HOUSE OF LORDS
Library Note

Crime and Courts Bill (HL Bill 4 of 2012–13)

This Library Note provides background reading in advance of the second reading in the House of Lords of the Crime and Courts Bill on 28 May 2012. The Bill is wide-ranging in scope. Part 1 provides for the creation of a National Crime Agency to combat organised crime. Part 2 contains various provisions on the courts and tribunals system, including reform of judicial appointments, and for broadcasting court proceedings. Part 3 contains provisions with regard to immigration and border control, drug driving, and community sentencing.

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1. Introduction

The Crime and Courts Bill 2012–13 is wide-ranging in scope and application. Part 1 of the Bill makes provision for a new organisation to be established to fight organised crime, the National Crime Agency, which will also take a leading role on economic crime, border security, cyber crime and the protection of children. Part 2 provides for reform of the system of judicial appointments, for the streamlining of the courts system, and for the broadcasting of court proceedings from the Court of Appeal. Part 3 contains provisions for strengthening attempts to combat drug driving, enhancing the powers of immigration officers and the reform of some aspects of the immigration appeals system, and on community sentencing.

The individual provisions in the Bill are examined in detail below, including relevant background to the measures and reaction to them since the Bill's publication. The full explanatory notes to the Bill can be accessed via the following link.

2. Part 1: National Crime Agency

Part 1 of the Crime and Courts Bill establishes the new National Crime Agency (NCA). The NCA will have the responsibility for investigating and preventing serious, organised and complex crime; enhancing border security; and tackling the sexual abuse and exploitation of children and cyber crime.

2.1 Background: Organised Crime in the UK

According to Home Office estimates, organised crime costs the UK between £20 and £40 billion pounds each year, and involves approximately 38,000 organised criminals and around 6,000 criminal groups.[1] The Government is clear that not only does this activity have a detrimental impact on individuals and communities across the country, but it has also classed recent increases in organised criminality as a 'Tier 2'—or 'high'—risk to national security.[2]

The preamble to the Home Office strategy document *The National Crime Agency: A Plan for the creation of a national crime-fighting capability* (June 2011) (hereafter referred to as the '*NCA national plan*') argues that the current approach to tackling organised crime in the UK has been both 'patchy' and 'fragmented'. It contends that no single body has effective oversight of the national and cross police force threats from serious and organised criminality, or how operational assets to counter those threats are being deployed.[3] There is also no national body with a sufficiently strong focus on operational crime-fighting, or able to resolve differing priorities and determine how best to deploy resources.[4]

Consequently, as announced in the Home Office publication *Policing the 21st Century* in 2010, the Government plans to close the Serious Organised Crime Agency (SOCA).[5] In

[1] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 4.
[2] The National Security Council (NSC) has prioritised risks into tiers based on a combination of the likelihood of the risk rising, and its potential impact. Source: Home Office, *Local to Global: Reducing the Risk from Organised Crime*, July 2011, p 9.
[3] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 10.
[4] ibid, p 10.
[5] SOCA was created by the Serious Organised Crime and Police Act 2005.

its place, a new National Crime Agency (NCA) will be created, tasked with dealing with the threat of organised crime, providing national tasking and co-ordination of police assets, and strengthening border policing and enhancing national security.

The Government did not explicitly state the reasons for the replacement of SOCA with the NCA in *Policing the 21st Century*. However, there was an implication in that document that there had been a failure on the part of SOCA to build effective relationships between police services and other law enforcement bodies:

> We will create a powerful new body of operational crime-fighters in the shape of a National Crime Agency. This should harness and build on the intelligence, analytical and enforcement capabilities of the existing Serious Organised Crime Agency (SOCA) and the Child Exploitation and Online Protection Centre. But the new Agency should better connect these capabilities to those within the police service, HM Revenue and Customs, the UK Border Agency and a range of other criminal justice partners.[6]

Sir Ian Andrews, Chair of the Serious Organised Crime Agency, also gave evidence to the Commons Home Affairs Select Committee, during its examination of the *New Landscape of Policing* in 2011, about how the NCA might differ from its predecessor:

> It was accepted, I think, and indeed explicit in the legislation that set SOCA up in 2006 that there was an expectation—nay, a requirement—that we should work with domestic and overseas partners, but the same obligation was not placed on other partners. So there was a sense inevitably of a sort of "coalition of the willing", and... what is different about the National Crime Agency is that it will explicitly have the leadership requirement, the tasking and co-ordination, but also, for the first time, it will be underpinned by an Organised Crime Strategy and a Strategic Policing Requirement, which will provide that national oversight, which, frankly, we have lacked in the past.[7]

2.2 Organisation and Responsibilities of the National Crime Agency

The Government mapped out the planned role and responsibilities of the NCA in the *NCA national plan*:

- [A]ccountable to the Home Secretary, the National Crime Agency (NCA) will set the national operational agenda for fighting serious and complex crime and organised criminality. An integral part of UK law enforcement with a senior Chief Constable at its head, the NCA will have strong, two-way links with local police forces and other law enforcement agencies. The NCA will respect the devolution of powers, recognising the primacy of those in whose territories it operates.

- The NCA will be home to a significant multiagency intelligence capability, drawing on other existing national intelligence capabilities, including on economic crime. It will build and maintain a comprehensive picture of the threats, harm and risks to the UK from organised criminals, and it will be responsible for ensuring that those criminals are subject to a prioritised level of operational response.

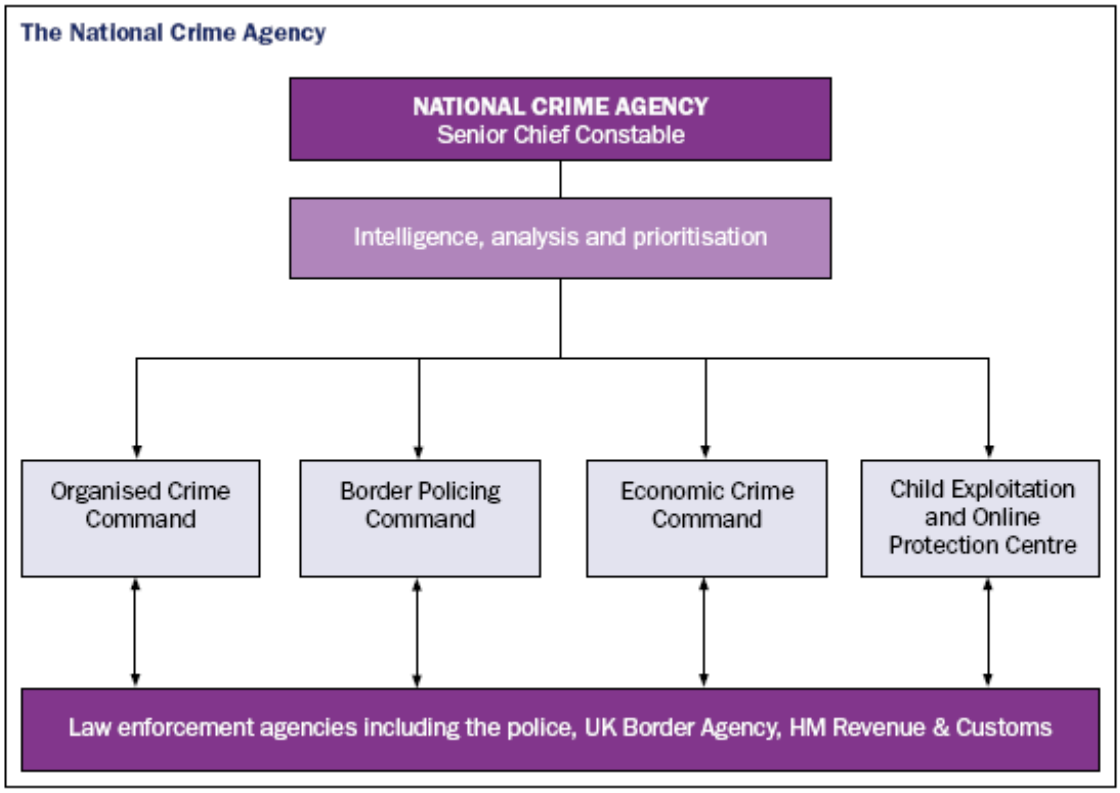
[6] Home Office, *Policing in the 21st Century*, July 2010, p 29.
[7] House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, HC paper 939 of session 2010–12, p 35.

- The NCA will have the authority to undertake tasking and coordination of the police and other law enforcement agencies, to ensure networks of organised criminals are disrupted and prevented from operating.

- The tasking and coordination function entails the NCA setting the overall operational agenda for tackling serious and organised criminality; ensuring that appropriate action is taken against criminals at the right level led by the right law enforcement agency; stepping in to directly task where there are disputes about the nature of approach or ownership; and where appropriate, tasking or providing its own resources in support.

- Including a dedicated cyber crime unit acting as a centre of expertise on cyber crime, the NCA will have the specialist operational capabilities that add most value to those in police forces and other law enforcement partners, collectively enhancing the fight against serious and organised criminality.[8]

As illustrated by the organisational chart below, the NCA will contain four 'Commands', which according to the national plan will be distinct, yet share intelligence, capabilities, expertise and assets: the Organised Crime Command; the Border Policing Command; the Economic Crime Command; and the Child Exploitation and Online Protection Centre.[9]



(Source: Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 6)

[8] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 5.
[9] ibid.

Organised Crime Command

The NCA's Organised Crime Command will be responsible for a unified national response on organised crime. In practice, in the words of the *NCA national plan,* that will mean the Organised Crime Command is responsible for ensuring that:

- All organised crime groups are subject to a prioritised level of operational response, based on a clear national picture of the threats, harms and risks posed by those groups.

- Activity is properly co-ordinated across all relevant law enforcement agencies [with regard to both emerging, and existing, criminal groups] and to address any difference in priorities between different agencies.

- Operational support is provided to other agencies, police forces and regional policing units, and that its own assets are added to those of others in response to unanticipated threats.

As such, the Organised Crime Command will lead wide-ranging operations, co-ordinating resources from a range of forces or national agencies. The Home Secretary, Theresa May, said during her contribution on the debate on the Humble Address that not only would the NCA build on the work that SOCA had done, but that SOCA 'would become' the serious and organised crime command within the NCA. The Organised Crime Command will therefore have at its disposal, according to the *NCA national plan*:

- The international network built up by SOCA, allowing the command to tackle organised crime 'upstream';

- Officers who have the three fold powers of a police officer and custom and immigration powers;

- NCA-wide resources, including specialist operational and investigative skills, and intelligence and analytical capability.[10]

Border Policing Command

The *NCA national plan* asserts that the Border Policing Command will tackle threats from cross-border criminal activity 'in the broadest sense'—which it defines as those from overseas, at the physical border, and 'in-country'.[11] This, the plan adds, will be driven by a 'single, coherent' border strategy based on a multi-agency assessment of border-related threats, and will entail:

- Working with foreign governments and better coordinating the activity of staff posted overseas to disrupt criminals, the Border Policing Command will aim to prevent threats reaching UK shores where possible.

- At the border, the command will build on the established and effective tasking and coordination arrangements currently in place between the Special Branch ports officers and their local force, the counter-terrorism

[10] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 19.
[11] ibid.

network and the Security Service, Serious Organised Crime Agency, UK Border Agency, HM Revenue & Customs and so on.[12]

Economic Crime Command

Working closely with the National Fraud Intelligence Bureau in the City of London Police, and the NCA's centralised intelligence functions, the Economic Crime Command will be responsible for ensuring a coherent approach to economic crime across a range of agencies. Such co-ordination, the *NCA national plan* argues, will overcome the 'negative fragmentation' of separate pools of specialist expertise pursuing complex areas of offending. Further to its core purpose, the Economic Crime Command will also lead for the NCA on the civil recovery of assets for England, Wales and Northern Ireland.[13]

In 2011 the Government established the Economic Crime Coordination Board. This, Ministers believe, will also inform the work of the Economic Crime Command by 'driving better coordination of cases and the alignment of resources across agencies' and therefore enable a greater volume and complexity of economic crime cases to be tackled.[14]

Child Exploitation and Online Protection Centre

The Child Exploitation and Online Protection Centre (CEOP) was established in 2006. Tasked with the protection of children from sexual abuse, it is currently an affiliated unit with operational independence from SOCA, but accountable to the Board of the Agency through a committee. According to CEOP's last annual review in 2011, in the previous year 414 children identified as being at serious risk were made safe through risk assessment and protective measures, and 513 suspects were arrested as a result of its investigative and intelligence work. There were also two million child viewings of its 'Thinkuknow' education packages in schools.[15] The Government has described the work of CEOP as a 'significant success story in UK policing'.[16]

The Crime and Courts Bill would see CEOP brought within the auspices of the National Crime Agency. The Government argue that this move will allow CEOP to co-ordinate with the other Commands to ensure that children are better protected from a range of potential threats. The *NCA national plan* provides the example of CEOP working with the Border Command in order to identify missing children who are being taken from or brought into the UK, and to ensure that the appropriate action is taken.[17]

However, the proposal to integrate CEOP into the NCA attracted significant controversy when it was announced in 2010. The former Chief Executive of CEOP, Jim Gamble, expressed unease about the move and ultimately resigned his position, citing his belief that the Centre's multiagency approach to child protection would not sit well with the

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[12] The strategy's authors add that these arrangements will recognise the 'particular circumstances' with the land border between Northern Ireland and the Republic of Ireland and the relationship between the Police Service of Northern Ireland and An Garda Siochána; Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 19.

[13] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 20.

[14] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 21; HC *Hansard*, 20 October 2011, col 1073W.

[15] CEOP Annual Review, p 7.

[16] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 21.

[17] ibid.

NCA's focus on an operational response to crime.[18] The National Society for the Prevention of Cruelty to Children (NSPCC) also voiced a similar view to the Home Affairs Select Committee in 2011:

> Evidence has shown that child protection is so difficult that to be effective it requires strong organisational leadership and accountability. Merging CEOP into a larger body that does not have a specific child protection mission may place this at risk.[19]

In the 2011 *NCA national plan*, the Government asserts that CEOP will retain its operational independence. It also states that CEOP will have clear, delegated authority for its budget, will retain its well-known brand and its 'mixed economy' of staff from a variety of disciplines, and the governance structures of the centre will continue to include external partners. Further, CEOP will retain its current 'innovative partnerships' with the public, private and third sector, and its ability to raise and hold funds from donors.[20] In its 2011 report on the *New Policing Landscape*, the Home Affairs Select Committee welcomed these commitments and added that, in light of the fact that they reflect the principles of CEOP's current Chief Executive [Peter Davies], the Committee had 'fewer reservations' about the incorporation of CEOP into the NCA.[21]

Cyber Crime

The National Crime Agency will also house the national cyber crime unit. The Government envisages that this unit will support the work of the entire NCA, whilst focusing on organised crime groups operating online:

> Underpinning the work of the totality of the NCA, this unit will focus on the organised crime groups operating online that affect the UK and will work closely with international partners. It will have its own investigative capacity and will also help local forces develop their own capability to deal with this threat. There will continue to be close working between the Police Central e-crime Unit in the Metropolitan Police and SOCA's e-crime unit to develop the national response to cyber crime in advance of the creation of the NCA but with no change to structures prior to the Olympics.[22]

2.3 Relationships with Other Agencies (Clause 5 and Schedule 2)

Clause 5 of the Crime and Courts Bill defines the relationships between the NCA and other agencies. Subsections (1) to (4) provide for 'voluntary' arrangements to perform a task, including the power for the Director General of the NCA to make a request of a UK police force or law enforcement agency. They also provide similar provisions for those police forces and law enforcement agencies to make requests of the NCA.

[18] House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, HC paper 939 of session 2010–12, p 36.
[19] ibid.
[20] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 21.
[21] House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, HC paper 939 of session 2010–12, p 37.
[22] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 16.

Subsections (5) to (9) of Clause 5 provide for 'directed' arrangements to perform a task. The Explanatory Notes to the Bill outline those provisions as follows:

> In certain limited and specified circumstances... the Director General may direct the chief officer of an England and Wales police force or the Chief Constable of the British Transport Police to perform a task specified in a direction where the performance of the task would assist the NCA to exercise functions; it is expedient for the directed person to perform that task; and voluntary arrangements cannot be made or made in time... The directed person must comply with the direction.[23]

Clause 5 makes further provision with regard to the Chief Constable of the British Transport Police, and the apportioning of costs of both voluntary and directed tasking arrangements.[24]

2.4 Abolition of the National Police Improvement Agency and Transfer of Functions (Clause 15)

Alongside the Serious Organised Crime Agency, the National Police Improvement Agency (NPIA) is also abolished by Clause 15 of the Bill. As highlighted by the Home Affairs Select Committee, the *NCA national plan* made no reference to which functions currently performed by the NPIA might transfer to the NCA, despite the NCA being posited as a potential home for some of these functions.[25] However, on 4 July 2011, a month after the publication of the *NCA national plan*, the Home Secretary did announce plans to set up a police information and communications technology company which would take on certain functions of the NPIA.[26] In further written statements on 15 December 2011 and 26 March 2012 the Home Secretary subsequently announced that alongside the creation of this IT company, a new professional policing body would be established to take on a number of the existing functions of the NPIA, and provided further clarity over which of the NPIA's other functions would be moved to different agencies. This included the transfer of the Central Witness Bureau, the Crime Operational Support Unit, the National Missing Persons Bureau, and the Serious Crime Analysis Section and Specialist Operations Centre to SOCA on 1 April 2012, for future incorporation into the National Crime Agency.[27]

2.5 Timetable of Implementation, Staffing and Cost

The Government expects the National Crime Agency to become fully operational in 2013, with some elements operational sooner.[28] The first Director General of the NCA, Keith Bristow, former Chief Constable of Warwickshire Police, was appointed in October 2011.[29] Mr Bristow gave evidence to the Home Affairs Select Committee on his appointment in January 2012. With regard to staffing levels at the NCA, at that time Mr Bristow said that, while transfer schemes were still being drawn up, it was expected that there were approximately 3,700 full time equivalent people within SOCA and 150

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[23] Crime and Courts Bill *Explanatory Notes*, p 18.
[24] Crime and Courts Bill *Explanatory Notes*, p 18.
[25] House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, HC paper 939 of session 2010–12, p 26.
[26] Crime and Courts Bill *Explanatory Notes*, p 4.
[27] HC *Hansard*, 15 December 2011, col 126WS; HC H*ansard*, 26 March 2012, col 95WS.
[28] ibid.
[29] Due to an ongoing commitment to the investigation into Cleveland Police, currently Mr Bristow is technically on secondment from Warwickshire Police.

full-time equivalents within the NPIA who would be transferred to the National Crime Agency.[30]

With regard to cost, the *NCA national plan* states that the NCA will be expected to operate within existing budget constraints defined by the 2010 Spending Review:

> The total cost of the organisation will not exceed the aggregate of the Spending Review settlement for the precursors and the costs of the fully funded functions it is agreed should migrate into the NCA.[31]

In evidence to the Home Affairs Select Committee in 2011, Stephen Webb, Director of Finance and Performance Directorate in the Crime and Policing Group at the Home Office, confirmed that the 'vast bulk' of the NCA's budget would be that of the Serious Organised Crime Agency.[32] However, he also added:

> It is likely to be a little higher than that because some functions that may come over from the NPIA will want to come over with funding.[33]

As identified by the Home Affairs Select Committee, the nominal budget of the Serious Organised Crime Agency will reduce over the Spending Review Period. The Select Committee report highlights the following Home Office figures on resource allocation until 2014/15:

Table 4: SOCA Spending Review Budget allocations (figures in £ million)

SOCA	2011/12	2012/13	2013/14	2014/15	Real Terms Reduction from 2010/11 baseline
Admin	30.601	28.208	25.765	23.199	36%
Programme near cash	344.045	327.832	324.872	326.596	19%
Ringfenced resource (depreciation)	*42.000*	*40.000*	*36.000*	*30.000*	
Total non-ringfenced resource (near cash)	374.646	356.041	350.637	349.795	
Resource DEL total	416.646	396.041	386.637	379.795	20%
Capital DEL	21.200	20.400	16.600	15.200	

(Source: Additional written evidence supplied by the Home Office, House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, p 45)

The Government has tacitly recognised this reduction in funding, stating that the NCA will be expected to ensure that 'more law enforcement activity takes place against more criminals, at reduced cost'.[34] The Explanatory Notes to the Bill add:

> The Government is committed to delivering the NCA within the budget of its precursor organisations (principally SOCA, which has a Home Office delegated budget of £425 million in 2012/13 including the budget related to NPIA functions

[30] Home Affairs Select Committee, *Uncorrected evidence*, 17 January 2012.
[31] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 24.
[32] House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, HC paper 939 of session 2010–12, p 45.
[33] ibid.
[34] ibid.

> that were transferred on 1 April 2012, and which is abolished by Clause 15) reduced in line with the plans in the 2010 Spending Review. In 13/14, SOCA's indicative budget is £411 million, which will transfer to the NCA on vesting. The budget for the NCA in 2014/15, the first full financial year of operation, which includes functions transferred from the NPIA, is provisionally estimated to be £403 million. As with SOCA, there are likely to be supplementary funding streams and the NCA may receive additional funds for undertaking specific projects. As the NCA evolves it may take on additional functions on behalf of law enforcement; the cost of these functions will be met from existing budgets.[35]

The Explanatory Notes add with regard to the winding down of the NPIA:

> Clause 15 also abolishes the NPIA. The Agency had a budget of £390 million in 2011/12. As a prelude to its abolition, the Agency is expected to be wound down and its functions transferred to successor organisations or discontinued by December 2012. As part of this process its budget will be apportioned between its successor organisations.[36]

2.6 Supplementary Provisions and Potential Future Functions

The Crime and Courts Bill also makes a number of supplementary provisions with regard to the NCA:

- Clause 3 of the Bill enables the Home Secretary to set the strategic priorities for the NCA, and Clause 4 dictates how the operational independence of the Director General will function within this strategic direction.

- Clause 6 of the Bill places a duty on the Director General of the NCA to publish certain information about the exercise of the NCA's functions, and Clauses 7 and 12 outline the responsibilities of the NCA and other agencies with regard to the sharing and disclosure of information.

- Clauses 9 and 10 (and Schedule 5) make provision for the Director General of the NCA to give designated NCA officers some or all the powers of a constable, a customs office or an immigration officer.

- Clause 11 (and Schedule 6) provides for the NCA to be inspected by Her Majesty's Inspectors of Constabulary and for potential future oversight from the Independent Police Complaints Commission. As the Home Secretary has made clear in her contribution to the debate on the Humble Address, she also envisages that the NCA will be accountable through the Director General's responsibility to the Home Secretary, and through the Home Secretary to Parliament.[37]

Potential Future Functions—Terrorism

Clause 2 of the Crime and Courts Bill enables the Home Secretary to make further provision about NCA counter-terrorism functions by order. Anti-terrorism is currently the responsibility of the Metropolitan Police Force. However, the *NCA national plan* does

[35] Crime and Courts Bill *Explanatory Notes*, p 73.
[36] ibid.
[37] HC *Hansard*, 10 May 2012, col 167.

indicate that a review of these functions could take place after the Olympic Games:

> Counter-terrorism policing already has effective national structures. The Government is considering how to ensure these strengths are maintained and enhanced alongside the rest of its new approach to fighting crime. However, no wholesale review of the current counter-terrorism policing structures will be undertaken until after the 2012 London Olympic and Paralympic Games and the establishment of the NCA.[38]

The Home Affairs Select Committee recognised the practicality of this approach in its 2011 report. However, it also added that the NCA taking on responsibility for the effort to combat terrorism in the future could be advantageous:

> Although London is a prime target for terrorist attacks, the terrorist threat is a national problem and there would be advantages in placing responsibility for counter-terrorism in the National Crime Agency. We recognise, however, that there is a danger that this would divert resources and attention from the fight against organised crime, but this will be the case wherever counter-terrorism is placed, and a national agency may be better placed to make such judgments. We agree with the Government that responsibility for counter-terrorism should remain with the Metropolitan Police until after the Olympics, not least because the National Crime Agency will not be fully functional until the end of December 2013. However, we recommend that, after the Olympics, the Home Office consider making counter-terrorism a separate command of the National Crime Agency: there should be full co-operation and interaction between the different commands. Such a change would also allow for greater clarity in the leadership and accountability of the Metropolitan Police through the Mayor of London, since there would be less justification for involvement by the Home Secretary: for example, in appointing the Metropolitan Police Commissioner.[39]

2.7 Reaction to the Establishment of a National Crime Agency

The Shadow Home Secretary, Yvette Cooper, indicated during the debate on the Humble Address that the Labour Party supported the establishment of the National Crime Agency, saying that it was a 'sensible enough' approach to address a serious range of issues.[40] However, Ms Cooper added that this was more of a reorganisation of existing arrangements than any radical new advance:

> [L]et us be honest that this is not radical reform but mainly a rearrangement. It is a cross between the Serious Organised Crime Agency and the Child Exploitation and Online Protection Centre, with the police national computer and a new command structure thrown in. It is sensible enough, it will be an improvement, but it will not compensate for the lack of 16,000 police.[41]

[38] Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, June 2011, p 13.
[39] House of Commons Home Affairs Select Committee, *New Landscape of Policing: Fourteenth Report of session 2010–12*, September 2011, HC paper 939 of session 2010–12, p 43.
[40] HC *Hansard*, 10 May 2012, col 184.
[41] ibid.

Ms Cooper also questioned how the creation of a Border Command within the NCA would assist in creating a more effective border operation:

> As for Britain's borders, the Home Secretary says the new National Crime Agency will include a border policing command. Will that deliver extra staff to deal with queues, extra technology to improve security checks, better management to sort out the chaos, and help for families queuing for hours with tired kids? No. Instead we will have a border command in a separate organisation from the border force, which is itself in a separate organisation from the border agency, and there will still be no clear direction from the Government about what any of the three of them is supposed to do. The Home Secretary is adding to the chaos, not solving it.[42]

Sir Hugh Orde, President of the Association of Chief Police Officers, said during a speech on 4 July 2011 that the police service also welcomed the establishment of the NCA:

> The service has long argued for an effective national agency to support the delivery of the UK effort against internationally and nationally organised crime.[43]

However, Sir Hugh did also express concern that these changes were being implemented during a period of considerable budget constraint, particularly with regard to the transfer of functions from the NPIA. He highlighted the example of the Police National Database, pointing out that its funding burden had already been transferred directly onto police forces at a cost of £5.6 million.[44]

[42] HC *Hansard*, 10 May 2012, col 184.
[43] Sir Hugh Orde Speech, 'Leading Change in Policing Conference', 4 July 2011.
[44] ibid.

3. Part 2: Courts and Justice

3.1 Establishing a Single County Court and a Single Family Court (Clause 17)

Clause 17 of the Crime and Courts Bill creates a single county court, and a single family court, with the intention of creating a justice system which is 'simpler, more efficient, and more effective'.[45]

A Single County Court

There are approximately 170 county courts in England and Wales.[46] Each county court has a separate legal identity and serves a defined geographical area. Currently, not all matters are considered by each county court:

> Certain civil matters, for example, in respect of proceedings in contract and tort or actions for the recovery of land, can be dealt with by all county courts, whereas other civil cases, for example family proceedings, certain contested probate actions and bankruptcy claims, are handled by designated county courts.[47]

Following a commission from the Judicial Executive Board, Sir Henry Brooke conducted an inquiry into the possibility of civil court unification in 2008. In his report, *Should the Civil Courts be Unified?*, Sir Henry recommended that the county courts should become a single national court. The Government took this proposal forward in a consultation paper in March 2011, and in its response, published in February 2012, said that it had received 'strong support' for the structural changes to the civil court system, and in particular the creation of a single county court for England and Wales.[48] Clause 17 of the Crime and Courts Bill implements this proposal.

A Single Family Court

In the first instance, family proceedings are currently heard in the magistrates' courts (family proceedings courts), the county courts and the High Court. The practices and procedures of all courts dealing with family proceedings are predominately dictated by the Family Procedure Rules 2010.[49] However, each court's family jurisdiction is constituted and governed by a variety of different statutes.

In November 2011, the Family Justice Review Panel, chaired by David Norgrove, published its review of the family justice system in England and Wales. The Panel recommended that a single family court—with a single point of entry—replace the current three tiered court system. The Panel issued a consultation on its recommendations (which were then incorporated into its final report) during which 75 percent of respondents agreed with this proposal.[50] Consequently, in a written Ministerial Statement on 6 February 2012, the Government announced that it would proceed with the creation of a single family court, as provided for by Clause 17.

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[45] HC *Hansard*, 10 May 2012, col 171; HC *Hansard*, 9 February 2012, col WS50.
[46] Crime and Courts Bill *Explanatory Notes*, p 4.
[47] ibid.
[48] Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales—the Government Response*, 9 February 2012.
[49] The Family Procedure Rules, 6 April 2011, SI 2010/2995.
[50] Crime and Courts Bill *Explanatory Notes*, p 5.

Reaction to the Proposals

The National Society for the Prevention of Cruelty to Children (NSPCC) has welcomed the creation of a single family court, saying it will provide a more efficient use of resources and help to prioritise cases effectively:

> This will be a better use of resources and can ensure that all courts are well used and share workloads which should help to reduce delay in court processes... It will also have the very important consequence of ensuring that cases are allocated to the appropriate level of judiciary according to the complexity of the case. This is particularly welcome in relation to emergency protection orders which currently are all dealt with in the family proceedings court, regardless of how complex the case is. Given that emergency protection orders can involve taking the drastic and life-changing step of removing a child from the family home it is right that consideration should be given to allocating the case at the appropriate level of judiciary.[51]

The Family Law Bar Association and the Magistrates Association have also welcomed the establishment of a single family court.[52]

3.2 Judicial Appointments (Clause 18)

The 2012 Queen's Speech announced plans to reform the courts and tribunals service to increase efficiency, transparency and judicial diversity. Clause 18 and Schedule 12 of the Crime and Courts Bill include provision to alter the judicial appointments process.

Background

The current Judicial Appointments Commission was established in April 2006 following the Constitutional Reform Act 2005. The Commission replaced the system whereby the Lord Chancellor's Department made enquiries as to the most eligible candidates and appointments were made on the recommendation of the Lord Chancellor. The creation of the Commission was seen as a way of selecting candidates for judicial appointments on a more transparent basis.

The Commission is made up of fifteen Commissioners; twelve Commissioners, including the Chairman, are appointed through open competition with the other three selected by the Judges' Council. The Chairman of the Commission must always be a lay member. Membership of the Commission is drawn from the judiciary, the legal profession, the magistracy and the public.

The Commission is responsible for recommending candidates to all judicial offices listed in Schedule 14 of the Constitutional Reform Act 2005 as well as to the offices of the Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, President of the Family Division, Chancellor of the High Court, Lords Justices of Appeal and High Court Judges.

The Commission makes recommendations for judicial appointments to the Lord Chancellor. The Lord Chancellor may accept the Commission's selection, require the Commission to reconsider its selection, or reject it.

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[51] NSPCC, *NSPCC Response to the Family Justice Review Interim Report*, June 2011.
[52] Family Law Week, *Family Justice Review panel publishes interim report*, June 2011; The Magistrates Association, *Response to the Family Justice Review Interim Report from the Magistrates' Association, Family Courts Committee*, 13 June 2011.

Under the Constitutional Reform Act 2005, the Commission has a statutory duty to select candidates solely on merit, select only people of good character, and have regard to the need to encourage diversity in the range of persons available for selection.

Since the Commission's establishment in 2006, several reports have examined the level of diversity in judicial appointments and progress towards improving diversity since the creation of the Commission. The following table shows progress towards improving diversity in judicial appointments since 1998:

Progress Towards Improving Diversity—Women and BAME Judges[53]

Year	Judges in post	% Women	%BAME
1998	3,174	10.3%	1.6%
1999	3,312	11.2%	1.7%
2000	3,441	12.7%	2.1%
2001	3,535	14.1%	1.9%
2002	3,545	14.5%	2.0%
2003	3,656	14.9%	2.2%
2004	3,675	15.8%	2.5%
2005	3,794	16.9%	2.9%
2006	3,774	18.0%	3.8%
2007	3,545	18.7%	3.5%
2008	3,820	19.0%	4.1%
2009	3,602	19.4%	4.5%
2010	3,598	20.6%	4.8%
2011	3,694	22.3%	5.1%

Since its creation the Commission has made almost 2,500 selections. Over 35 percent of these were women and at least 9 percent were Black, Asian and Minority Ethnic candidates.[54]

The Commission has carried out its own research into diversity within judicial appointments and the reason why lawyers did, or did not, apply for judicial appointments.[55] In addition, the Advisory Panel on Judicial Diversity, announced by the Lord Chancellor in April 2009, sought to identify barriers to progress on judicial diversity and make recommendations to the Lord Chancellor. The subsequent *Report of the Advisory Panel on Judicial Diversity* in 2010 made 53 recommendations to increase diversity in the judiciary, noting:

> Judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues. A judiciary which is visibly more reflective of society will enhance public confidence... we pay tribute to those

[53] Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century*, November 2011, CP19/2011, p 7.
[54] House of Lords Select Committee on the Constitution, *Judicial Appointments*, 28 March 2012, HL paper 272 of session 2010–12, p 25.
[55] Judicial Appointments Commission, *Barriers to Application*, 2009.

efforts [to increase diversity]... but argue that what has been lacking to date is a coherent and comprehensive strategy to promote diversity.[56]

The report included proposals to extend the concept of a judicial career, with continuous monitoring of judicial performance, to encourage young people and under-represented groups to consider a judicial career and gain experience of working with the judiciary without the imposition of diversity quotas or targets, and the creation of a judicial diversity taskforce. Recommendation 21 of the report stated that the Commission should make use of the Equality Bill positive action provisions where the merits of candidates were essentially indistinguishable. Section 159 of the Equalities Bill 2010 provides that where a person is choosing between two equally qualified individuals for a recruitment or promotion exercise the individual with a protected characteristic may be chosen over the individual without that characteristic.

In 2011, the current Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, launched the consultation *Appointments and Diversity: A Judiciary for the 21st Century*[57] which indicated the Government's support for the recommendations of the Advisory Panel on Judicial Diversity and proposed several changes to the judicial appointments process. The consultation closed on 13 February 2012.

At the same time the House of Lords Constitution Committee carried out an inquiry into judicial appointments which reported in March 2012. The report noted that in 2011 only 5.1 percent of judges were Black Asian and Minority Ethnic (BAME) and just 22.3 percent were women, concluding that a more diverse judiciary would improve public trust and confidence in the justice system. Although the report was not a direct response to the Government's consultation, several of the recommendations in the report related to the Governments proposals. Recommendations included:

- The Lord Chancellor and Lord Chief Justice should have a duty to encourage diversity amongst the judiciary as the Commission does currently.
- While appointment on merit is vital and should continue, Section 159 of the Equalities Act 2010 should be applied to judicial appointments where two candidates are found to be of equal merit.
- Opportunities for flexible working and taking of career breaks within the judiciary should be made more widely available to encourage applications from women and others with caring responsibilities.
- Greater commitment is needed on the part of the Government, the judiciary and the legal professions to encourage applications for the judiciary from lawyers other than barristers.
- While the Committee does not currently support the introduction of targets for the number of BAME and women judges, this should be looked at again in five years if significant progress has not been made.[58]

[56] Judiciary of England and Wales, *The Report of the Advisory Panel on Judicial Diversity*, 2010, p 4.
[57] Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century,* 21 November 2011, CP19/2011.
[58] House of Lords Select Committee on the Constitution, *Judicial Appointments*, 28 March 2012, HL paper 272 of session 2010–12, p 6.

In May 2012 the Government published its report *Appointments and Diversity: A Judiciary for the 21st Century—Response to the public consultation* which detailed responses to the consultation, including the recommendations from the House of Lords Constitution Committee report on judicial appointments, and outlined the provisions that would be taken forward in legislation.[59]

Changes to judicial appointments are provided for by Clause 18 and Schedule 12 of the Crime and Courts Bill. Part 1 of Schedule 12 provides for there to be no more than the equivalent of twelve full-time judges of the Supreme Court, rather than exactly twelve judges, and makes provision about their selection. This provision aims to facilitate part-time working for judges in the Supreme Court, and also allows the Lord Chancellor to provide further regulations and guidance regarding the selection process. The Schedule provides for selection panels for the Supreme Court to be made up of an odd number of people, with a minimum of five members so that the Chair does not have a casting vote. The selection panel for judges of the Supreme Court will comprise a panel of five, with a second judge of the Supreme Court being replaced by a judge from Scotland, Northern Ireland or England and Wales. Where a selection panel is appointing the President of the Supreme Court it can include the Lord Chancellor but should be chaired by one of its non-legally qualified members.

Part 2 of Schedule 12 contains provisions to facilitate greater diversity among judges. It allows for the diversity considerations to be taken into account by the selecting body where two applicants are of equal merit. In addition it introduces full time equivalent maximums, rather than exact numbers of judges, for the Court of Appeal and High Court.

Part 3 of Schedule 12 amends provisions about the membership of the Judicial Appointments Commission by allowing for the Lord Chancellor, with the agreement of the Lord Chief Justice, to make regulations regarding the number of Commissioners, the selection of Commissioners and the Commissioners' terms of office. The Government have stated their intention to make changes regarding the numbers and composition of the Commission in secondary legislation, whilst retaining key principles, such as the requirement for judicial, professional and lay commissioners, on the face of the Bill. This approach is also mirrored in Part 4 of Schedule 12.[60]

Part 4 of Schedule 12 makes provision about selection for certain judicial appointments. It provides for the transfer of the Lord Chancellor's current role in making selection decisions in relation to particular courts-based appointments below the High Court, to the Lord Chief Justice. It also provides for the transfer of the Lord Chancellor's current role in making the selection decision in relation to First-tier Tribunal and Upper Tribunal appointments, to the Senior President of Tribunals. It allows the Lord Chancellor to make, with the agreement of the Lord Chief Justice, regulations regarding the selection process.

Part 5 of Schedule 12 abolishes the office of assistant Recorder.

Where elements of the judicial selection processes currently detailed in the Constitutional Reform Act 2005 are transferred to secondary legislation, they will be subject to the affirmative Parliamentary procedure. In relation to regulations dealing with the Supreme Court, these will be subject to the agreement of the senior judge of the Court and consultation with the judiciary and devolved administrations as specified in the

[59] Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century—Response to the public consultation,* 11 May 2012, CP19/2011.
[60] ibid, p 6.

Act. In relation to regulations concerning judicial appointments in England and Wales, these will be subject to agreement with the Lord Chief Justice.

3.3 Deployment of the Judiciary (Clause 19)

Clause 19 and Schedule 13 of the Crime and Courts Bill make provision for the deployment of the judiciary. Deployment of the judiciary is a function referred to in the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007. The Lord Chief Justice has a responsibility, as President of the Courts of England and Wales, to main appropriate arrangements for the deployment of the judiciary of England and Wales. Under the 2007 Act the Senior President of Tribunals has the function of assigning judges and members to the chambers of the First-tier Tribunal and Upper Tribunal.

The Lord Chief Justice and Senior President of Tribunals currently lack the ability to share judicial resource in order to respond to changing pressures and demands. Schedule 13 of the Bill gives the Lord Chief Justice greater flexibility in the deployment of courts and tribunals judges between different jurisdictions.

3.4 Increasing the Effectiveness of Court Fines and the Functions of Fines Officers (Clause 20)

In order to address the costs incurred by the failure of offenders to pay court-imposed criminal financial penalties, Clause 20 of the bill provides for the recovery of charges for some or all of the administrative costs of collecting or pursuing such penalties in incidences where offenders have defaulted on payment. Such a charge would be added to the amount outstanding and treated in the same way. The Government hopes that this will encourage fines imposed by the court to be complied with earlier, and avoid costly enforcement action which is currently funded through the public purse.

Clause 20 also provides for the functions of fines officers—appointed by virtue of the Courts Act 2003 for the purpose of managing the collection and enforcement of court fines—to be performed by staff provided under contract. Clause 20 amends the Courts Act 2003 to make clear that the role and functions of the magistrates' courts fines officers are to be treated as not involving the making of judicial decisions or the exercise of judicial discretion, thus enabling these functions to be carried out by contracted staff.

3.5 Disclosure and Sharing of Information for Fee Exemption Applications (Clause 21)

Clause 21 of the Bill aims to streamline the process of fee remissions for court services by enabling the disclosure and sharing of information between agencies such as Her Majesty's Courts and Tribunals Service, and the Department for Work and Pensions. Such disclosure and information sharing would prevent individuals from having to submit multiple applications to differing agencies to seek fee remissions.

The Government intends that ultimately in the majority of cases this information will be disclosed via a shared IT database. The Explanatory Notes to the Bill offer the following commentary on the projected cost of such a system:

> It is estimated that there will be a one-off cost of some £1 million at nominal prices in 2013/14 to establish the IT information sharing gateway and annual running costs of around £0.1 million per year. Compared to what would have happened otherwise, the IT gateway is estimated to deliver a quantifiable financial saving to the Ministry of Justice that increases from effectively zero in 2013/14 to about £0.3 million per year at nominal prices when reforms to the

> state benefit system as provided for in the Welfare Reform Act 2012 are fully implemented in 2017/18.[61]

3.6 Broadcasting of Court Proceedings (Clause 22)

Clause 22 of the Crime and Courts Bill provides the Lord Chancellor with powers to bring forward secondary legislation (in accordance with prescribed limitations and conditions) which would allow the recording and broadcasting of court proceedings.

Background

The recording or broadcasting of court or tribunal proceedings in England and Wales (with the exception of those in the Supreme Court) is currently prohibited by law.[62] As part of efforts to improve transparency in the judicial system, however, in September 2011 the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, announced plans for broadcasters to be able to screen footage of judgments for the first time.[63] Mr Clarke said in a Statement to the House of Commons that the starting point for this process would be the Court of Appeal, though in time he wished to see this expanded to the Crown Court.[64]

Following this announcement, the Government published *Proposals to allow the broadcasting, filming, and recording of selected court proceedings* on 10 May 2012, as a precursor to the Crime and Courts Bill 2012–13. The introduction to that paper outlines the Government's rationale for the proposal:

> [We wish to] make it easier for victims and the general public to understand the nature of the sentences handed down by the courts. We believe that television has a role to play in this, and are therefore proposing to remove the ban on cameras in courts to allow broadcasting in certain limited circumstances. We are clear that this should not be at the expense of the proper administration of justice, and that protecting the interests of victims and witnesses must remain paramount. However, the broadcast media can play a part in opening up the courts to the public, demystifying the criminal justice process, and increasing understanding of sentencing.[65]

It adds:

> We are aware of concerns that televising our courts may open the judicial process to sensationalism and trivialise serious processes to a level of media entertainment. This is why we are not proposing to allow full trials to be filmed. However, we believe that allowing people to see and hear judges' decisions will increase their understanding of the court without undermining the proper administration of justice.[66]

Accordingly, the *Proposals* document outlines plans for judgments and sentencing decisions in the Court of Appeal (Criminal and Civil Divisions) to be broadcast, but only

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[61] Crime and Courts Bill *Explanatory Notes*, p 74.
[62] According to section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981.
[63] Ministry of Justice press release, 6 September 2011.
[64] HC *Hansard*, 6 September 2011, col 18WS.
[65] Ministry of Justice, *Proposals to allow the broadcasting, filming, and recording of selected court proceedings,* May 2012, p 7.
[66] ibid, p 8.

these proceedings, and again only in accordance with certain criteria. The Government has selected the Court of Appeal as it believes the complexity of the legal issues considered will mean allowing advocates' arguments to be filmed in addition to judgments would be 'more likely to improve public understanding', rather than broadcasting judgments alone.[67]

The Crime and Courts Bill would enable the Lord Chancellor (with the agreement of the Lord Chief Justice) to set out in secondary legislation the specific circumstances in which the prohibition on cameras in courts will be removed. However, even in those cases the court will have the discretion to stop filming or refuse to allow broadcast of recorded footage where it was felt it would interfere with the proper administration of justice; would threaten the interests of any person involved in the proceedings; or in the event of disruption or demonstration.[68] The use of footage will also be restricted to news, current affairs and educational purposes only. It will not be possible to use it for light entertainment, satirical programmes, advertising or promotion, similar to restrictions currently in place for broadcast footage from Parliament and the Supreme Court.[69]

Protection for Victims, Witnesses and Jurors

The *Proposal* document makes clear that victims, witnesses, jurors and defendants will not be filmed under any circumstances.[70] Existing rules regarding reporting restrictions on cases will also continue to apply to filmed cases, as they do to other types of news reporting, meaning for example that the identities of any young people involved in court proceedings will be protected. The broadcasting of court proceedings will also be restricted to 'recognised' media organisations, using authorised cameras installed in court rooms for the purpose of filming footage to be broadcast.[71] The general public will remain prohibited from filming the proceedings on a camera phone for example.

Reaction to the Proposals

The three main television news organisations in the UK—the BBC, ITN, and Sky—have welcomed the Government's proposals. The broadcasters have campaigned for such a move for some time, and the publication of the Bill follows a joint letter—co-signed by BBC News Director Helen Boaden, ITN Chief Executive John Hardie, and Head of Sky News John Ryley—to the Prime Minister and other main party leaders in February 2012 which called the reforms 'long overdue':

> The ability to witness justice in action, in the public gallery, is a fundamental freedom. Television will make the public gallery open to all. Each of our organisations fully accepts that there must be limitations on what can be broadcast and we agree that the presiding judge should have complete control of what is shown from the courtroom... We recognised that concerns have been raised about the impact television coverage will have, particularly in controversial cases. However, we believe that the outcome can only be positive. The experience over the last two years of live streaming from the Supreme Court has shown that the presence of cameras has not affected the course of justice in any

[67] ibid, p 8.
[68] ibid, p 19.
[69] ibid, p 19.
[70] ibid, p 19.
[71] ibid, p 21.

> way in this court. Instead it enhances public understanding and allows everyone to see justice being done.[72]

In November 2011, following the Lord Chancellor's initial announcement, the *Times* and the Bar Council conducted a survey of 700 barristers which reported that the majority (68 percent) supported the idea of cameras in courts.[73] The Law Society offered a more cautious welcome to the proposals, saying that it supported the restrictions in the Bill, but remained concerned that allowing broadcasting might lead to the 'sensationalisation' of court proceedings:

> [A]llowing TV cameras into courts may lead to selective and sensational reporting, and cause even more stress to victims of crime, witnesses and defendants alike. We are pleased the Government intends to introduce live broadcasting in limited circumstances only.[74]

The national charity Victim Support has also said that it supported the decision to protect victims and witnesses from cameras. Their Chief Executive Javed Khan, speaking with regard to the Ministry of Justice's 2011 announcement, said:

> There needs to be proper safeguards in place to protect victims and witnesses from the added stress of court. Boundaries also need to be established to ensure that televising sentencing decisions doesn't become a form of reality entertainment like Judge Judy.[75]

However, some observers have expressed considerable concern at the idea of cameras being introduced into courts in any form. Scottish Advocate Donald Findlay QC, who was speaking in connection to an ongoing case in Scotland rather than the proposals in the Crime and Courts Bill, said that any introduction of cameras would be 'dangerous':

> I'm totally against cameras in the courts. It turns the whole thing into a media circus. It is a dangerous move... Cameras in court will put pressure on people: pressure on witnesses, pressure on lawyers—creating an additional level of stress to something which itself is stressful enough... I think it's a worrying trend. Originally everyone had to agree to filming, now you have to drop out. I have no idea why there is, in certain quarters, an enthusiasm for cameras in court. I don't get this desire for intrusion everywhere. Courts are already public places.[76]

Sir Roger Gale MP has also campaigned against the introduction of the broadcasting of court proceedings. He said with regard to the Ministry of Justice's plans:

> This campaign, orchestrated by some Television Broadcasters, owes much more to entertainment and sensationalism than it does to the claimed "promotion of democracy" and "access to justice"... The Justice Secretary has already indicated, in response to my written parliamentary question, that no taxpayer's money will be spent on this exercise. That means that the funding will have to come either from the broadcasters, who will literally call the shots, or from

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[72] *Guardian*, 'Broadcasters lobby party leaders to overturn ban on cameras in court', 6 February 2012.
[73] *Times*, 'Allow cameras in court, but beware soap opera farce', 7 November 2011.
[74] *The Law Gazette*, 'Queen's Speech ushers in era of cameras in court', 9 May 2012.
[75] *The Law Gazette*, 'MoJ overturns ban on cameras in court', 6 September 2011.
[76] *Times*, 'Plan to film trial a 'dangerous move' says leading Scottish advocate', 12 April 2012.

> commercial sponsors, which would be equally undesirable... I remain of the view that this is the thin end of a very undesirable wedge.[77]

3.7 Community and Other Non-Custodial Sentencing of Adults (Clause 23)

Clause 23 of the Bill would provide for additional measures relating to community or non-custodial sentences. The Explanatory Notes state that the Secretary of State for Justice will bring forward amendments containing such measures following the conclusion of their consultation on community sentencing.[78] Entitled *Punishment and Reform: Effective Community Sentences,* the consultation period is due to expire on 22 June 2012. [79]

On 27 March, the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, launched the consultation through a written statement in the House of Commons:

> We propose wide-ranging reforms to the way sentences in the community operate. Our aim is to provide sentencers with a robust community sentencing framework that is effective at punishing and reforming offenders, and in which they and the public can have confidence. Our plans include intensive community punishment to be delivered through a tough package of requirements that would involve community payback, a significant restriction of liberty backed by electronic monitoring and effective financial penalties. We also propose that every community order includes a punitive element. We will build on these options by being creative with the technology available for monitoring offenders' movements and by exploring the use of asset seizure as a standalone punishment.[80]

The paper, *Punishment and Reform: Effective Community Sentences,* consults on the possibility of introducing several new punitive measures for offenders. [81] This includes electronic monitoring and asset seizure.

Electronic Monitoring

According to the consultation paper, the majority of electronic monitoring is achieved using Radio Frequency technology. This technology indicates whether an offender is in a specific place at a specific time. The Government proposes to move to a new system of electronic monitoring, which would allow the offender's location to be tracked more thoroughly. They suggest this would allow better monitoring of compliance.

Also, the consultation asks for views on changing current legislation to allow the technology to be used for purposes other than monitoring an offender's compliance with a community order, for the prevention of reoffending for example:

> Using EM technology to track offenders on community orders for the purpose of preventing reoffending would be a significant departure from current practice. It would potentially involve monitoring some offenders at all times. We will need to fully consider the civil liberties implications of these proposals.

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[77] Sir Roger Gale MP press release, 'Televising of the Courts—Parliamentary Opposition', 18 April 2012.
[78] Crime and Courts Bill, *Explanatory Notes*, p 8.
[79] Home Office, *Punishment and Reform: Effective Community Sentences*, 27 March 2012, Cm 8334.
[80] HC *Hansard*, 27 March 2012, cols 129–30WS.
[81] Home Office, *Punishment and Reform: Effective Community Sentences*, 27 March 2012, Cm 8334.

> Appropriate safeguards would also need to be in place to ensure that the new technology is used appropriately, and to ensure compatibility with human rights and data protection requirements. This will involve, among other things, careful consideration of the purposes of such a requirement, how long offenders would be tracked for, and how long the data which is gathered should be retained.[82]

Asset Seizure

The courts already have the power to seize an offender's assets in certain circumstances. This includes distress warrants for offenders who default on a fine, or the confiscation of property obtained through or linked to the crime. In addition, the Government are consulting on the potential introduction of asset seizures as a new sentencing power in its own right. They suggest that offenders may view this as more punitive than an equivalent financial penalty, and that it could be appropriate in cases falling just outside the custody threshold.

The consultation paper also covers:

- possible measures to make fines more effective;
- the strengthening of restorative justice and victim compensation; and
- further consideration of managing health and alcohol dependency issues.

Some of the contents of the consultation paper already form part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[82] Home Office, *Punishment and Reform: Effective Community Sentences*, 27 March 2012, Cm 8334, pp 16–17.

4. Part 3: Miscellaneous and General Provisions

4.1 Driving Whilst Under the Influence of Drugs (Clause 27)

Clause 27 of the Crime and Courts Bill provides for a new offence of driving or being in charge of a motor vehicle with a specified controlled drug in the blood or urine, in excess of the specified limit for that drug.

It is already an offence (under section 4 of the Road Traffic Act 1988) to drive whilst impaired by drugs (or alcohol). However, unlike the existing offence, the new provision in the Crime and Courts Bill (to be inserted alongside the existing offence in the 1988 Act) will not require proof of impairment. The Explanatory Notes to the Bill suggest that it is similar in this way to the offence in Section 5 of the 1988 Act of driving or being in charge of a motor vehicle with an alcohol concentration above the prescribed limit. Penalties for this new offence would be the same as those for section 5 of the 1988 Act.

The Government envisages that the presence of drugs in excess of prescribed limits will be ascertained through the use of 'drugalyser' monitoring equipment, which it hopes to have available in police stations and at the roadside by the end of the year.[83]

Background

The current and previous Governments have both examined the problems caused by individuals driving under the influence of drugs. Following work by the Sentencing Advisory Panel in 2007, and a consultation by the Department for Transport in 2008, the previous Government asked Sir Peter North to review the provisions for drug driving in December 2009. The North Review produced its final report in June 2010, after the 2010 General Election. It concluded the following with regard to driving under the influence of drugs, as detailed in the accompanying press notice:

> In the short term, Sir Peter recommends that police procedures enforcing current drug driving laws are improved, making it more straightforward for police to identify and prosecute drug drivers by allowing nurses, as well as doctors, to authorise blood tests of suspects. Medium-term, he recommends early approval of saliva testing of drug driving suspects in police stations, which will largely overcome the environmental problems in roadside use that had previously slowed technological development of so-called 'drugalysers'.

On the question of a new law setting banned drug levels, Sir Peter said:

> The focus should be on public safety. Any new offence should therefore focus on establishing levels of drugs in the blood at which significant impairment-—and therefore, risk to public safety—can be reasonably assumed, as is the case now for drink-driving.[84]

Following the conclusion of the North Review, the House of Commons Transport Select Committee conducted an inquiry into drink and drugdriving in the second half of 2010. Building on the proposals from the North Review, the Committee recommended that the

[83] Department for Transport press release, 'Government crack down on drug driving menace', 9 May 2012.
[84] North Review press notice, '"Time to give the public what they want": North proposes crack down on drink and drug driving', 16 June 2010.

Government adopt a five year strategy to tackle drug driving which included a 'zero-tolerance' approach to illegal drugs which are known to impair driving:

> The Government should adopt a five-year strategy to tackle drug driving, so that it is as important a road safety priority as combating drink driving. This should include a high profile advertising campaign, in particular on the consequences of being caught and convicted of the crime.
>
> The police currently lack the ability to enforce drug driving legislation effectively, which accounts for the low conviction rate. We welcome the Government's commitment to install drug screening devices in every police station by 2012; the medium-term aim should be to develop and type-approve a drug screening device for use at the roadside.
>
> Unlike with drink driving, there is no objective test for impaired driving due to drugs, no legal definition of impairment in the Road Traffic Act, and no offence of driving in breach of prescribed limits of specific drugs. We favour the adoption of a "zero-tolerance" offence for illegal drugs which are known to impair driving, which are widely misused, including among drivers, and which represent a substantial part of the drug driving problem.[85]

The Department for Transport said in its written evidence to the Committee that it planned to introduce preliminary testing devices to assess suspected drug driving, and discussed the difficulties involved in ascertaining the prevalence of driving impaired by drugs. In March 2011 the (former) Secretary of State for Transport outlined how the Government planned to proceed in these areas in a Written Ministerial Statement:

> The Government are committed to improving road safety... We are convinced that our first priority must be to give the police the means to identify drug-drivers and compel them to give evidence for testing... We have taken the first steps to address this with a specification for drug testing equipment for the police. We aim to have this available for use later this year. We will—as Sir Peter suggested—examine the case for a new specific offence which would remove the need for the police to prove impairment on a case-by-case basis where a specified drug has been detected.[86]

Problems of Testing for Evidence of Drugs and Roadside Detecting Equipment

The police currently have the power—as provided for by Schedule 7 of the Railways and Transport Safety Act 2003—to conduct roadside drug tests. However, in the absence of effective drug analysis, or 'drugalyser', equipment, these tests—which involve asking individuals to perform a series of physical tasks and inspection of pupil dilation, slurring of speech and poor co-ordination—are subjective and non-scientific. Such tests also make no distinction between illegal or misused drugs and those available over the counter, or on prescription. Consequently, in practice, police have preferred to use powers provided by the Misuse of Drugs Act 1971 which makes it illegal to possess a controlled drug, rather than seek proof of impairment to drive.

A reliable drug screening or 'drugalyser' device which could be used at the roadside has been in development by the Home Office for more than a decade. Following recent trials of a potential device, Minister Michael Penning said in October 2011 that the

[85] House of Commons Transport Select Committee, *Drink and drug driving law: First report of session 2010–11*, HC paper 460 of session 2010–11, 24 November 2010, p 3.
[86] HC *Hansard*, 21 March 2011, col 45WS.

Government was committed to their introduction at police stations and the roadside 'as soon as possible'.[87] This was echoed by the Prime Minister David Cameron in December 2011, when he met the family of Lillian Groves, who died aged 14 after being hit by a drug driver in June 2010. Tacitly noting the fact that reliable devices were not universally available by the end of 2011 as the Department for Transport had hoped, Mr Cameron said that the introduction of the equipment had 'taken too long'.[88] He added in a further statement made shortly before the Queen's Speech:

> I found meeting Lillian Groves's family in Downing Street late last year incredibly moving. As they said at the time, it simply can't be right that a schoolgirl... can lose her life and then we discover we don't have the laws or the technology to punish drug-drivers properly. We want to do for drug-driving what drink-driving laws have done for driving under the influence of alcohol.
>
> That's why we're doing what we can to get drugalysers rolled out more quickly. And this week we'll publish a new drug-driving offence so that driving under the influence of drugs itself is a crime, just like it is for drink-driving.[89]

As above, the Government expects that devices to screen for drugs in the body will receive type approval from the Home Office by the end of this year.[90]

Prescription and Legal Medications

The North Review examined the issue of whether prescription or over the counter medicines should be included in any attempt to restrict driving under the influence of drugs. The press release which accompanied the publication of the Review said:

> Responding to concerns from patients and healthcare professionals that people taking medicines would be banned from driving, Sir Peter stresses that this is not his intention. Instead, he highlights that although medicines can be as impairing to driving as illegal drugs, there is an important opportunity for the relevant parties to work together to improve public awareness and the driving patient's safety.[91]

The Review itself said with regard to medicinal drugs:

> While cannabis remains the most commonly used drug associated with driving impairment, there are various medicines which have been detected in suspected driver impairment (although not necessarily associated with increased crash risk). The medicines most frequently implicated are benzodiazepines (eg 'Valium', temazepam), sedative hypnotics (eg zopiclone, zolpidem), first generation antidepressants (eg amitriptyline), antihistamines (eg chlorpheniramine), muscle relaxants (eg carisoprodol) and narcotic analgesics (eg codeine, morphine, tramadol and methadone).

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[87] HC *Hansard*, 20 October 2011, col 1064W.
[88] *Independent*, 'Drug-driver test kit for police overdue, admits Cameron', 4 December 2011.
[89] *Guardian*, 'Drug-drivers to fail jail time under new law: Legislation to mirror drink driving crime, says PM', 7 May 2012.
[90] Department for Transport press release, 'Government crack down on drug driving menace', 9 May 2012; *Independent*, 'The Queen's Speech: Drug-driving legislation welcomed by road safety groups', 9 May 2012.
[91] North Review press notice, '"Time to give the public what they want": North proposes crack down on drink and drug driving', 16 June 2010.

> It should be noted that abuse or misuse of therapeutic drugs or 'medicines' can produce significant impairment and adverse effects. The Medicines and Healthcare Products Regulatory Agency (MHRA) highlighted in its evidence to the Review that there is an increasing trend of buying prescription only medicines over the Internet. It is likely that a proportion of medicines bought in this way may be misused.
>
> However, despite evidence of impaired driving, the evidence regarding the role of medicines in road crashes remains unclear, mainly due to the lack of adequately large and robust research studies. A recent OECD review of the international literature on the effect of psychoactive substances used as medicines (including anticonvulsants, antidepressants, antipsychotics and sedatives) has concluded that there is currently insufficient evidence to determine the extent to which these psychoactive substances are associated with an increased crash risk.[92]

In its response to the North Review in March 2011, the Government stated its intention to:

> [A]llow custody nurses to advise the police whether or not a suspected driver has a condition that may be due to a drug. This will remove the need to call out police doctors and so speed up the testing process—ensuring that drug drivers do not escape punishment because a doctor is not available and also freeing up police time.[93]

Under the provisions included in the Bill, an individual will be guilty of an offence if the proportion of a specified controlled drug in their blood or urine exceeds the specified limits for that drug. However, the Bill also provides for a defence if the drug is taken in accordance with medical advice (or if it can be proven that there was no likelihood of an individual driving a vehicle whilst over the specified limit). This defence is not available if the actions of the individual run contrary to medical or dental advice given, however, or to accompanying instructions given by the manufacturer or distributer of the drug.[94]

Setting of Appropriate Limits

The provisions in the Bill allow for different specified limits to be applied to different controlled drugs, including a limit of zero (and thus consistent with a 'zero-level' approach), as defined in the explanatory notes:

> New section 5A(2) of the 1988 Act allows for different specified limits to be set for different controlled drugs. For some controlled drugs the specified limit might be set at a level where the average person's driving would be impaired. However, for other controlled drugs which are also associated with road safety problems (as they can impair driving), it may not be technically possible to determine a level which impairs most people's driving. This may be, for example, because tolerances vary widely in the population, or because the drug is often taken in conjunction with other drugs and is associated with abuse or risk-taking behaviour. For such drugs a specified limit may be set at a lower level than may be considered likely to impair most people's driving. In some cases the level may be very low (for example minimum detectable amounts); this can be described as

[92] North Review, *Report of the Review of Drink and Drug Driving Law*, June 2010, paras 6.44–6.47.
[93] Department for Transport press notice, 'Government crackdown on drink and drug driving', 21 March 2011.
[94] Crime and Courts Bill *Explanatory Notes*, p 70.

> a zero tolerance approach. New section 5A(9) provides that specified limits could be zero.[95]

Reaction to the Proposals

The road safety charity Brake have welcomed the measures to address drug driving, describing them as "an incredibly important step forwards".[96] Similarly Andrew Howard, Head of Road Safety at the AA, said: "This is to be welcomed because it brings closer the day when drug driving will be treated the same way as drink driving."[97]

The Chief Executive of the Institute of Advanced Motorists, Simon Best, also supported the move, but said that there would need to remain some assessment of impairment alongside drugalyser tests:

> While we support the introduction of the drugalyser test and this offence, it needs to be backed up by some measure of impairment. Without this, the test could simply catch those people who have used drugs at some point, but are not necessarily still impaired by them.[98]

4.2 Removing the Full Appeal Right for Family Visa Visit Cases (Clause 24)

Currently, individuals who submit an application to visit the UK for the purpose of visiting a 'qualifying family member'[99] have a full right of appeal against a refusal to grant entry clearance. The Home Office published a consultation document in July 2011 entitled *Family Migration: A Consultation* which sought views on a range of issues, including whether this full right of appeal should be removed. The Government is yet to publish its full response to the consultation. However, it has decided to move forward with proposals to amend the appeal right in family visa visit cases. As stated in the Explanatory Notes to the Bill, the Government proposes first to restrict the full right of appeal—by narrowing the definition of 'qualifying family member' and introducing a sponsor status requirement through regulation—and then to remove it. Clause 24 gives effect to the latter half of these proposals.

As a result of these changes, in the future if applicants are denied a family visit visa then they will need to reapply and incur the cost of a new application. However, appeals will still be permitted on the grounds of human rights or race discrimination.

Background and Reaction to the Proposals

The Government has said that the number of appeals from those wanting to visit family living in the UK has risen to almost 50,000 a year, with failed applicants accounting for nearly 40 percent of all immigration appeals.[100] The Home Office also reports that 95 percent of decisions on fresh applications are typically taken within 15 days, whereas the appeals process can last up to eight months.[101] Consequently, a spokesperson for the Home Office said the current appeals process was "burdening the system and diverting resources which could otherwise be used to settle asylum claims and foreign

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[95] Crime and Courts Bill *Explanatory Notes*, p 70.
[96] Brake press release, 'Brake welcomes drug driving announcement', 8 May 2012.
[97] *Telegraph*, 'Drug drivers face jail term under new laws', 7 May 2012.
[98] Fleet News website, 'IAM response to drug driving law', 10 May 2012.
[99] A qualifying family member typically includes the applicant's spouse, father, mother, son or daughter.
[100] UK Border Agency, 'Scrapping family visitor appeal will save millions', 10 May 2012.
[101] UK Border Agency, 'Scrapping family visitor appeal will save millions', 10 May 2012.

criminals' deportation cases".[102] Immigration Minister Damian Green added with regard to the proposals:

> We are not stopping anybody visiting family in the UK. If an applicant meets the rules they will be granted a visa... However, it is grossly unfair that UK taxpayers have had to foot the huge bill for foreign nationals who, in many cases, have simply failed to provide the correct evidence to support their application.[103]

However, the plans have attracted criticism from the Chairman of the Home Affairs Committee, Keith Vaz MP. Mr Vaz argues that the plans will prevent relatives coming to the UK to attend family occasions, and will only add to the existing immigration caseload of MPs:

> The Government will deeply regret their decision to take away the right of appeal for family visits... The fact is that taking away the right of appeal will hugely increase Members' case loads. We are happy to do more work, but the fact is that we will send those people back to make further applications... [T]he facts are very clear: 50 percent of the appeals against decisions to refuse family visits are won in the immigration tribunal, which means that decision making is not as good as it should be. If we take away the right of appeal, we will take away people's only option to have their relatives come here to attend family occasions, funerals and weddings.[104]

4.3 Removing In-country Appeal Rights from those Excluded from the UK by the Home Secretary (Clause 25)

Clause 25 removes the in-country right of appeal against the decision of the Secretary of State to cancel an individuals' leave to enter, or right to remain, in the UK where they have decided to exclude that individual on the grounds of the public good. The Clause is a response to the 2011 judgment made by the Court of Appeal in the case the *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333 which allowed for such a right of appeal, as explained by an explanatory memorandum published by the Home Office:

> The Secretary of State (in practice, the Home Secretary) has a non-statutory power to direct that an individual's exclusion from the United Kingdom would be conducive to the public good. Such decisions are taken by the Secretary of State personally. When taking such a decision, it may be necessary to give an accompanying direction cancelling an individual's existing immigration status, such as leave to enter or remain in the United Kingdom. The Secretary of State's decision to exclude is not in itself an appealable decision but the accompanying decision to cancel leave attracts an automatic appeal right under existing immigration legislation (the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")).
>
> In March 2011, the Court of Appeal held, in the case of the Secretary of State for the Home Department v MK (Tunisia), that existing immigration legislation allowed for an in-country right of appeal against a cancellation of leave, even when the cancellation was accompanied by the Secretary of State using her non-statutory power to direct that an individual's exclusion from the United Kingdom would be conducive to the public good. As a result of this decision, an individual

[102] BBC News, 'Visa appeals to be scrapped for many visiting family in the UK', 15 May 2012.
[103] BBC News, 'Visa appeals to be scrapped for many visiting family in the UK', 15 May 2012.
[104] HC *Hansard*, 10 May 2012, col 199.

excluded from the UK is allowed to re-enter the country to appeal a decision to cancel leave, in contravention to the exclusion decision by the Secretary of State.

Clause 25 provides for a power by which the Secretary of State may remove an in-country right of appeal to the cancellation of an individual's immigration leave, when the Secretary of State certifies that such a decision was taken on the grounds that the person's presence in the UK was non-conducive to the public good. In effect, the certification on non-conducive grounds will be accompanied by an exclusion decision by the Secretary of State.[105]

A person served with such a certificate would continue to be able to exercise their right of appeal against the cancellation of leave from outside the UK. This provision applies to non-European Economic Area (EEA) foreign nationals only. The exclusion of EEA nationals is covered under separate legislation.

4.4 Investigatory Powers of Immigration Officers (Clause 26)

Clause 26 and Schedule 14 of the Crime and Courts Bill will strengthen the investigatory powers available to customs officials and immigration officers within the UK Border Agency crime teams. By doing so the Bill will also equalise the powers available to customs officials, following the passage of fast-track legislation in Scotland in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

Clause 26 provides for legislative amendments in four key areas, as detailed in the Impact Assessment on the Bill:

1. Regulation of Investigatory Powers Act (RIPA) 2000/Police Act 1997

The Bill will extend access to the more intrusive covert investigative techniques under RIPA and Part 3 of the Police Act 1997 to those within UK Border Agency responsible for the investigation of serious and/or organised immigration crime.

2. Cross Border Powers of Arrest

The Bill will provide for cross border powers of enforcement contained within the Criminal Justice and Public Order Act 1994 available to immigration officers. This will ensure that they can deal independently with suspects wanted for offences in different jurisdictions across the United Kingdom, without over reliance on other law enforcement agencies.

3. Scotland

Provisions will create the necessary legislative change that is required to enable immigration officers to investigate crime effectively in the context of the Scottish criminal justice system and to facilitate lawful and efficient joint working between the relevant law enforcement agencies that operate within it. The Bill will provide immigration officers with the power of detention, access to common law warrants and alignment of powers to the Scottish criminal justice system.

[105] Home Office*, Crime and Courts Bill: Fact sheet 16—Clause 25: Restriction on the right of appeal from within the United Kingdom*, May 2012.

4. Policing and Crime Act 2009—The Bill will enable immigration officers to:

a) exercise freestanding money laundering, confiscation and cash detention investigations;

b) seize, detain and seek the forfeiture of cash just as customs officers can currently;

c) take advantage of the provisions to be inserted into POCA in due course by Part 5 of the Policing and Crime Act 2009 (which strengthened the powers to seize and confiscate the proceeds of crime).[106]

[106] Home Office, *Impact Assessment: Crime and Courts Bill, parts 1 and 3*, 12 April 2012.

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