by offences such as speeding, driving without insurance and TV Licence evasion for cases when defendants do not attend the hearings, meaning only magistrates, prosecutors and court staff do. This is disproportionate, expensive and wasteful when compared with the seriousness of the offence and the likely penalty for the defendant. It also takes valuable magistrate resources away from dealing with more serious offences, such as those which have the biggest impact on communities.

The Government refers to 'regulatory cases' by which it means "summary-only, non-imprisonable cases, which almost exclusively result in a financial penalty, where defendants seldom attend court or even enter a plea".[118]

12.2 The Bill

Clause 24 would amend section 29 of the *Criminal Justice Act 2003* so that, in addition to the written charge and requisition procedure, relevant prosecutors could initiate criminal proceedings by written charge and single justice procedure notice.[119]

A single justice procedure notice would be a document that required a person to respond to it stating whether they plead guilty or not guilty to the charge, and if they plead guilty whether they are content for the case to be dealt with by the single justice procedure.

Clause 25 would allow for the Criminal Procedure Rules to make provision relating to the single justice notice procedure where the rules already make provisions relating to requisitions.

Clause 26 would provide for the single justice notice procedure, inserting new clauses 16A to 16E into the *Magistrates' Court Act 1980*. A single magistrate would have the power to deal with summary-only, non-imprisonable offences in cases where:

- the accused is over 18 on the date they are charged;
- the accused had been served with a written charge and single justice procedure notice and any other documents prescribed by the Criminal Procedure Rules; and
- the accused has not entered a plea of not guilty or specifically requested an oral hearing before a magistrates' court in response to the single justice procedure notice.

In cases heard using the single justice notice procedure, the case would be dealt with by a single magistrate, on the papers, in the absence of the parties. There would be no obligation for the case to be heard in open court.

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[117] Home Office, Department for Constitutional Affairs and the Attorney General's Office, *Delivering Simple, Speedy ,Summary Justice*, July 2006

[118] Ministry of Justice, *Streamlining high-volume, low-level 'regulatory cases' in magistrates' courts*, IA No: MoJ 227, 5 February 2014, p1

[119] The Bill uses the term relevant prosecutor rather than public prosecutor as is currently used in the *Magistrates' Court Act 1980*. Relevant prosecutors would be those named in section 29 of the *Magistrates' Court Act 1980* or those named by order of the Secretary of State.

A case could not be tried using the single justice notice procedure where the single magistrate decides it would be inappropriate to do so or where, at any time before the trial, the accused or his legal representative gives notice that the accused does not wish the case to be tried under the single justice notice procedure.[120]

There would be a statutory declaration procedure so that an accused that was not aware of the single justice notice procedure notice or proceedings would be entitled to make a statutory declaration to that effect. If the declaration were made in accordance with the provision, the declaration would render the proceedings void. A magistrate would then be able to re-start the proceedings against the accused.[121]

Clause 27 concerns the sentencing and other powers of a single justice using the single justice notice procedure. A single justice would be able to deal with summary-only non-imprisonable offences in a similar way to a bench of three magistrates under a written charge and requisition notice. This would include making a compensation order for compensation to be paid to a victim, ordering payment of the victim surcharge, disqualifying a driver and endorsing a driving licence. A single justice would also be given the power to impose a fine.

Clause 28 and **Schedule 5** concern amendments required to other areas of legislation to reflect the new single justice procedure.

13 Criminal courts charge

13.1 Background and current law

In April 2013 Chris Grayling was reported to have said that the Government "was exploring ways to make criminals pay towards the cost of their prosecution to the court".[122]

Currently, when an offender is convicted of a crime, there is no charge payable that covers the cost of administering the case. Offenders can already, in certain circumstances, be required by the courts to make other types of payments, including fines, the victim surcharge, compensation to victims and contributions towards prosecutions costs.[123]

The Government says, in the Ministry of Justice fact sheet *Criminal Court Charges*, that it considers that convicted adult offenders who use the criminal courts should pay towards the cost of running them.

The overarching impact assessment for the Bill states that there will be monetised benefits to HMCTS from charging convicted offenders. The impact assessment states that a full impact assessment of the provisions on criminal courts charges will be published shortly.[124]

13.2 The Bill

Clause 29 would require courts to impose a charge (the criminal courts charge) in respect of the costs of the criminal courts on all adult offenders who have been convicted of a criminal offence.

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120 New section 16B subsections (1) and (2), to be inserted by clause 26

121 New section 16E

122 See, for example, "Justice Secretary Chris Grayling wants criminals to pay towards cost of their trials", *Independent*, 9 April 2013

123 Re prosecution costs see *Prosecution of Offences Act 1985*, section 18(1), Rule 76.5 *Criminal Procedure Rules 2013* and Part 3 *Practice Direction (Costs in Criminal Proceedings) 2013*

124 Ministry of Justice, *Impact Assessment: Criminal Justice and Courts Bill, IA No: MoJ001/14*, 5 February 2014, p9

Clause 29 would insert a new part 2A into the *Prosecution of Offences Act 1985*, consisting of section 21A to 21F.

New section 21B would require a magistrates' court or the Crown Court to order an offender to pay the charge when dealing with a person for an offence, for breach of a community order, for breach of the community requirements of a suspended sentence order or for breach of the supervision requirements imposed under section 256AC of the *Criminal Justice Act 2003* (which would be inserted by the *Offender Rehabilitation Bill*). The Crown Court would additionally be required to order an offender to pay the charge when dismissing an appeal by the person against conviction or sentence. The Court of Appeal would be required to order an offender to pay the charge when dismissing an appeal against sentence or conviction, or when dismissing an application for leave to bring an appeal.

The level of the charge would be set by the Lord Chancellor in regulations. New section 21C(2) would require that the charge be set at a level that does not exceed the relevant court costs reasonably attributable to a case of the particular class. The Explanatory Notes for the Bill state that the Lord Chancellor expects to set the level of the charge with regard to factors likely to effect on the cost of proceedings, such as whether the offender pleaded guilty, whether their case was dealt with by the magistrates' or Crown Court and the offence type.[125]

The Lord Chancellor would have the power to make regulations to require offenders to pay interest where the charge has not been paid. The Lord Chancellor would not be able to charge a higher rate of interest that that which the Lord Chancellor considers would maintain the real term value of the unpaid debt.[126]

The charge would not be taken into account by the court when sentencing. New 21A(4) would require the court to disregard the criminal courts charge when otherwise dealing with a person for any offence.

The Explanatory Notes for the Bill state that the criminal courts charge would be collected after other financial impositions, such as compensation and the victim surcharge have been paid.[127] The Ministry of Justice fact sheet *Criminal Court Charges* states that the charge would be collected using existing HMCTS debt collection processes in a similar way to other financial impositions such as fines and compensation.

Magistrates' courts would be given a power, in certain circumstances, to remit the whole or part of a charge (new section 21E). The court would only be able to cancel the charge if it believed that the offender had taken all reasonable steps to pay, having regard to the person's personal circumstances, or it believed that it was not practicable to collect or enforce it.

The Government states, in the fact sheet *Criminal Court Charges*, that allowing the court to cancel the charge after a limited period of time has passed will incentivise rehabilitation through rewarding those offenders who do not reoffend and will encourage compliance with payment terms. The time period after which the court would be able to remit the offender's charge debt would be specified in secondary legislation.

Clause 30 would introduce a duty on the Lord Chancellor to undertake a review of the operation of the new provisions for criminal court charges after an initial period. The initial period would be set at three years after the provisions enter into force. The Lord Chancellor would be required to repeal the provisions by regulations should he consider it appropriate to

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[125] Explanatory Notes, para 39
[126] New section 21D
[127] Bill 169 EN 2013-14, para 39

do having regard to the conclusions reached by the review. The regulations made under this clause would be made by statutory instrument and subject to the affirmative procedure.

13.3 Comment

Stephen Whitehead of the think tank the New Economics Foundation (NEF) commented on several perceived problems with the proposed charge, relating to the impartiality of the courts, the potential hardship for offenders and their families and the difficulties of collection:

> Because the charge is only levied when defendants are found guilty, it gives the courts service a direct financial interest in the outcomes of cases, running the real risk that the perceived impartiality of the court will be undermined. This then also threatens to impinge on exercising the right to appeal or to a jury trial if defendants are dissuaded by the prospect of facing escalating fines.
>
> While it's tempting to lay an ever increasing set of burdens on offenders, we must remember that offenders found guilty are already facing a set of punishments which have been designed by parliament and the sentencing council to be proportionate to the offense that they've committed – whether its custody, community service or a financial penalty that is designed to take account of their ability to pay. And even those personalised fines are problematic. Many poorer offenders will see their fines, and other charges, taken directly from their benefits, potentially creating real hardship not only for them but also for their families. Collection can be difficult and expensive to administer - the Public Accounts Committee estimates that £600m are outstanding.
>
> Like so many other services, our courts are desperately in need of investment. Many court buildings are showing their age, and the potential for new technology to make our courts run quicker and easier is largely untapped. But we shouldn't look to offenders to meet that need. Courts aren't a service to individual criminals. Like police and prisons, they are part of a system which keeps society safe from crime. If government can't afford to pay for that any more, then perhaps it's time for a more fundamental rethink of how we fund the state.[128]

The Bar Council was reported to be in favour of the criminal charge:

> The Bar Council, which represents barristers in England and Wales, supports the idea of making convicted defendants pay for their trial. "An individual, who chooses to contest a charge he is in fact guilty of, should bear the true cost of his or her offending," it said.[129]

In the same article, the organisation Justice was reported to have concerns about the provision, questioning whether it would raise more funds than it cost to administer and stating that the provisions would involve a challenge to the presumption of innocence:

> ... Jodie Blackstock, criminal justice director of the civil rights group Justice said: "The reality is most people will not be able to pay. It's not clear that the costs of administering it will outweigh the benefit from the costs raised. These charges involve a challenge to the presumption of innocence."[130]

Penelope Gibb, writing for the online magazine *The Justice Gap*, describes the criminal courts charge as one of the most worrying proposals in the Bill:

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[128] NEF blog, *Who should pay for our courts*?, 7 February 2014
[129] "Punitive fees for prisoners intended to raise £30m a year", *Guardian*, 5 February 2014
[130] Ibid

> Nobody thinks convicted criminals should not make amends for their crimes, but financial penalties are not the most effective means. Already the courts face huge problems getting fines paid.
>
> Now offenders have to pay a victim surcharge too. Offenders are often incredibly poor and, once convicted, have very little access to cash. This will add to their list of debts, and may bring in less to the courts than it costs to collect. I'm particularly concerned by the suggestion in the Bill that defendants should pay for unsuccessful appeals. The financial barriers to appealing sentences are already considerable. An accessible appeals system is at the heart of a humane justice system. It should not be sacrificed at the altar of austerity. [131]

14 Variation of collection orders

14.1 Background and current law

Under Schedule 5 of the *Courts Act 2003*, where a fine or compensation order is imposed on an offender by a magistrates' court, the court must make a collection order unless this would be impracticable or inappropriate. The collection order will state, amongst other things, the amount due, whether an attachment of earnings order (AEO) or an application for benefit deductions (ABD) has been made,[132] if no AEO or ABD has been made the payment terms, and, if an AEO or ABD has been made the reserve term (the payment term that will apply if the AEO or ABD fails). Payment terms are terms requiring an offender to pay sums within a period or by instalment.

Currently fines officers have the power to vary payment terms under a collection order only while an offender is not in default and any variation must be in the offender's favour.[133]

14.2 The Bill

Clause 31 would make changes to the powers of fines officers to vary collection orders.

Under clause 31 an offender would be able to apply to a fines officer for the payment or reserve terms of a collection order to be varied at any time, including when the offender is in default. The Government fact sheet *Criminal Court Charges* states that this will give offenders a further opportunity to take responsibility for their debts and reduce the administrative burden of enforcement activity.[134]

Clause 31 would also provide that a fines officer can vary payment terms or reserve terms in a way which is less favourable to the offender. This would only be done with the offender's consent.

An application by an offender for variation of the payment or reserve terms of an order once the offender is in default would not prevent the fines officer taking enforcement action.

15 Appeals in civil proceedings and wasted costs orders

As part of its consultation on reforms to judicial review, the Government also consulted on proposals in two areas which would apply more generally to all civil proceedings: leapfrog appeals and wasted costs orders.

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131 On the Alter of Austerity, The Justice Gap, undated [accessed 11 February 2014]

132 Under an AEO or an ABD, instead of the offender making payments to the court, deductions are instead taken at source from the offender's earnings or benefits (by the employer or the Department for Work and Pensions respectively) before he receives them

133 Para 22, Schedule 5, *Courts Act 2003*

134 Ministry of Justice, *Criminal Justice and Courts Bill: Fact Sheet: Criminal Courts Charge (clauses 29 - 31)*, para 11

15.1 Leapfrog appeals

Current law

Leapfrog appeals in civil cases move directly from the High Court, or any Divisional Court in England and Wales, to the Supreme Court, missing the Court of Appeal. The current law is set out in sections 12 to 16 of the *Administration of Justice Act 1969*, which set out the circumstances in which leapfrogging is possible and the process to be followed. An appeal directly to the Supreme Court is possible only where there could otherwise be an appeal to the Court of Appeal, and where a sufficient case for a leapfrog appeal has been made out to justify an application for leave to bring such an appeal.

In summary, for a leapfrog appeal to take place, a number of elements must be present:

- a certificate must be granted by the judge;
- an application for a certificate for a leapfrog appeal may be made by any of the parties to the proceedings (within a specified time limit) but all parties must consent to the application;
- a Committee of the Supreme Court must agree that a leapfrog appeal should take place;
- the case must involve a point of law that is of general public importance, and which either:
    - relates to statutory interpretation that has been fully argued or
    - is one where the judge would be bound by a decision of the Court of Appeal or of the Supreme Court (previously the House of Lords) in previous proceedings, and was fully considered in the judgments given by the superior court in those previous proceedings.

Government consultation

In its consultation published in September 2013, *Judicial Review Proposals for further reform*, the Government invited views on extending the scope of leapfrog appeals, citing delays and confidence in the effectiveness of the justice system as reasons for proposing reform:

> In a small number of significant cases it is clear that leave to appeal to the Supreme Court will ultimately be sought. At present, these cases may take many years to come to a conclusion, delaying matters which the Government regards as important and to which a swift resolution would clearly be desirable, and also harming public confidence in the justice system. A party may have an interest in seeking delay when this is clearly not in the wider public interest. The Government considers that such cases should be determined more quickly with fewer intermediate steps.[135]

The Government proposed three reforms:

- expanding the criteria for leapfrog appeals, allowing a case to leapfrog if it is of national importance or raises significant issues:

> 190. ... The Government wishes to ensure that where a case is of national importance or raises significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) the court can use the power to leapfrog. Whilst

[135] Ministry of Justice, *Judicial Review Proposals for further reform*, Cm 8703, September 2013, p48

> there would still be the need for the point of law to be one of general importance the key deciding factor would be whether the case had implications as above.
>
> 191. Cases that leapfrog to the Supreme Court are ones which would have reached the Supreme Court anyway under the current law. Our proposed reform would remove an intermediate step, reducing the time needed to resolve the case. The Government's view is that the reform to leapfrogging would not cause cases to reach the Supreme Court which otherwise would not. In some cases the Supreme Court may take the view that the Court of Appeal's consideration would be helpful for them to narrow down the arguments in which case an application to leapfrog would be refused.[136]

- removing the requirement for all parties to consent, whilst retaining judicial discretion over which cases should be allowed to leapfrog:

> 193. In many cases which might benefit from leapfrogging the claimant's desired outcome may simply be delay, so they would not consent to expedite the case through leapfrogging. The Government seeks views on removing the need for all parties to consent to leapfrogging and on alternative processes for determining an application.
>
> 194. The court of first instance and the Supreme Court would retain their present role and discretion to refuse a leapfrog appeal where inappropriate. This should ensure that this change would not lead to an increase in the volume of cases moving to the Supreme Court.[137]

- enabling leapfrog appeals to be initiated, in addition, in the Upper Tribunal, Employment Appeals Tribunal and the Special Immigration Appeals Commission. Information about the work of each of these bodies is provided in the Government's consultation paper, *Judicial Review Proposals for further reform.*[138]

Government response

In February 2014, the Government published its response to the consultation.[139] This indicated that, although some concerns had been raised, and some refinements had been suggested, the majority of those who had responded agreed with the principle of the Government's proposals:

> 70. In general those who responded agreed with the principle that appropriate cases should be expedited to the Supreme Court, though some highlighted the risk that the Supreme Court could become overloaded and would lose the benefit of the Court of Appeal's consideration. In terms of the specific proposals, a majority was supportive of these changes, though some refinements were suggested. Specific concerns raised included that the extended criteria were too vague, that removing the need for consent would undermine appeal rights, and that leapfrogging should not be extended to SIAC.

The Government said that it intended to proceed with all three of its proposals, which, it felt, would enable leapfrogging only where appropriate and which would reduce delay and costs:

> 71. Under the proposals the current role of the court of first instance and Supreme Court in agreeing to a leapfrog taking place would be retained, which would mitigate the potential risk of overloading the Supreme Court. This would also ensure that leapfrogging is only used in appropriate cases, addressing concerns that appeal rights

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136 Ibid, p48
137 Ibid, p49
138 Ibid, pp50-51
139 Ministry of Justice, *Judicial Review – proposals for further reform: the Government response,* Cm 8811, February 2014

> could be undermined and that SIAC cases may not be suitable for leapfrogging. The Government considers that it is important to widen the criteria to allow certain high-profile cases to leapfrog and that sufficient clarity will be achieved through legislation and subsequent interpretation by the judiciary.
>
> 72. Therefore the Government is persuaded to make the three changes proposed in order to ensure that appropriate cases can be resolved more quickly, with fewer intermediate steps and at lower cost. Legislation is being brought forward to extend the criteria which must be met for a leapfrog to take place to include cases of national importance or which raise significant issues, remove the requirement for consent of both parties and allow a leapfrog to be initiated in the Upper Tribunal, EAT and SIAC.[140]

The proposals would apply to leapfrog appeals in civil and administrative proceedings generally, not only to appeals in judicial reviews.

The Bill

Clause 32 would amend the *Administration of Justice Act 1969* to give effect to the Government's proposals to widen the scope for appeals from the High Court to be made directly to the Supreme Court. This clause would specify alternative qualifying criteria and remove the requirement for all parties to consent. The alternative conditions would be that the proceedings involve a point of law of general public importance and that:

- the proceedings involve a matter of national importance;
- the result of the proceedings is so significant that the judge considers a hearing by the Supreme Court to be justified; or
- the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

The new provisions would not apply to appeals from the High Court of Northern Ireland, meaning that the current provisions in the *Administration of Justice Act 1969* would continue to apply those appeals.

Clauses 33, 34 and 35 would introduce amendments to relevant legislation to enable appeals directly to the Supreme Court to be initiated respectively in the Upper Tribunal, the Employment Appeal Tribunal and the Special Immigration Appeals Commission. In each case leapfrog appeals could be initiated under the same conditions as appeals from the High Court.

Similar exclusions would apply as already apply in respect of appeals from the High Court. Accordingly, the Upper Tribunal, Employment Appeal Tribunal and the Special Immigration Appeals Commission would not be able to grant a certificate allowing an application for permission to appeal direct to the Supreme Court:

- if there would have been no right of appeal at all to the relevant appellate court or from the relevant appellate court to the Supreme Court;
- where no right of appeal would exist without first obtaining permission to appeal, unless the Tribunal/Commission in question considers that the case merits such permission being granted;

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[140] Ibid, pp17-18

- in relation to appeals from decisions relating to contempt of court.

The Explanatory Notes set out how these provisions would apply respectively in Scotland and Northern Ireland.[141]

Comment

In its response to the Government's consultation, the Civil Justice Council (CJC) said that it wished to register concern "that questions raising issues of much wider application in the civil justice system should not be slipped into consultation papers on specific topics".[142]

The CJC raised concerns about overwhelming the Supreme Court with applications and questioned the amount of time which would be saved:

> The possibility of leapfrogging all cases of national importance or raising significant issues gives rise to the prospect of overwhelming the Supreme Court with applications while bypassing the High Court and Court of Appeal (which often narrow the issues in a case so that the Supreme Court only considers a particular outstanding point of law).
>
> Time saved on leapfrogging may be lost in litigation appealing against the decision to issue the certificate for it.
>
> The Council suspects that even if the criteria are broadened and the judge agrees to issue a certificate, as it is proposed (paragraph 194) that the Supreme Court retain their discretion to refuse a leapfrog appeal, in practice many of these cases will simply return to the High Court of Court of Appeal, but after a delay and extra cost.
>
> Our general understanding, in any event, is that cases involving national security and other important public interest matters are already expedited in the High Court and Court of Appeal.[143]

In its response to the Government's consultation, Matrix Chambers generally welcomed the leapfrog appeal provisions in appropriate cases, but also cautioned that leapfrogging can sometimes result in an appeal being insufficiently focused:

> Generally speaking, Matrix feels that in suitable cases, the ability to "leapfrog" appeals to the Supreme Court should be facilitated in the most expeditious and efficient manner. In circumstances where the issues are already clear, evidence has been finalized, and the parties are of the view that it is appropriate, leapfrogging is likely to be an entirely sensible course of action and proposals aimed at streamlining this process are to be welcomed. However, it may be worth recording that the experience of some members of Matrix is that leapfrogged appeals can sometimes result in matters before the Supreme Court being insufficiently focused, with issues still being formulated and even evidence still being submitted. One example of this is the *James, Lee and Wells* [2010] 1 AC 553 litigation (concerned with the lawfulness of IPP sentences) where two of the appeals were leapfrogged from the Administrative Court. The slightly incomplete way in which matters were presented to the Supreme Court may have been a factor in the appellants' ultimate success in Strasbourg.[144]

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141 Bill 169 – EN, paragraphs 70, 74, 281 and 283
142 Civil Justice Council, *Civil Justice Council (CJC) Response - Judicial Review: Proposals for Further Reform,* 6 November 2013
143 Ibid
144 *Judicial Review: Proposals for Further Reform Response by Matrix Chambers,* p22

The UK Constitutional Law Association has described the leapfrog appeal provisions as "sensible and welcome".[145]

15.2 Wasted Costs Orders

Current law

Wasted costs orders (WCOs) enable the Court to order that a legal representative is personally liable for any costs of litigation which have been unnecessarily caused ('wasted') to a litigant by the legal representative's conduct where, because of that conduct, it is unreasonable to expect the litigant to pay them. A litigant can seek a WCO against the legal representative of any party including the litigant's own representative.[146] The conduct in question must have been improper, unreasonable or negligent. The current law applies to all civil litigation and is set out in the *Senior Courts Act 1981* section 51 and the *Civil Procedure Rules* (CPR) Rule 46.8 and Practice Direction 46; case law governs how these are applied. Further information about WCOs, including the process to be followed, is provided in the Government's consultation published in September 2013, *Judicial Review Proposals for further reform*.[147]

WCOs are intended to be compensatory rather than punitive:

> The purpose is not to punish the solicitor or other legal representative for their wrong-doing but to protect their client and other parties from the consequences of it. It is a form of compensation – a person seeking wasted costs must show loss. The legal representative is only liable for the element of the overall costs that were 'wasted' by their conduct. [148]

The court also has further powers under CPR Rule 44.11 (court's powers in relation to misconduct) to make an order for costs against a legal representative where their conduct was unreasonable or improper:

> This is a broader power than that under CPR 46.8, under which the court may disallow costs generally as well as order either the party or the legal representative to pay costs which they have caused any other party to incur. The costs judge may make an order at their own initiative or at the request of either party.[149]

The Government's consultation paper indicates that a WCO is regarded as a serious matter used only rarely and in exceptional cases:

> A wasted costs order is viewed as a serious matter: the courts have interpreted "any improper, unreasonable or negligent act or omission" in section 51(7) as requiring that the conduct of the legal representative is quite plainly unjustifiable and involves breach of the legal representative's duty to the court. The test in section 51(7) has been interpreted strictly by the courts and a legal representative is generally not held to have acted improperly or unreasonably or negligently simply because they acted for a party who pursued a case that was hopeless. The legal representative could advise their client of the weakness but the client is free to disregard that advice and pursue the case. A judge must make full allowance for the difficulties facing a legal representative

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145 Constitutional Law Association, *Ben Jaffey and Tom Hickman: Loading the Dice in Judicial Review: The Criminal Justice and Courts Bill 2014,* [accessed 11 February 2014]
146 Ministry of Justice, *Judicial Review Proposals for further reform,* Cm 8703, September 2013, p38
147 Ibid
148 Ibid (footnote omitted)
149 Ibid, p39

> in court; however a legal representative may not "lend his assistance to proceedings which are an abuse of the process of the court".[150]

However, a WCO does not automatically result in any formal regulatory or contractual consequences for the legal representative who has acted improperly, unreasonably or negligently.[151]

Between March 2011 and June 2013 only around 50 WCOs were made, all of them in relation to immigration and asylum judicial reviews. The average value of a wasted costs order made between March 2011 and June 2013 was £400.[152]

Government consultation

The Government consulted on whether the approach to WCOs should be modified to capture a wider range of behaviours; and on whether the consideration of an application for a WCO could be streamlined so as not to be more time consuming or expensive than the wasted costs in issue. The Government also sought views on whether legal representatives who contest a wasted costs order and request an oral hearing should be required to pay a fee for the cost of that oral hearing, to properly cover the costs involved in hearing the case, and whether that fee should be contingent on the case being successful.[153]

Government response

The Government indicated that 145 of the 325 total responses to the consultation answered questions on WCOs. 7 responded positively, 6 respondents offered mixed comments both in support and opposition and 132 respondents opposed the proposals:

The main arguments and views expressed by respondents were:

- There is an insufficient case for change to the existing approach for issuing WCOs.
- Broadening the test risked deterring legal representatives from taking on difficult but important cases.
- It is the lawyer's role to advise the client of the merits of the case, but the client's decision whether or not to proceed to bring the claim.
- The court would often have to consider advice given to the client covered by legal professional privilege. This could only be disclosed if the client waived that privilege, and it would rarely be in their interest to do so.
- Legal representatives should not be financially penalised to defend themselves against a WCO at an oral hearing.
- The effect of earlier fees reform should be assessed before further action is considered.[154]

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150 Ibid (footnotes omitted)

151 Ministry of Justice, *Criminal Justice and Courts Bill Fact Sheet: Reform of Judicial Review (clauses 32 – 36 and 50 – 57),* 5 February 2014, paragraph 10

152 Ministry of Justice, *Judicial Review Proposals for further reform,* Cm 8703, September 2013, p39

153 Ibid, p40

154 Ministry of Justice, *Judicial Review – proposals for further reform: the Government response, Annex A*: *Summary of consultation responses Annex A: Summary of consultation responses*, Cm 8811, February 2014, p34

The Government has decided not to amend the current test but instead to strengthen the implications for the legal representative by requiring the courts to consider notifying the relevant regulator and, where appropriate, the Legal Aid Agency, when a WCO is made:

> In many situations where a WCO is awarded, professional negligence will be at issue and, as many respondents pointed out, independent regulatory bodies should have a role in these situations. This should help encourage legal representatives to consider more carefully the decisions they make in handling a case.[155]

This duty would apply in respect of all civil cases, not only judicial reviews.

The Bill

Clause 36 would amend section 51 of the *Senior Courts Act 1981* by requiring the court to consider whether to notify either the legal representative's regulator and/or the Legal Aid Agency when making a wasted costs order.

16 Contempt of court and juror research and misconduct

16.1 Background

Part 3 of the Bill also makes changes in respect of the law on contempt of court. There are two main aspects:

- Reforming the law on the strict liability rule to take account of the the availability of relevant information on the internet and on social media;
- Reforming the law applying to jurors, to create new offences prohibiting research on the internet, social media or elsewhere, when a trial is taking place.

A number of recent court cases have prompted calls for statutory reform. The Attorney General Dominic Grieve made a keynote speech in December 2011 on contempt of court. He called for more consistent enforcement:

> So, when I assumed Office, I was determined to ensure that some clarity was reintroduced to the process in those cases. Over the last year I have asked the Courts to consider a number of cases in which I believed contempt had been committed. The first two involved the press, the last a juror and Facebook.[156]

The Law Commission launched a review of the law of contempt of court in 2012 and its consultation paper on contempt of court was published in November 2012. The consultation period closed on 28 February 2013.[157] The Law Commission published a report explaining and setting out our recommendations on 9 December 2013.[158] The Commission announced with its publication of proposals on that it would publish two further reports in 2014 on contempt of court. These have not yet been published. The December 2013 report concentrated on the reforms which are being introduced in this Bill.

The strict liability rule: the current position

The law of contempt of court allows the courts to act to prevent or punish conduct which tends to impede, prejudice or insult the administration of justice, in relation to a particular

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[155] Ministry of Justice, *Judicial Review – proposals for further reform: the Government response,* Cm 8811, February 2014, p14

[156] "Full text: Dominic Grieve on the press and contempt of court", *Journalism.co.uk*, 1 December 2011

[157] Contempt of Court – a consultation paper, Law Commission no 209, November 2012

[158] *Contempt of Court(1) Juror Misconduct and Internet Publications*, Law Commission no 340, HC 860 December 2013

case or generally. Until the *Contempt of Court Act 1981* the law was developed almost exclusively through the common law. Full background and history is given in *Arlidge Eady and Smith on Contempt.*[159] A European Court of Human Rights *case Sunday Times v United Kingdom (1979)*[160] was an influential factor in the development of statute law for contempt of court in the 1981 Act.[161] The rationale for contempt by publication arises from the need to protect the right to a fair trial. This right is enshrined in article 6 of the European Convention on Human Rights ("ECHR"), (right to fair and public hearing). It is balanced by the right to freedom of expression under article 10 of the ECHR, especially because reporting on legal proceedings serves an important public interest.

Section 1 of the *Contempt of Court Act 1981* sets out the definition of strict liability:

> In this Act "the strict liability rule" means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.

Under the 1981 Act, the media are prohibited from reporting (whether orally, in writing or by some other method) comments or information that would create "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[162] Examples of reports that might be in contempt could include details of a defendant's previous convictions, or assumptions as to a defendant's guilt. Contempt by publication is committed where a publication creates a "substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" regardless of whether the publisher or distributor of the publication intended it to have that effect or was aware that it might do.

This contempt can be committed only where the "proceedings in question" are "active" at the time of publication, as defined by the 1981 Act. In general, most criminal proceedings become active from the time an arrest warrant is issued or at the point of arrest and cease to be active when the defendant is acquitted or sentenced. There are separate provisions for civil and appellate proceedings, but generally strict liability tends to arise in criminal cases where there is often intense public curiosity.[163]

The 1981 Act provides an exemption in that a reporter will not be guilty of contempt of court where the report is "a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith". (Section 4) This enables the press to publish details of ongoing trials, provided they are published very soon after the hearing (or on the same day) and are a balanced and accurate report of what was said in court. Section 7 prohibits prosecutions without the consent of the Attorney General.

The 1981 legislation was drafted at a time when the internet and social media did not exist and there have a series of recent cases which have revealed issues with the current definitions. Under the present law, a publisher is liable for prejudicial material which remains online, even when it was posted entirely legitimately before legal proceedings became active. This places an onerous burden on the media to monitor online archives to check whether they relate to newly active legal proceedings.

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159 Sweet and Maxwell 2011; see chapter 4 on the strict liability rule

160 2 E.H.R.R. 245

161 For the historical background, see the Phillimore Committee Cmnd 5794 1974 and Law Commission report no 96 *Offences relation to interference with the course of justice* 1979. Appendix A of the Law Commission Consultation Paper 209 December 2012 covers the background to the Contempt of Court Act 1981 in some detail

162 Section 2 of the 1981 Act

163 See Arlidge, Eady and Smith on Contempt at para 4.191-3

In the Scottish case of *HM Advocate v Beggs (No 2)*[164] the court held that the expression "at the time of publication" was capable of referring to a period of time during which the material was accessible on the website, commencing with the moment when it first appeared and ending when it was withdrawn. This interpretation was adopted in England by Mr Justice Fulford (now Lord Justice Fulford) at first instance in the Crown Court in the case of *Harwood*.[165] The question of re-publication by a source not the originator of the material arose in the case of *Attorney General v MGN Ltd.*[166]

There are other concerns about defining place of publication, in terms of an internet provider hosted abroad, and the liability of intermediaries which host information as opposed to the originator or blogger creating the material which might be in contempt. However, the Impact Assessment on jury misconduct and strict liability produced for the Bill noted the comparative rarity of these cases:

> 8. There have been four recent cases concerning juror contempt using the internet, and in each case the defendant was found to have committed contempt and received a sentence of imprisonment[167]

Juror research and misconduct: the current position

Another issue which has arisen with the internet age is the ability of a juror to research information about defendants or witnesses while they are taking part in a case. The *Dallas* case in 2012 is an example.[168] Here, the Lord Chief Justice explained in his judgment:

> ...undertaking such research was a contempt of court because: The defendant [Dallas] knew perfectly well, first, that the judge had directed her, and the other members of the jury, in unequivocal terms, that they should not seek information about the case from the internet; second, that the defendant appreciated that this was an order; and, third, that the defendant deliberately disobeyed the order.
>
> By doing so, before she made any disclosure to her fellow jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it.

Two more cases in July 2013 led the Attorney General to call for much clearer guidance from the judiciary to jurors.[169] The cases were described in the Law Commission report in December 2013:

> 3.3 In Attorney General v Davey and Attorney General v Beard, the court was concerned with two different types of misconduct committed by jurors
>
> 3.4 Beard's case concerned an allegation that he had undertaken research via the internet into the case that he was trying by typing the defendants' names into a search engine. The case against Davey was that, having been empanelled as a juror on a different trial involving an allegation of sexual activity with a child, he had posted an update on Facebook about the case[170]

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164 2002 SLT 139 See Arlidge Eady and Smith on Contempt at para 4.28

165 *Harwood* [2012] EW Misc 27 (CC) at [37]. Available at http://www.bailii.org/ew/cases/Misc/2012/27.html

166 [2011] EWHC 418 (Admin) [2011] E.M.I.R.17.

167 Juror misconduct and strict liability contempt for publication Impact Statement 5 February 2014 These cases are: *Attorney General v Fraill and Sewart* [2011] EWCH 1629 (Admin), *Attorney General v Dallas* ([2012] EWHC 156 (Admin), [2012] 1 WLR 991), *Attorney General v Beard* [2013] EWHC 2317 (Admin), *Attorney General v Davey* [2013] EWHC 2317 (Admin)

168 *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991

169 "Roll out new guidelines on juror contempt of court says Attorney General" 30 July 2013 *Daily Telegraph*

170 *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment)

The Law Commission report of December 2013 found that there was inconsistency in the advice and direction given to the jurors not to research information about their cases. The availability of smart phones, tablets etc, meant that jurors had ready access to information. Some courts required such devices to be surrendered, but there was no consistency of practice, even during deliberations of the jury. Another issue was the question of jurors posting their opinions on the case on social media, while the case was continuing, despite directions from the judiciary not to do so. It concluded that new criminal offences were necessary, as well as a programme of jury education.

Other recommendations from the Commission covered the question of clarifying the law in respect of a juror reporting misconduct during a case, such as another juror researching the defendant. The Commission also considered the law in relation to academic research on the behaviour of juries and recommended changes.

Law Commission proposals on strict liability and juror research

In December 2013, the Law Commission recommended a number of statutory changes. These were summarised as follows:

> **Contempt by publication and the impact of the modern media**
>
> 1.18 In respect of contempt by publication on and the impact of the modern media, we recommend that the definition of a publication "addressed to the public at large or any section of the public" under section 2(1) of the 1981 Act should not be amended. Although the definition is vague, particularly in relation to publications over social media (for instance those which are available to only a limited number of "friends" or "followers"), we do not consider that a statutory or other definition would be practicable. We instead recommend that the law should be left to develop on a case-by-case basis, allowing for future changes to online means of communication.
>
> 1.19 The cases of HM Advocate v Beggs (No 2) and Harwood both hold that the "time of publication" of material held online refers to the entire period during which the material is accessible. We recommend that section 2(3) of the 1981 Act be amended to put this interpretation on a statutory footing. However, we also recommend creating a new statutory exemption to contempt under section 2 of the 1981 Act, covering communications addressed to the public (or any section of it) and first published before proceedings become active. This exemption would apply unless a publisher is put on notice by the Attorney General a) that relevant proceedings have become active and b) of the location of their relevant publication. If, following such notice, the publisher did not remove the material, the trial judge would, following a hearing, have the same power to order temporary removal as under the current law.
>
> 1.20 Although on balance consultees favoured a statutory definition of "place of publication" to ensure a more consistent approach, the challenge presented by the cross-border nature of the internet is not limited to contempt. We conclude that the issue of criminal jurisdiction merits more thorough treatment than can be achieved in a project specifically focused on contempt. We therefore recommend that the Law Commission should examine the definition of "place of publication" for the purposes of contempt as part of a wider future project examining aspects of criminal jurisdiction in the age of social media.
>
> **Juror contempt**
>
> 1.21 In respect of contempt committed by jurors, we confirm our provisional proposal and recommend the introduction of a new statutory offence of sworn jurors in a case deliberately searching for extraneous information related to the case. We recommend that this offence should be triable on indictment, with a jury, in the usual manner. The

> maximum penalty for the offence should be 2 years' imprisonment and/or an unlimited fine, with the usual sentencing powers available following trial on indictment (including community penalties and disposals).
>
> 1.21 In respect of contempt committed by jurors, we confirm our provisional proposal and recommend the introduction of a new statutory offence of sworn jurors in a case deliberately searching for extraneous information related to the case. We recommend that this offence should be triable on indictment, with a jury, in the usual manner. The maximum penalty for the offence should be 2 years' imprisonment and/or an unlimited fine, with the usual sentencing powers available following trial on indictment (including community penalties and disposals).
>
> 1.22 We also recommend a range of other measures designed to discourage and prevent jurors from undertaking research and from disclosing their deliberations (save in certain specified circumstances). Our recommendations feed into ongoing research about the best methods of informing people about their obligations as jurors and are designed to strengthen existing preventative measures with a view to creating greater consistency and certainty for jurors. The recommendations include greater education in schools about the role and importance of jury service; improving the information provided to jurors about their obligations during jury service; changes to the wording of the juror oath to include an agreement to base the verdict only on the evidence heard in court; requiring jurors to sign a written declaration; informing jurors about asking questions during the trial; a statutory power for judges to remove internet-enabled devices from jurors where necessary and effective systems for jurors to report concerns.
>
> 1.23 Finally, in respect of the prohibition on disclosing jury deliberations, we recommend the introduction of a specific, statutory, defence to a breach of section 8 of the Contempt of Court Act 1981, where, after the conclusion of the trial, a juror, in genuine belief that they are exposing a miscarriage of justice, discloses the content of jury deliberations to a court official, the police or the Criminal Cases Review Commission. We also recommend the introduction of an exception to the section 8 prohibition on jury research. This would allow for authorised academic research into jury deliberations, with a range of rigorous safeguards in place in order to protect the integrity of the jury's decision and the anonymity of jurors and parties to the trials.[171]

The Attorney General made a speech on 13 December 2013 supportive of the Law Commission proposals and repeating the need for clearer guidance from the courts to jurors.[172] The Government has not made a formal response to the report, but this will come in due course.

16.2 The Bill

The Government responded to the recommendations by introducing relevant clauses in this Bill. These largely accept the Law Commission proposals. The clauses on jury research and misconduct amend the *Juries Act 1974*, and repeal section 8 of the *Contempt of Court Act 1981.*

The Bill does not make any specific provision for research into the behavior of juries. The approach has been to create new criminal offences, rather than remodel section 8 so that it became a criminal offence, as suggested by the Law Commission. .

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[171] Law Commission, *Contempt of court (1): juror misconduct and internet publications*, HC 860, December 2013, pp5-6

[172] "Internet age should not undermine our jury system", *Guardian*, 13 December 2013

Since the Law Commission's remit extends only to England and Wales, the changes to the *Contempt of Court Act 1981* and *Juries Act 1974* applies only to those areas, and the law relating to Scotland and Northern Ireland remains unchanged. In a footnote, the Law Commission suggested that there might be merit in reforming the law as a whole in order to provide consistency across the jurisdictions.[173]

Clauses 37 and 38: strict liability

These clauses provide for a new system of strict liability, as recommended by the Law Commission. Briefly, material made available to the public prior to active proceedings(whether by a publisher or distributor), but which is still available during active proceedings, can be covered by the 1981 Act, but a publication will not be treated as being in contempt where it is first made available before the proceedings are active. However, if the Attorney General gives the person a notice informing the person that there are active proceedings in respect of which the publication may be contemptuous, this defence ceases to be available. Further detail is in the *Explanatory Notes*:

> 292. Subsection (2) inserts a new subsection (2A) into section 2 of the Contempt of Court Act 1981 so as to provide that, in England and Wales, the strict liability rule applies to a publication only when proceedings are active at a time when the publication is available to the public or a section of the public. This ensures that material made available to the public prior to active proceedings, but which is still available during active proceedings, can be covered by the 1981 Act. The liability in respect of such material is subject to new section 4A of the Contempt of Court Act 1981, referred to below.
>
> 293. Subsection (3) inserts a new subsection (5) into section 3 of the Contempt of Court Act 1981 (defence of innocent publication or distribution) to ensure that a person continues to have the defence under that section as regards the making available of matter until the person has relevant knowledge or a reason to have a relevant suspicion.
>
> 294. Subsection (4) inserts a new subsection (5) into section 4 of the Contempt of Court Act 1981 (defence relating to contemporary reports of proceedings) to limit the defence so that it applies only as regards strict liability for contempt of court in connection with the proceedings that are the subject of the report and other proceedings that are active when the report is first published.
>
> 295. Subsection (5) inserts a new section 4A into the Contempt of Court Act 1981 to provide that a publication will not be treated as being in contempt of court under the strict liability rule in England and Wales in connection with proceedings where it is first made available before the proceedings are active. However, if the Attorney General gives the person a notice informing the person that there are active proceedings in respect of which the publication may be contemptuous, this defence ceases to be available to the person in connection with those proceedings.
>
> 296. Subsection (6) amends section 21 of the Contempt of Court Act 1981 to specify that the new provisions do not extend to Scotland or to Northern Ireland.
>
> 297. Clause 38 provides that if a person is subject to an injunction granted under the Senior Courts Act 1981 in respect of material that is judged to constitute contempt under section 1 of the Contempt of Court Act 1981, the person can appeal against that injunction to the Court of Appeal.

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[173] Law Commission, *Contempt of court(1): juror misconduct and internet publications*, December 2013, footnote 124 on p39

Juror research and misconduct

The Ministry of Justice Factsheet Criminal Justice and Courts Bill: Contempt of Court set out the proposed changes as follows:

> 6 Clause 42 creates a criminal offence which prohibits a member of a jury researching information relevant to the case they are trying. Jurors take an oath or make an affirmation promising to give true verdicts according to the evidence presented in court. If there is to be a fair trial it is necessary that they consider only evidence which has been seen and tested by all parties in the courtroom. There have been recent cases where jurors have taken it upon themselves to research the case they are trying, despite a judge's direction to the contrary. Such behaviour has been held to be a contempt of court
>
> 7 Research can be undertaken in different ways, for example by asking questions, searching the internet, or by asking another person to seek the information. Information which may be relevant to the case includes, for example, information about a person involved in events relevant to the case, the judge dealing with the issue, or any other person involved in the trial, whether as a lawyer, a witness or otherwise.
>
> ***Sharing research with other jurors***
>
> 8 Clause 43 makes it an offence for a member of a jury intentionally to disclose information to another member of the jury, where the member of the jury carried out research in the process of obtaining the information, and the information has not been provided by the court.
>
> 9 Jurors must judge a case solely on the evidence presented in court. The problems created in terms of the fair trial of a defendant, where a juror researches the case, are exacerbated if that research is passed on to other jurors who may then use it as evidence in their deliberations.
>
> ***Jurors engaging in other prohibited conduct***
>
> 10 Clause 44 makes it an offence for a member of a jury, trying an issue before a court, intentionally to engage in conduct from which it may be reasonably concluded that the person intends to try the issue otherwise than on the basis of the evidence presented in the proceedings on the issue.
>
> ***Disclosing jury deliberations***
>
> 11 Clause 45 makes it an offence for a person intentionally to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or to solicit or obtain such information.
>
> 12 However, there will be occasions when disclosure may be in the interests of justice because there has been an irregularity such as an alleged offence of juror misconduct. This clause therefore allows exceptions so that a juror with real concerns about the fairness of the deliberation process can make disclosure to the trial judge during the trial or the Court of Appeal thereafter. These concerns may need further investigation and ultimately lead to proceedings.
>
> ***Jurors and electronic communication devices***
>
> Clause 40 creates a discretionary power for a judge to order a juror to surrender their electronic communications device for a period of time while on jury service. The order

must be necessary or expedient in the interests of justice, and be a proportionate means of safeguarding those interests.

Jurors and electronic communication devices: powers of search

13 Where an order has been made for a juror to surrender their electronic communications device, it is important that it can be enforced. Clause 41 therefore sets out that a court security officer must, if ordered to do so by a judge, search a member of the jury in order to determine whether the juror has failed to surrender a device in accordance with the order. If the search reveals a device, the officer must ask the juror to surrender the device. If the juror refuses to do so, the officer may seize it.

Disqualification from jury service

14 Clause 48 adds conviction for a juror misconduct offence to the list of criteria for disqualification of a person from jury service. The period of disqualification would be for ten years. It is right that someone who has been found guilty of an offence should be banned for a period of time from serving as a juror.

The Bill therefore makes changes to the *Juries Act 1974.* Active research by jurors, whether internet based or otherwise, which is undertaken with the intention of seeking information relevant to the case being tried, becomes an offence, with a maximum sentence of two years imprisonment. It also becomes an offence to share research with other jurors. The judge is given powers to order the surrender of 'electronic communications devices' from juries, but not when the juror is at home or otherwise absent from court proceedings.[174]

Coroners juries and courts martial

The provisions extend to England and Wales only. Schedule 7 applies identical provisions on jury research and misconduct in respect of coroner jurors under the *Coroners and Justice Act 2009.* Section 7 of the 2009 Act requires the coroner to sit with a jury if the coroner has reason to suspect:

- that the deceased died while in custody or otherwise in state detention, and that either:
    - the death was a violent or unnatural one, or
    - the cause of death is unknown,
- that the death resulted from an act or omission of:
    - a police officer, or
    - a member of a service police force,

  in the purported execution of the officer's or member's duty as such, or
- that the death was caused by an accident, poisoning or disease which must be reported to a Government department or inspector.

An inquest may also be held with a jury if the coroner thinks that there is sufficient reason for doing so. In all other cases the inquest must be held without a jury. According to statistics

[174] Ministry of Justice, *Factsheet on the Criminal Justice & Courts Bill - contempt of court*, February 2014

produced by the Ministry of Justice, in 2012, jury inquests accounted for just two per cent of all inquests.[175]

Clause 47 and Schedule 8 make equivalent provision for the service justice system for the Armed Forces. New service offences are created in respect of each new civilian juror offence and will to all lay members of the Court Martial. The *Explanatory Notes* explain these new service offences will apply to the lay members "to ensure the defendant's right to a fair trial is equally well protected in the service justice system."[176]

The Court Martial is a standing, permanent court established by the *Armed Forces Act 2006* (it came into force in October 2009. It has the jurisdiction to try any Service offence including criminal conduct and disciplinary offences. A Court Martial is presided over by a civilian judge known as a Judge Advocate. The practices and procedures in contested trials resemble those in the Crown Court. The Court Martial does not have a jury but the jury functions in contested trials are fulfilled by lay members of the court. They are sometimes also known as 'board members'. All Court Martial proceedings that require lay members usually have three lay members except for in the most serious cases, in which case the minimum is five. Additional lay members may be provided in certain circumstances. Whether lay members are service personnel or civilians (e.g. MOD civilians) depends on the status of the defendant.[177]

The lay members have additional functions, for example at the sentencing stage the lay members move from the members' box to the bench, to sit alongside the judge and provide their collective Service experience and knowledge to bear in deciding the appropriate sentencing.[178] The new provisions would apply to the whole of the UK, since the *Armed Forces Act* extends to Scotland and Northern Ireland as well. Clause 62 enables the changes to extend also to the Channel Isles, Isle of Man and British overseas territories.

16.3 Comment

Strict liability

The reaction of a number of media representatives to the Law Commission proposals on strict liability was somewhat critical; there were concerns as to the complexity and workability of the notice to be served by the Attorney General. Some preferred the existing powers under the *Senior Courts Act 1981.*[179] However, the majority of responses to the Law Commission consultation paper indicated that they considered *Beggs* to have been wrongly decided and/or that section 2(3) should be amended so that publication would not be a continuing act.[180]

The Law Commission report of December 2013 acknowledged concerns from consultees that orders on strict liability would be made proportionately and not indiscriminately.[181] The Internet Service Providers Association for example thought that clarification would be needed to identify which intermediary would be the most appropriate subject of the order. he Equality and Human Rights Commission response to the Law Commission consultation on contempt of court agreed that the proposals on strict liability would be compliant with Article 10 of the ECHR and were generally supportive.[182]

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175 Ministry of Justice Statistics Bulletin, *Coroners Statistics 2012 England and Wales*, 16 May 2013, p19
176 Criminal Justice and Courts Bill (Bill 169) Explanatory Notes
177 JSP 830: volume 2, chapter 28
178 Guidance on Sentencing in the Court Martial version 4", *Judge Advocate General,* October 2013, para 1.2-1.3
179 This is discussed in detail in *Contempt of Court(1) Juror Misconduct and Internet Publications* Law Commission no 340, HC 860 December 2013 para 2.106
180 Ibid, para 2.101
181 Ibid, para 2.120
182 Ibid, para 2.113

Jury research and misconduct

Many media respondees to the Law Commission consultation were reported as considering that new offences for jurors would be a more proportionate response to the danger of jurors being exposed to prejudicial material than placing further limits on media publication.[183] The relevant Impact Assessment considered that since the behaviour being made subject to the new criminal offences is already covered by common law contempt, the main difference would be the manner in which the misconduct was tried, and the procedures that would apply. No difference in the number of cases tried was therefore expected.

Dr Ian Cram of Leeds University, in a seminar at the Institute of Advanced Legal Studies on the Law Commission proposals on 13 February 2014, queried whether creating new offences might have the unintended effect of driving juror research underground. Jurors might still undertake research at home, away from mobile devices in the vicinity of the court. Under those circumstances, decision-making by jurors might still be affected by unauthorised research. Clear guidance would be necessary to inform and educate jurors.

Dr Cram also queried whether judges would use the powers to punish juries in practice. Evidence from the United States suggested that judges were reluctant to undertake punitive actions against jurors, as this had a deterrent effect in encouraging potential jurors to serve.[184]

Age of jurors

The opportunity has been taken in the Bill to implement a recommendation to increase the maximum age of jurors made in a consultation "The Upper Age Limit for Jury Service" launched by the previous Government in March 2010. This applies to jury service in England and Wales only. A Ministry of Justice press release on 13 August 2013 announced that the increase would be implemented through primary legislation. **Clause 39** of the Bill would raise the upper age limit for jury service to 75.

In a written ministerial statement on 2 September 2013 the Minister for Policing and Criminal Justice, Damian Green, noted that the increase would bring some savings:

> While the main motivation for increasing the upper age limit is to make juries more representative of all the people who are playing a full part in their communities, we do expect some savings to result from a reduction in the number of jurors in full-time employment. This will reduce the number of employers who have to pay staff who are on jury service, and the costs to Her Majesty's Courts and Tribunal Service of paying for loss of earnings. The only costs involved in implementing this policy will be minor changes to our systems, and to the relevant forms and guidance.[185]

Currently anyone registered as an elector and aged 18-70 who has been ordinarily resident in the UK, the Channel Islands or the Isle of Man for any period of at least five years since the age of 13 is qualified to serve as a juror. The only disqualifications are for people who are in hospital, subject to recall to hospital, or subject to a community treatment order as a result of a mental health condition; and people on bail or who have received certain criminal sentences. This age range was last amended by the Criminal Justice Act 1988, which raised the upper limit from 65 to 70. The *Juries Act 1974* still provides for discretionary excusal, where there is a good reason.

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[183] Ibid, para 3.43
[184] The Googling Juror: Challenges for the law of contempt IALS 13 February 2014
[185] HC Deb 2 September 2013 c14WS

17 Judicial Review

Part 4 of the Bill would make a number of changes in relation to the funding and conduct of judicial review proceedings. The Government's proposals for reform in this area have proved controversial.

Judicial Review is a process by which individuals and other affected parties can challenge the lawfulness of decisions, actions or inaction of public authorities, including those of Government Ministers, local authorities, other public bodies and those exercising public functions.

The Impact Assessment identifies the underlying issues that the Bill seeks to address:

> The total number of judicial review (JR) applications has increased threefold from around 4,300 in the year 2000 to around 12,600 in 2012. The Government is concerned that a large number of these claims are unmeritorious and that many cases, including those with national economic significance, could be resolved more quickly. Limited legal aid resources should be properly targeted at those JR cases where they are needed more and not at weak cases, if the legal aid system is to command public confidence and credibility.
>
> ...
>
> The policy objective is to ensure that JR cases, including those with potentially large impacts on economic development and growth, are resolved as quickly and efficiently as possible and that there is less scope for abuse of the system, such as bringing JR applications with an intention to delay lawful Government actions. In addition limited legal aid resources should be properly targeted at those JR cases where they are needed most, to ensure that the legal aid system commands public confidence.[186]

17.1 Background and current law

Judicial reviews are concerned with the way in which a decision has been made, and the procedures that have been followed, rather than the rights and wrongs of the conclusion reached. The court will not substitute what it thinks is the 'correct' decision. This may mean that the decision making body will be able to make the same decision again, so long as it does so in a lawful way.

There are three main grounds on which a decision or action may be challenged:

- Illegality, for example, it was not taken in accordance with the law that regulates it or goes beyond the powers of the body;
- Irrationality, for example, that it did not take account of all relevant factors, or that no reasonable person could have taken it; and
- Procedural unfairness, for example, a failure to consult properly of to act in accordance with natural justice or with the underpinning procedural rules.

The following options are available where a court concludes that the decision in question was not taken lawfully:

- A quashing order, setting aside the original decision;

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[186] Ministry of Justice *Criminal Justice and Courts Bill impact assessments*, 5 February 2014

- A mandatory order, requiring the public body to do something to take a particular course of action;
- A prohibiting order, preventing a public body from doing something or taking a particular course of action;
- A declaration, for example, that an act or decision was unlawful;
- An injunction, for example, to stop a public body acting in an unlawful way.

To be entitled to apply for judicial review of a decision, in principle a person must have a "sufficient interest" (or standing). Only those with sufficient interest are entitled to bring a case and they must first obtain permission for their case to be heard.

Both representative groups and pressure groups acting in the 'public interest' have been found to have sufficient standing, on the basis that they represent the interests of the persons directly affected.

Other persons or bodies who may be interested more generally in the issues being considered in a judicial review may seek to intervene, by filing evidence or making representations at the judicial review hearing. The court determines applications to intervene after hearing the views of the parties involved.

The procedure which governs making a claim for judicial review is set out in the Civil Procedure Rules: CPR Part 54. Parties are expected to have exhausted all other remedies before commencing a claim – including alternative remedies such as statutory appeals and appeals to relevant tribunals. There is also a "pre-action protocol", designed to allow parties to avoid litigation. This involves the claimant producing a letter before action, which should identify the decision being challenged, and the basic reasons (such as procedural defects, failure to take into account relevant fact, defective reasoning).

Judicial Review: proposals for reform consultation

A Ministry of Justice consultation, *Judicial Review: proposals for reform*, was held between December 2012 and January 2013, following which the Government announced its intention to introduce reforms to judicial review procedures on 23 April 2013.

The Government's review of this area was prompted by concern over what the consultation document described as the "significant growth" of judicial review applications,[187] of which only a small proportion were granted permission to proceed. The paper suggested that this indicated that judicial review was being used in weak or unmeritorious cases. The Government was also concerned with the resultant uncertainty over public authority decisions, as well as the time and cost implications.

The stated aims of reform were to:

- Discourage potential claimants from bringing weak, frivolous or unmeritorious claims;
- Ensure claims are brought quickly;
- Prevent the progression of weak claims early on.

[187] Ministry of Justice, *Judicial Review: proposals for reform*, December 2012, p9

The consultation document acknowledged that the increase between 2005 and 2011 had mainly been the result of the growth in the number of challenges made in immigration and asylum matters.[188] The Upper Tribunal (Immigration and Asylum Chamber) has dealt with judicial reviews related to decisions on 'fresh claims' for asylum since October 2011.[189] Most other categories of immigration judicial reviews transferred to the Upper Tribunal on 1 November 2013, as provided for by section 22 of the *Crime and Courts Act 2013*.

A number of legal and academic commentators have criticised both the proposals and the evidence base upon which they were made. For example, barrister Adam Wagner argued that there was "at least a case for the increase being due to the increase in the size of the state, the growth in EU and human rights law and the huge increase in immigration." [190] The Immigration Law Practitioners Association said, amongst other things, that:

> There is little or no consideration of the fact that significant numbers of judicial review claims settle pre- and post-permission, suggesting that far from being unmeritorious, or deliberate 'delaying' tactics, the claims were properly and responsibly brought and conducted, and that the parties managed to achieve a resolution of the claim without using further court time and resources.[191]

Library Standard Note 6166, *Judicial Review: Government reforms*, discusses both sides of the debate in more detail.

The *Civil Procedure (Amendment No 4) Rules 2013* implemented the first tranche of changes by way of amendments to Civil Procedure Rules (CPR) 52 and 54, which came into effect on 1 July 2013.

Time limits

Currently, a judicial review claim must be brought "promptly" and in any event within three months of the grounds for the claim first arising.[192]

Under the new rules the claim form for an application relating to a planning decision must be filed within six weeks of the date when grounds for the application first arose, and in relation to a procurement decision,[193] within 30 days. The amendment does not apply to a judicial review application where the grounds arose before 1 July 2013.[194]

One of the effects of this change is greater consistency with statutory time limits in that the new planning time limit will now be in line with the right to challenge under the *Town and Country Planning Act 1990* (section 288). The new procurement time limit is also consistent with the time limit laid out the *Public Contracts Regulations 2006*, under which most procurement decisions are challenged.

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188 Ibid, pp9-10

189 Section 53 of the *Borders, Citizenship and Immigration Act 2009*

190 A. Wagner, 'Quicker, costlier and less appealing: plans for Judicial Review reform revealed', UK Human Rights Blog, 13 December 2012

191 'Legal fee rises will stem 'soaring' judicial review cases, says MoJ', *Guardian*, 23 April 2013

192 CPR 54.5

193 Governed by the *Public Contracts Regulations 2006*

194 The planning decisions affected by this rule change will be any decision made by the Secretary of State or local planning authority under the planning acts. Decisions on planning policy are excluded from the reforms. Procurement decisions governed by the *Public Contracts Regulations 2006* for these purposes means any decision the legality of which is or may be affected by a duty owed to an economic operator under Regulation 47.

Permission applications

The new rules also amend CPR 54.12 so that where the court refuses permission to proceed on the papers and records the fact that the application is totally without merit, the claimant may not request an oral renewal.

This amendment does not apply to judicial review claims where the claim form was filed before 1 July 2013.

Changes to fees for claims for judicial review issued on or after 7 October 2013

The consultation paper also proposed the introduction of a new fee, payable when an application is made for an oral renewal of an application for permission, in order to encourage the applicant to weigh up the potential benefits of the application against the costs.[195]

This proposal has now been implemented. From 7 October 2013 where the court, without a hearing, refuses permission to proceed, the claimant may not appeal but may request the decision to be reconsidered at a hearing. If such a request is made, the claimant must pay a fee of £215 when lodging the request within 7 days of the service of the order refusing permission.[196]

Judicial Review: Proposals for further reform consultation

The *Criminal Justice and Courts Bill* follows the subsequent consultation *Judicial Review: Proposals for further reform* which ran from September to November 2013 and examined proposals in a number of areas with the aim of "reducing the burden of judicial review".[197]

It put forward proposals for reform which sought to address three issues. These were: the impact of judicial review on economic recovery and growth, where unmeritorious challenges can lead to delays and extra costs in infrastructure projects; the inappropriate use of judicial review as a campaign tactic; and the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.

Proposals were put forward in relation to:

- How the courts deal with judicial reviews based on minor defects that would have made no difference to the final outcome;
- Proposals to rebalance the system of financial measures so that those involved have a proportionate interest in the costs of the case, including a limit on payments to legal aid providers for their work on an application for permission to cases where permission is granted by the court;
- Measures aimed at speeding up appeals to the Supreme Court in important cases;
- A new specialist "planning chamber" for challenges relating to major developments;
- The question of standing, that is, who is entitled to apply for judicial review.

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[195] Para 103.

[196] See the *Judicial Review and Costs* section of the Ministry of Justice website [accessed 10 February 2014].

[197] Ministry of Justice *Judicial Review: Proposals for further reform* September 2013 Cm 8703. See also *Judicial Review - proposals for further reform: the Government response* February 2014 Cm 8811 & *Annex A: Summary of responses*

In an article in the *Daily Mail* in September 2013, Chris Grayling described the impetus for his reforms as follows:

> Of course, the judicial review system is an important way to right wrongs, but it is not a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change.
>
> We will protect the parts of judicial review that are essential to justice, but stop the abuse.
>
> Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state.[198]

In a Written Ministerial Statement on 5 February 2014, Chris Grayling explained that the Government intended to bring forward changes in the *Criminal Justice and Courts Bill* in order to give effect to several of these reforms.[199]

17.2 The Bill

Clause 50 would require the High Court or Upper Tribunal to refuse to grant a remedy or permission on an application for judicial review if it considers it highly likely that the defendant's conduct in the matter in question would not have affected the outcome for the applicant. At present the court may refuse to grant permission or award a final remedy on the basis that it is inevitable that a complained of failure would not have made a difference to the original outcome.

Clause 51 provides that permission to proceed with a judicial review cannot be granted unless the applicant provides information about the financing of the judicial review. This is apparently so that claims cannot be brought in a way that limits a person's proper cost exposure and circumvents the court's powers to make them liable for the defendant's costs where they lose, for example where a claim is funded by an anonymous backer or company created for the purpose.[200]

Clause 52 provides that, when considering liability for costs in judicial review proceedings, the High Court, the Upper Tribunal and the Court of Appeal must have regard to information provided as a result of clause 51, and any additional information about financing provided in accordance with the rules of court or Tribunal Procedure Rules. The court must also consider whether to order costs to be paid by a person who is not a party to the judicial review but has financially assisted proceedings.

Clause 53 establishes a presumption that interveners in a judicial review will pay their own costs and, in addition, any costs incurred by any other party because of the intervention, unless there are exceptional circumstances which justify a different order. The question of who should bear the costs arising from the intervention of a third party is currently in the discretion of the court. By convention, third parties generally bear their own costs, but do not bear other costs, or benefit from costs awards. This reform seeks to ensure that those who

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198 "The judicial review system is not a promotional tool for countless Left-wing campaigners", *Daily Mail*, 6 September 2013

199 HC Deb 5 February 2014 cc WS27-28

200 *Criminal Justice and Courts Bill, Fact Sheet: Reform of Judicial Review* 5 February 2014. Available from www.gov.uk/ government/publications/criminal-justice-and-courts-bill-fact-sheets [accessed 10 February 2014]

choose to become involved in litigation have a more proportionate financial interest in the outcome.[201]

Clauses 54 & 55 remove the ability of the High Court and the Court of Appeal to award costs capping orders (known as Protective Costs Orders, or "PCOs") in a judicial review case unless specified criteria are met. A cost capping order is an order that removes or limits the liability of a party to the proceedings to pay another party's costs incurred in bringing or defending a judicial review. Such orders would only be available if the judicial review proceedings are "public interest proceedings", meaning that an issue being argued in the case is of general public importance, it is in the public interest for that issue to be resolved, and the judicial review proceedings are an appropriate means of resolving the issue.

Clause 56 would enable proceedings for judicial review to be exempt from the requirements of clauses 54 and 55 if they concern issues which, in the Lord Chancellor's opinion, relate entirely or partly to the environment. Different considerations may apply in these cases.[202]

Clause 57 would require applicants to seek the permission of the High Court in order to challenge the validity of certain decisions in relation to English planning matters.[203] The application would need to be brought within six weeks of the decision. The Government hopes that this will allow weak challenges to be dealt with more quickly, allowing resources to be focused on stronger cases.[204]

17.3 Comment

The decision to drop some of the more controversial proposals from the consultation has been welcomed. The most controversial proposal was that to introduce a more restrictive test of standing in judicial review proceedings. The Judiciary's response to the consultation stated:

> The test of standing in judicial review must be such as to vindicate the rule of law. Unlawful sue of executive power should not persist because of the absence of an available challenger with a sufficient interest. The existing test of standing meets that requirement and we do not consider there to be a problem with it. We do not agree with the suggestion that standing should be limited in some way to those with a direct interest in the subject matter and that the public interest in vindication of the rule of law should play no part in the court's determination of whether a person has standing to bring a claim.
>
> Any consideration of a new test of standing must address head-on the effect this may have on the rule of law. The consultation paper fails to do so.[205]

Mark Elliot,[206] writing on the *Public Law for Everyone* blog, welcomed the receptiveness of the Ministry of Justice to criticisms of the proposals, in particular the decision to drop the proposal to restrict standing:

> As I have argued previously ... and as the Bingham Centre for the Rule of Law pointed out in its response to the consultation, to restrict standing in the way originally

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201 Ibid
202 Explanatory Notes to the Criminal Justice and Courts Bill (Bill 169), paragraph 64
203 Brought under section 288 of the *Town and Country Planning Act 1990*
204 Ibid
205 Judiciary of England and Wales *Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'* November 1 2013
206 Reader in Public Law, University of Cambridge. *Judicial review reform (again)*, 6 February 2014

> envisaged would be to misconceive the purpose of judicial review – the objective of which transcends the protection of individual interests, and extends to the maintenance of government according to law in which community as a whole has a strong and shared interest.

However, he criticised the new test introduced by clause 50, noting that the Ministry of Justice had not listened to what the judiciary said in its response to the consultation on this issue:

> This proposal is problematic for three reasons. First, the "makes no difference" principle presupposes that judicial review is orientated exclusively towards securing the lawfulness of outcomes, which in turn assumes that values such as legality and procedural fairness are to be conceived of purely in instrumental terms. This overlooks the argument that such values are inherently valuable because they serve to reflect the dignity of individuals affected by government decision-making, and that they serve as a necessary discipline upon that process.
>
> Second ... [it] may be very difficult to apply in practice. As the judiciary pointed out in its response to the consultation: "... in most cases ... the decision whether a procedural flaw made a difference to the outcome cannot be taken without a full understanding of the facts. At permission stage the requisite full factual matrix is rarely before the court ...".
>
> ...
>
> Third, and finally, there is a constitutional difficulty with the proposal. Nothing in the Bill suggests that unlawful administrative actions that cannot be successfully challenged due to the "makes no difference" principle (either because leave will be denied or relief withheld) will be rendered unlawful. The effect of the proposal is not to alter the legal status of the unlawful measure, but merely to shield it from judicial review.

Concerns have been raised about other provisions in the Bill. Adam Wagner, writing on the *UK Human Rights Blog*, said:

> There is plenty more to be concerned about in this bill, and not just for lawyers who practise in Judicial Review...
>
> For example, the proposal to expose "secret funders" for litigation, hidden financial disincentives... and threats to interveners through the threat of substantial costs orders.
>
> So watch out. It is now for Parliament to blunt some of the sharp edges of this bill. If it fails to do so, there will be a real threat to the rule of law and the ability of individuals to keep the executive in check.[207]

On the *UK Constitutional Law Association blog*,[208] Tom Hickman and Ben Jaffey suggested that the reforms being brought forward include some drastic changes with constitutional and access to justice implications, and set out some areas of particular concern:

- The new test in clause 50, that relief must be refused if it is "highly likely" that the outcome would not have been substantially different but for the conduct complained of, lowers the bar from the test of inevitability that is currently applied at common law.

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[207] *Don't be fooled by the "concessions", there is still a real threat to Judicial Review,* UK Human Rights blog 6 February 2014 [accessed 7 February 2014]

[208] *Loading the Dice in Judicial Review: The Criminal Justice and Courts Bill 2014*, UK Constitutional Law Blog, 6 February 2014. Available at http://ukconstitutionallaw.org [accessed 7 February 2014].

This undermines the constitutional orthodoxy that the purpose of judicial review is to ensure that decisions are made properly by the person Parliament has designated to make the decision, by drawing the courts into speculating on what a decision would have been in different circumstances.

- Clause 54, relating to the granting of Protective Costs Orders, would mean that a PCO could only be made if permission has been granted, but it is common for defendants to run up large bills before this point. The risk of facing liability for these costs is likely to deter claimants who would otherwise qualify for protection against such a risk. A PCO in these circumstances would not achieve its aim of enabling access to justice to those who cannot afford to expose themselves to substantial risk.

- Clause 53 would make interveners liable for costs incurred by other parties as a result of their intervention, and would therefore deter interveners such as NGOs, who would not want to risk such liability.

Legal commentator Joshua Rozenberg noted that the clauses relating to costs would be of concern to campaign groups:

> Claimants seeking judicial review will be required to say how their claims are to be funded. That will enable costs orders to be made against people who have funded an unsuccessful application without putting their names to it. Campaign groups that are allowed to intervene in a case will be liable for costs incurred by other parties unless there are "exceptional circumstances". This seems to apply even if the arguments advanced by the campaign group are accepted by the court, though judges could get round it by simply inviting the campaign group to intervene.
>
> So-called protective costs orders are to be limited: courts will be allowed to cap the costs payable by a claimant who is unsuccessful only if the judge is satisfied that the case has been brought in the public interest by someone who would be justified in pulling out without costs protection.[209]

[209] Joshua Rozenberg, "*Despite the tough talk, Grayling has listened to the judges on judicial review*" , *Guardian*, 5 February 2014