HOUSE OF LORDS

Library Note

Criminal Justice and Courts Bill (HL Bill 30 of 2014–15)

The Criminal Justice and Courts Bill contains a range of proposals across four areas: criminal justice; young offenders; courts and tribunals; and judicial review. The Bill was carried over from the last session, having only reached report stage in the House of Commons by the time the session ended. On 17 June 2014, it completed its remaining stages in the House of Commons and is scheduled for second reading in the House of Lords on 30 June 2014. This Library Note provides background reading for that debate. It summarises the key debates that took place on the Bill at report stage and third reading in the House of Commons, highlighting amendments made to the Bill, and refers to some of the other issues raised by MPs. In addition, a recent report by the Joint Committee on Human Rights identified a number of key clauses in the Bill which the Committee thought raised "significant human rights issues". Short extracts from this report are provided, where applicable.

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1. Introduction

The Criminal Justice and Courts Bill has four parts, containing provisions relating to: criminal justice, including sentencing and the release and recall of prisoners; the detention of young offenders; reforms to courts and tribunals, including changes to costs orders, and to contempt of court laws; and reforms that streamline judicial review procedures. Some aspects of the Bill apply to the UK as a whole, but most apply to England and Wales only. There is also provision to extend specified aspects of the Bill to the Channel Islands, the Isle of Man and British Overseas Territories.

The Bill (HL Bill 30 of session 2014–15) was introduced to the House of Lords on 19 June 2014, having completed its passage through the House of Commons. On publication of the Bill, the Government released a statement which said its proposals would:

- Deliver a firm but fair package of sentencing and criminal law reforms that properly punish serious and repeat offenders and better protect victims and the public. People who break the law will not escape the law.
- Reduce the burden of the cost of courts on hardworking taxpayers by making criminals pay towards the cost of their court cases. We are reforming judicial review to tackle unmeritorious claims and unnecessary delays to the system.
- Put education at the heart of youth custody, giving young offenders the tools they need to turn their backs on crime.
- Modernise the law to tackle the influence of the internet on trials by jury to ensure defendants receive a fair trial, reflecting how technology and the wealth of information available at the touch of a button has changed the way we live. We are also increasing the upper age limit for jurors from 70–75 and so harness the knowledge and life experiences of a group of people who can offer significant benefits to the court process.[1]

The Bill received its first reading in the Commons on 5 February 2014, followed by second reading on 24 February. It was then examined by a public bill committee of MPs over 13 sittings between 11 March and 1 April 2014. The first day of report stage was completed on 12 May before the session ended, and was then subject to a carry-over motion for parliamentary scrutiny to continue in the 2014–15 session. Formal first and second readings were given to the Bill on 5 June, and it completed the remainder of its Commons stages on 17 June 2014.

The following sections of this Library Note provide background information ahead of the second reading in the House of Lords, scheduled for 30 June 2014. The Note summarises the Bill's proposals in each of its four parts, identifying where clauses were added to the Bill at report stage in the House of Commons, and highlights some of the issues that were raised in the debates that took place. Legislative scrutiny of the Bill has been undertaken by the Joint Committee on Human Rights (JCHR). In its report, published in June 2014, the JCHR made recommendations with regard to a number of clauses it deemed to have "significant human rights issues".[2] An overview of the recommendations the Committee made in relation to several clauses is also provided, together with its assessment of the reforms to judicial review,

[1] Ministry of Justice, 'Criminal Justice and Courts Bill', 5 February 2014.
[2] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, 11 June 2014, HL Paper 189 of session 2013–14.

which were the subject of a separate report.[3] The Note concludes with a short summary of some of the closing statements made in the House of Commons at third reading.

Further information about the Bill can be found in a series of fact sheets the Ministry of Justice has produced, and the Explanatory Notes prepared for the Bill.[4] More detailed information relating to the cost benefits of the policies can be found in the accompanying Impact Assessments.

2. House of Commons: Second Reading

Second reading of the Bill in the House of Commons took place on 24 February 2014. Opening the debate, Chris Grayling, Justice Secretary and Lord Chancellor, told MPs the Bill represented "the vital next stage in this Government's mission to deliver a more credible justice system that keeps the public safe and secure, reduces reoffending and puts victims first".[5] He said this was based on a "consistent and clear approach" that "the justice system must be on the side of those who work hard and play by the rules, keeping our communities safe and secure". The Bill, he argued, contained:

> […] a vital set of proposals as we work to deliver a justice system in which people can have confidence—a justice system that deals robustly with those who repeatedly commit crimes. The Bill toughens sentencing for some of the most serious crimes and ensures that serious offenders will be released only if they can show that they are no longer a threat to society. The Bill requires offenders to contribute to the cost of the criminal courts, and allows us to test a new approach to youth custody and to reduce the delays and expense involved in unmeritorious judicial reviews.[6]

For the Opposition, Sadiq Khan, Shadow Justice Secretary, speculated that the Bill had been introduced "to keep Tory backbenchers happy and busy".[7] Turning his remarks to the substance of the Bill, Mr Khan said there were "some elements of this Bill we support, some need further work and there are some we downright oppose". He thought the provisions in part 1 would "see more people in our prisons"[8] and was concerned about the lack of detail on the proposals for youth detention in part 2.[9] He said he welcomed any efforts to "speed up court proceedings and make them more efficient", but not to the "detriment of proper open justice or due process".[10] On the plans for judicial review in part 4, he warned MPs that "we tinker at our peril with important checks and balances such as judicial review without proper thought", and stated that the Government's policies were "dangerous".[11] Mr Khan argued that the Bill was also missing some important reforms, such as a victim's law, and help in the justice system for women, those with mental health issues and ethnic minorities. He concluded by predicting the Bill would not achieve the goals it set out to.[12]

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[3] Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review*, 30 April 2014, HL Paper 174 of session 2013–14.
[4] Explanatory Notes to the Criminal Justice and Courts Bill, HL Bill 30-EN 2014–15.
[5] HC *Hansard,* 24 February 2014, col 47.
[6] ibid, col 58.
[7] ibid, col 59.
[8] ibid, col 61.
[9] ibid, col 63.
[10] ibid, col 64.
[11] ibid, cols 64–5.
[12] ibid, col 67.

Sir Alan Beith (Liberal Democrat MP for Berwick-upon-Tweed and Chair of the House of Commons Justice Committee) was among further contributors. He raised points in relation to the Bill's proposal for simple cautions, secure colleges and judicial review.[13] On secure colleges, he welcomed the Government's focus on education and skills, but thought more detail was needed about how these would be delivered. He was also concerned about the Bill's provisions for the use of reasonable force and wondered how this related to article 3 (prohibition of torture) of the European Convention on Human Rights (ECHR). He thought the plans for judicial review would need to be looked at closely: in particular proposals for the exclusion threshold. He concluded by advocating broader thinking in relation to criminal justice, what he said his Committee had called "justice reinvestment".[14] He explained this meant "taking resources away from the damaged end of the system and putting them into the beginning, so that victims do not become victims in the first place because crimes do not happen".

3. House of Commons: Committee Stage

Following second reading, the Bill was then received by a public bill committee, which considered the Bill between 11 March and 1 April 2014. It held several evidence sessions on aspects of the Bill and received written submissions. A number of amendments were then debated, but no amendments or new clauses were added as a result of a Government defeat. The House of Commons Library has produced a briefing detailing these debates, noting that the "Opposition concentrated most of its concern in relation to part 4 on judicial review changes, and there were a number of divisions on clause stand part debates".[15] Two new clauses were added to the Bill at committee: drugs for which prisoners can be tested; and a new offence of sending letters with intent to cause distress and anxiety. These are clauses 14 and 27 of the Bill, as introduced to the House of Lords (HL Bill 30 of session 2014–15), and are explained further below.

4. Part 1: Criminal Justice

Dangerous Offenders

Clauses 1–3 propose adding three terrorism-related offences to the enhanced dangerous offenders sentencing scheme and would increase the maximum penalty of these offences to life, if that penalty were not already available to the court. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced this scheme, with two new sentences to replace imprisonment for public protection (IPPs) and extended sentences for public protection (EPPs): extended determinate sentences (EDS) and life sentences for a second serious offence respectively.[16]

The three new offences included in the Criminal Justice and Courts Bill are: 'weapons training for terrorist purposes'; 'training for terrorism'; and 'possession of explosives'.[17] Adding these offences to schedule 15B of Criminal Justice Act 2003—which provides a list of serious sexual and violent offences—would mean offenders would be subject to the following:

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[13] ibid, cols 87–90.
[14] ibid, col 90.
[15] House of Commons Library, *Criminal Justice and Courts Bill: Commons Stages*, 14 June 2014, SN/HA/6882.
[16] Explanatory Notes, para 10.
[17] Ministry of Justice, *Fact Sheet: Adding Certain Terrorism-related Offences to the Enhanced Dangerous Offender Sentencing Scheme, and Increasing Maximum Penalties*, accessed 18 June 2014, pp 1–3.

- Those convicted of these offences, if they receive an EDS sentence, must apply to the Parole Board to get early release at the two-thirds point of the custodial term, rather than receiving automatic release at the two-thirds point of the custodial term;
- A previous conviction for one of these offences satisfies a condition for the imposition of an EDS sentence for a further sexual or violent offence specified in schedule 15B;
- If an offender is convicted a second time of a schedule 15B offence, and receives or merits a sentence of at least 10 years on each occasion, he is subject to an automatic life sentence (unless there are exceptional circumstances which would make the imposition of such a sentence unjust in all the circumstances).[18]

Clause 4 would amend the release arrangements for offenders receiving an EDS, therefore ensuring that all prisoners defined as dangerous (regardless of seriousness) would not be entitled to automatic release at the two-thirds point, and would only get released if the Parole Board recommended it. This would change the current position whereby some offenders who receive an EDS, though found to be dangerous when sentenced, are automatically released on license at two-thirds the way through their sentence.[19]

Having examined clauses 1–3, the JCHR thought that "significant increases in maximum sentences require clear and transparent justifications which in this case has not been given".[20] It did accept though the Government's view that it was important to maintain consistent and up-to-date sentencing for all offences, "especially in view of the courts' discretion to impose a lower sentence remaining unaffected by the provisions".[21] The Committee had raised concerns in correspondence with ministers that a possible implication of the Bill could be that it compels courts to make whole of life orders in certain cases. The report explained the outcome of this query and recommended Parliament act to clear up any continuing uncertainty:

> It is now clear that the compulsion only obtains where a court decides for itself that the case is sufficiently serious to warrant such an order, in which case the court has no choice but to make such an order. Although the Court of Appeal in the *McLoughlin* case has brought welcome clarification of the legal position concerning "whole life orders", we believe that, in view of the legal uncertainty that remains about the availability of a review mechanism for such orders, more specific details need to be provided about this mechanism, including the timetable on which such a review can be sought, the grounds on which it can be sought, who should conduct such a review, and the periodic availability of further such reviews after the first review. The current Bill provides an opportunity for Parliament to remove any legal uncertainty by specifying the details of the review mechanism.[22]

Other Offenders of Particular Concern

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[18] ibid, p 1.
[19] Ministry of Justice, *Fact Sheet: Ending Automatic Early Release for all EDS Sentences for Dangerous Offenders (Clause 4); and Ending Automatic Early Release for Serious Child Sex and Terrorist Offenders (Clause 5 and Schedule 1)*, accessed 18 June 2014, p 1.
[20] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, 11 June 2014, HL Paper 189 of session 2013–14, p 3.
[21] ibid, p 9.
[22] ibid, p 3. See [2014] EWCA Crim 188 for further information about R v Ian McLoughlin and R v Lee William Newell.

Clause 5 (and schedule 1) would end the automatic early release of serious child-sex and terrorist offenders half-way through their sentence. It would introduce a new determinate custodial sentence, made up of custodial term and a year on licence "to ensure that those who end up serving their whole custodial terms are not released without supervision".[23] These prisoners would only get an early release if the Parole Board directs it.[24]

Release and Recall of Prisoners

Clauses 6–13 contain a number of measures relating to the release and recall of prisoners. Specifically:

- Clause 6 (and schedule 2) would introduce powers, by negative resolution procedure, to allow offenders serving custodial sentences to be electronically tracked on licence as a mandatory condition. It would also provide for a Code of Practice to be issued by the Secretary of State relating to the processing of data gathered;
- Clauses 7 and 8 would provide that an offender is not suitable for a fixed term recall (of 28 days) if it is considered an offender is highly likely to breach a licence again if released. This would allow prolific and repeat offenders that persistently do not comply with licence conditions to be given a standard recall (meaning effectively being held until the end of the sentence, subject to discretionary release by the Parole Board). It would also introduce a new statutory release test—relating to likelihood of licence condition breach—for Parole Boards to apply in considering the release of recalled determinate sentence prisoners;
- Clause 10 would create a new offence of being unlawfully at large after recall from licence or after recall from home detention curfew. This would harmonise sentencing for all offenders who are released and either abscond following recall, or who fail to return from release on temporary licence;
- Clause 11 would increase the maximum penalty to two years for the offence of being unlawfully at large after temporary release.[25]

In its correspondence with the Government about clause 6, the JCHR asked for a justification of why it was intended to introduce these powers by order, rather than through primary legislation, and whether a draft Code of Practice would be available for scrutiny by Parliament. The Committee were told that the measure was proportionate to ensure compliance with conditions of release and an order-making power provided the necessary flexibility to implement the policy.[26] The Government also referred to certain safeguards, including those which Ministers believe exist in the Human Rights Act 1998 and Data Protection Act 1998, and the new Code of Practice.

The JCHR were unconvinced:

> The detailed safeguards in the Code of Practice will be crucial to ensuring that the processing of data so gathered is carried out in such a way that any interference with

[23] Ministry of Justice, *Fact Sheet: Ending Automatic Early Release for all EDS Sentences for Dangerous Offenders (Clause 4); and Ending Automatic Early Release for Serious Child Sex and Terrorist Offenders (Clause 5 and Schedule 1)*, accessed 18 June 2014, p 14.
[24] ibid, p 2.
[25] Explanatory Notes, paras 14–19.
[26] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, 11 June 2014, HL Paper 189 of session 2013–14, p 4.

> the right to respect for private life is necessary and proportionate to the legitimate aims pursued. We recommend that the Bill be amended to make the Code subject to some form of parliamentary procedure in order to ensure that Parliament has as opportunity to scrutinise the adequacy of the relevant safeguards.[27]

At report stage, Philip Davies (Conservative MP for Shipley) moved a number of amendments relating to prisoner recall and release, and to open prisons. New clause 29 proposed removing those who had committed serious offences from being eligible for a 28 day recall for a breach of their licence.[28] Mr Davies added that his amendments concerning open prisons (new clauses 37–42) were in response to the case of Michael Wheatley, a prisoner known as 'Skull Cracker' who was serving a life sentence and failed to return from day release.[29] In order to address such issues, he proposed making those prisoners liable for deportation, and those serving a sentence for murder, ineligible for a resettlement licence and unable to be moved to an open prison.[30]

Jeremy Wright, Parliamentary Under-Secretary of State for Justice, responded for the Government. He sought to reassure MPs that public protection was "the priority" when consideration was given to placing a prisoner in open conditions.[31] He said the Government had acted to ensure victims voices were heard by the Parole Board in making its decision.[32] In terms of prisoners liable for deportation, Mr Wright added that current policy sought "to ensure that those who will be removed from the UK stay in closed conditions, and that those who will not can be considered for transfer to open conditions and temporary release".[33] Furthermore, the Government had "already acted to ensure public protection is placed at the heart of the temporary release scheme", including changes to risk assessment requirements following three serious incidents last year.[34] From the autumn, Mr Wright added, a new scheme of restricted release on temporary licence for serious offenders would start. New clause 38 was put to division and was defeated 469 votes to 6.[35]

Drugs Testing of Prisoners

Clause 14 was added to the Bill at public bill committee. It would change current laws concerning drugs for which prisoners may be tested under the existing mandatory drug testing (MDT). Introduced by the Government as new clause 21, Jeremy Wright explained that it:

> [C]reates a power for the Secretary of State to specify in secondary legislation drugs that are not controlled under the Misuse of Drugs Act 1971 for which prisoners can be tested in addition to controlled drugs. The effect is to expand the scope of the mandatory drug testing programme currently operated in prisons and young offenders institutions, so that prisoners can be tested for non-controlled drugs as well as controlled drugs under the Misuse of Drugs Act.[36]

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[27] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, 11 June 2014, HL Paper 189 of session 2013–14, p 4.
[28] HC *Hansard,* 12 May 2014, col 486.
[29] BBC, 'Fugitive 'Skull Cracker' Jailed for Life', 29 May 2014.
[30] HC *Hansard*, 12 May 2014, cols 491–4.
[31] ibid, col 509.
[32] ibid, col 509.
[33] ibid, col 510.
[34] See HC *Hansard*, 10 March 2014, cols 3–4WS.
[35] HC *Hansard,* 12 May 2014. col 513.
[36] Criminal Justice and Courts Public Bill Committee, 27 March 2014, cols 487–8.

He added that the MDT programme was "an important part of our response to drug misuse in prisons".[37] The new clause was added to the Bill without division.[38]

Cautions

Simple cautions are a means of dealing with a low level criminal offence committed by a person aged 18 or over. They do not involve court processes, or the imposition of conditions or sanctions. Following the recommendations of the *Review of Simple Cautions*,[39] the Government announced it would prevent their use for all indictable only offences, certain specified either way offences and where an offender had been cautioned or convicted over the course of the previous two years.[40] Clause 15 would implement these recommendations, with clause 16 providing that the specification of either-way offences would be made by order, subject to the negative resolution procedure.[41]

Offences Involving Ill-treatment or Wilful Neglect

At report stage, the Government added clauses 17–22 to the Bill with the intention of making wilful neglect a criminal offence, covering care workers, carers and care providers. This followed reports into events at Mid Staffordshire NHS Foundation Trust,[42] and a further review into patient safety, led by Professor Don Berwick.[43] Moving the new clauses at report stage, Jeremy Wright explained that Professor Berwick had identified a "small but significant gap in the existing legislation" and recommended new legislation covering "ill-treatment or wilful neglect".[44] At present, legislation only provides such protection to a child or those lacking capacity under the Mental Health Act 1983. Consequently, Mr Wright said:

> […] a significant group of patients and service users are denied the protection of an offence directed explicitly at ill-treatment or wilful neglect by those entrusted with their care, both individuals and organisations. There is a range of existing legislative and regulatory safeguards that may apply in some cases, but we share the view that they are not sufficient to cover all the situations that might arise from ill-treatment or wilful neglect.[45]

He added that the new offences were "not about hounding a hospital worker who makes an honest mistake, or punishing an organisation for fair and informed prioritisation of services, but about holding to account the worst and most unacceptable acts and failures to act".[46]

Police Corruption

Clause 23 was added to the Bill at report stage. This would make it an offence for a police officer to exercise their powers and privileges "improperly", and was introduced in response to

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[37] ibid, col 488.
[38] ibid, col 489.
[39] HM Government, *Review of Simple Cautions*, November 2013.
[40] Ministry of Just, *Fact Sheet: Simple Cautions*, accessed 18 June 2014.
[41] Explanatory Notes, paras 172–8.
[42] *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry: Executive summary*, February 2013, HC 947 of session 2012–13.
[43] National Advisory Group on the Safety of Patients in England, *A Promise to Learn—a Commitment to Act: Improving the Safety of Patients in England*, August 2013.
[44] HC *Hansard,* 17 June 2014, col 1021.
[45] ibid, col 1021.
[46] ibid, col 1023.

the findings of the Stephen Lawrence Independent Review.[47] It covers officers of the 43 territorial forces, the British Transport Police, Ministry of Defence Police, the Civil Nuclear Constabulary and those designated as officers at the National Crime Agency. Explaining the new clause to MPs, Jeremy Wright, Parliamentary Under-Secretary of State for Justice, said that the "public expect the police to act with honesty and integrity at all times" which was why the Government had introduced:

> […] a range of measures to improve both the integrity and the transparency of the police. In the small number of cases where police officers fall short of the high standards we expect, it is right that the full force of the criminal law is available to punish and deter acts of corruption or other improper exercise of power.[48]

He added that such offences were currently dealt with under the common law offence of misconduct in public office, but the Government felt that the "best way" to proceed was "to create a new offence of police corruption that applies solely to police officers, alongside the existing broader common law offence".[49] The new offence would be:

> […] triable only in the Crown court, and it will carry a maximum sentence of 14 years' imprisonment. It will send a clear message that police corruption is serious, and that Parliament has expressly set a high maximum sentence for those convicted.[50]

Murder of a Police or Prison Officer

Clause 24 concerns the term of imprisonment for murder of a police or prison officer. This was added to the Bill at report stage in the House of Commons. Jeremy Wright explained that:

> New clause 10 makes an amendment to schedule 21 to the Criminal Justice Act 2003, which provides guidance to the courts in assessing the seriousness of all cases of murder in order to determine the appropriate minimum term to be imposed under the mandatory life sentence. The amendment would raise the starting point for offenders aged 21 and over from 30 years to a whole life order for the murder of a police or prison officer in the course of his or her duty.
>
> I do not need to remind the House of the vital role that those officers play every day in keeping our communities safe and in managing difficult and dangerous offenders. Tragically, some officers have paid the ultimate price while carrying out these duties on our behalf. The Government consider it essential that those officers feel the full weight of the state behind them in the execution of their duties. Changing the starting point to a whole life order for those who murder police and prison officers will send a powerful message of support for the work that those vital public servants do. It will show that we place the highest value on their safety and that we recognise the dangerous job they perform on a daily basis.[51]

Andy Slaughter (Labour MP for Hammersmith) responded for the Opposition. He noted the courts already took their sentencing powers "very seriously", and gave the example of the

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[47] Stephen Lawrence Independent Review, *Possible Corruption and the Role of Undercover Policing in the Stephen Lawrence Case*, March 2014, HC 1094 of session 2013–14.
[48] HC *Hansard*, 17 June 2014, col 1020.
[49] ibid, col 1021.
[50] ibid, col 1021.
[51] HC *Hansard,* 12 May 2014, col 463.

killers of Sharon Beshenivsky, who received 35 years in prison.[52] In spite of this, Mr Slaughter said he had no objection to the clarification the amendment would bring.

Possession of an Offensive or Bladed Weapon

Clause 25 would amend the sentencing for second offences for those aged 16 or over in possession of a weapon or bladed article in public, or on school premises. A previous conviction for threatening with a knife or an offensive weapon would count as a first strike. The clause would provide that the minimum custodial sentence is six months for those aged 18 or over, and a four month Detention and Training Order for those aged over 16 but under 18.[53] This was added to the Bill at report stage, following the passing of an amendment sponsored by Nick de Bois (Conservative MP for Enfield North). Setting out the case for the amendment, Mr de Bois said that the House of Commons should:

> […] require courts to send a clear and unequivocal message about carrying a knife. If we need more convincing that the message that people should not carry knives is currently weak, we need look no further than the thousands of children who do not regard it as a serious offence. More than 2,500 of those caught in possession of knives last year were aged 10 to 17. Nationally, 13 percent of offenders under 18 received a custodial sentence, but in London only 7 percent did, although 43 percent of all offences throughout England and Wales are committed here in London.[54]

He explained that the clause was intended to act as a deterrent, but said that those who thought the clause would turn an "offender into a serial offender" missed the rehabilitative aspects of the proposals.[55] The clause, Mr de Bois argued, would mean:

> […] mandatory sentencing would kick in for a second offence. The new clause targets the second offender, giving them a chance to turn their life around the first time. Being convicted a second time suggests that he or she is well on the road to being a serial offender.[56]

Referring to criticisms made of the clause ahead of the debate, Mr de Bois told MPs that it was:

> […] not an attempt to change the basis of prosecution; we simply wish to toughen up the sentencing. Our new clause would not change the basis for prosecution of someone carrying a knife, so a tradesman carrying his tools or—the Deputy Prime Minister seemed overtly worried about this—someone carrying a small penknife is excluded from the proposal by existing legislation".[57]

Jeremy Wright responded to the amendments for the Government. He said the Government had "done their bit" on knife crime through a number of measures, but was unable to support the amendment at a division.[58] He stated: "although both coalition parties are fully committed

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[52] ibid, col 467.
[53] Explanatory Notes, para 242.
[54] HC *Hansard,* 17 June 2014, col col 1013.
[55] ibid, col 1015.
[56] ibid, col 1015.
[57] ibid, col 1018.
[58] ibid, col 1025.

to protecting the public, policy agreement has not been reached on these new clauses, so it will be for the whole House to decide on the conclusion to this debate".[59]

Speaking for the Opposition, Andy Slaughter explained that his party supported the amendment because knife crime was "one of the most serious and intractable criminal justice issues".[60] He said key to his party's support was that the clause permitted judicial discretion, which would therefore "allow a defence if possession of a knife was with lawful authority or reasonable excuse".[61]

Support for the amendment also came from David Burrowes (Conservative MP for Enfield, Southgate), which he co-sponsored. He said that the clauses were consistent with his party's manifesto commitment on knife crime and urged MPs to support it.[62] Julian Huppert (Liberal Democrat MP for Cambridge) opposed the amendment. He said that his party did "not dispute that knife crime is a problem: too many people are attacked and injured with knives. Knife possession is, and should be, a criminal offence".[63] Mr Huppert added that his concern was "whether we should do the thing that sounds the toughest or the things that actually work".[64] He argued that, in any case, "a strong sanction" was already available: "judges can, if they think it is appropriate, sentence people to up to four years in jail for first-time possession of a knife". He said the main argument for the clause was "it sends a message out", but thought "sending a message through legislation always seems a pretty poor argument".[65] Jeremy Corbyn (Labour MP for Islington North) was also opposed, saying judges needed to retain discretion in how they sentenced individuals and that principle should be respected.[66] Sir Edward Garnier (Conservative MP for Harborough and a former Solicitor General) urged the Government to proceed with caution if the new clause was passed. He raised a number of practical challenges and asserted that "a lot more thought needs to go into it before it hits the statute books".[67]

At a division on the amendment, MPs voted in favour of the clause by 404 votes to 53.[68] The Labour party voted with backbench Conservative MPs in support of the amendment, with Liberal Democrat MPs, including members of the Government, voting against. Conservative members of the Government abstained.[69]

Disqualified Drivers

Clause 26 would introduce new offences relating to disqualified drivers and was added to the Bill at report stage. The Explanatory Notes for the amendment state that it:

> makes the offence of causing death by driving while disqualified an indictable only offence and increases the maximum penalty for such conduct to 10 years' imprisonment. It also creates an offence of causing serious injury by driving while disqualified, an either way offence with a maximum penalty of 4 years' imprisonment.[70]

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[59] ibid, cols 1025–6.
[60] ibid, col 1027.
[61] ibid, col 1027.
[62] ibid, cols 1029–33.
[63] ibid, col 1034.
[64] ibid, col 1034.
[65] ibid, col 1036.
[66] ibid, col 1041–3.
[67] ibid, cols 1044–5.
[68] ibid, col 1056.
[69] BBC, 'Knife Crime: MPs Back Mandatory Jail Term for Second Offence', 17 June 2014.
[70] HC *Hansard,* 12 May 2014, col 458.

Jeremy Wright, Parliamentary Under-Secretary of State for Justice, explained that:

> We thought carefully about whether these changes should apply to unlicensed and uninsured drivers as well. We decided to limit the changes to disqualified drivers, because we think that they have a higher level of culpability than other illegal drivers. A driving ban would only be imposed on an offender following the commission of a series of motoring offences or a single serious offence. If such an offender flouts a ban imposed by the court, continues to drive badly and causes a death or serious injury, it is right that he should feel the full force of our proposed new provisions.[71]

Andy Slaughter (Labour MP for Hammersmith), responding for the Opposition, said that his party agreed current sentencing was inadequate and it would not oppose the new clause.[72] However, he questioned whether 10 years was right.[73] The Opposition's amendment (new clause 22) proposed making "the offence of driving while disqualified triable either way, with a maximum penalty of 2 years' imprisonment for conviction on indictment". This, Mr Slaughter said, was intended to address the issue of people wilfully defying a court order and driving while banned. This was resisted by the Minister, Jeremy Wright, on the basis the Government was committed to "carrying out a review of the road traffic sentencing framework over the next few months".[74] The Opposition amendment was defeated at a division, 291 votes to 196.[75]

Malicious Communications

Clause 27, relating to the sending of malicious communications, was added to the Bill during public bill committee. Angela Bray (Conservative MP for Ealing Central and Acton) moved the amendment that added the clause to the Bill. She explained that it would make the "offence in section 1 of the Malicious Communications Act 1988 of sending communications with intent to cause distress or anxiety an either-way offence and provides that the penalty on conviction on indictment is imprisonment for a term not exceeding two years or a fine (or both)".[76] Ms Bray said she had tabled the amendment following a case in her constituency that involved unwanted text messages of a sexual nature from a man in his forties being sent to a girl, aged 13 or 14, where the CPS was unable to prosecute. The amendment was supported by the Opposition and accepted by the Government. Jeremy Wright told MPs that:

> We must recognise that the internet and mobile phones are increasingly used to send or attempt to send offensive and distressing material, including to vulnerable young people. Police and prosecutors need adequate time to respond to such offending and tough penalties should be available to the courts. The Government therefore welcome and accept the new clause.[77]

Extreme Pornography

Clause 28 was part of the Bill as originally introduced to the House of Commons. It would extend the extreme pornography offence in section 63 of the Criminal Justice and Immigration

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[71] ibid, col 459.
[72] ibid, cols 466–7.
[73] ibid, col 466.
[74] ibid, col 460.
[75] ibid, col 479.
[76] Criminal Justice and Courts Public Bill Committee, 27 March 2014, col 489.
[77] ibid, col 493.

Act 2008 to cover the possession of extreme images depicting rape and non-consensual sexual penetration. This seeks to close a loophole that currently does not explicitly cover the latter.[78] This was welcomed by the JCHR, who said that it considered "that the cultural harm of extreme pornography […] provides a strong justification for legislative action, and for the proportionate restriction of individual rights to private life and freely to receive and impart information".[79]

At report stage, Dan Jarvis MP (Labour MP for Barnsley Central) spoke for the Opposition. He moved an amendment concerning extreme forms of pornography. The amendment, he said, would "improve the law in two ways": by making it clear that the ban on possession of rape pornography would include all depictions, staged or not, and by banning content if it showed rape but not the act of penetration.[80] Jeremy Wright responded for the Government. He said that the amendment would "capture any sexual activity that involved real or apparent lack of consent", but was "too broad an extension" to the "tightly drawn deliberately targeted offence" found in the Bill as drafted.[81] The amendment was not divided on and was not added to the Bill.

Other Amendments at Report

Sarah Champion (Labour MP for Rotherham), proposed amendments to part 1 of the Bill concerning child exploitation, following an inquiry she led with Barnardo's.[82] She proposed lowering the threshold so it would be a crime to meet with a child with the intention of committing a sexual offence once, rather than twice under current law. Additionally, she advocated amending the Child Abduction Act 1984 to ensure consistent protection for all those under 18. She argued present legislation was inconsistent with regard to child abduction.[83] Jeremy Wright, Parliamentary Under-Secretary for Justice, said he "sympathised" with the amendment concerning grooming, but said the law was "robust and strong".[84] With regard to the abduction amendment, he argued that it could cause difficulties because 17 and 18 year olds were able to marry.[85]

Dan Jarvis, for the Opposition, proposed an amendment to introduce a new offence of assaulting a member of the armed forces. He explained it would:

> […] make physical or verbal attacks against members of our armed forces an aggravated offence, when the prosecution can establish that a person's service in the armed forces was a motive for the assault. It is a small change, but one that would send a strong signal that we will not tolerate such attacks as a society.[86]

Mr Wright, in response to the amendment for the Government, felt it was unnecessary. He said that while the Government was "firmly committed to the protection of members of the armed forces" there was difficulty in legislating in such a way.[87] He argued that comparisons

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[78] Ministry of Justice, *Fact Sheet: Extension of the offence of Extreme Pornography (Clause 16)*, accessed 18 June 2014.
[79] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill,* 11 June 2014, HL Paper 189 of session 2013–14, p 4.
[80] HC *Hansard,* 12 May 2014, col 497.
[81] ibid, col 513.
[82] Barnardo's, 'MP and Charity Call for Tougher Laws to Protect Children from Being Groomed by Sex Offenders', 1 April 2014.
[83] HC *Hansard*, 12 May 2014, cols 501–3.
[84] ibid, col 511.
[85] ibid, cols 511–12.
[86] ibid, col 498.
[87] HC *Hansard*, 12 May 2014, col 512.

with similar protections for police officers were invalid as assaults on police officers usually happened in course of their work. He added the courts were already required to take into account if a victim was serving the public. The new clause was put to a vote, and was defeated 277 votes to 195.[88]

5. Part 2: Young Offenders

Secure Colleges

The Bill would provide for a new form of youth detention accommodation, focused on educational provision. Clauses 29–31 would give the Secretary of State the powers to provide secure colleges and to make contracts in relation to their provision.[89] This would implement the Government's vision for secure colleges, set out in a Government consultation launched in February 2013,[90] a new model of youth custody centred on new establishments that would provide a broad curriculum with the aim of supporting young people from refraining from reoffending following release. It is envisioned that a pathfinder Secure College will be opened in 2017.[91] Schedule 6, paragraph 10 would provide authority for a secure college custody officer to use "reasonable force" where necessary to ensure good order or discipline, but only when authorised by secure college rules.

The Joint Committee on Human Rights emphasised international standards in its assessment of the proposals. In particular, it highlighted "that the State should set up small open facilities where children can be tended to on an individual basis and so avoid the additional negative effects of deprivation of liberty; and that institutions should be decentralised to allow for children to continue having access to their families and their communities".[92] The JCHR further raised questions in respect of the ages and gender of children to be detained in the secure colleges. These aspects of the proposals, the Committee noted, were "difficult to scrutinise" with regard to human rights and equality standards because:

> […] the Government does not appear to have carried out any equality impact assessments of the proposed secure colleges policy, and we recommend that such assessments should be carried out and made available to Parliament at the earliest opportunity, assessing in particular the impact on girls and younger children of detaining them in large mixed institutions holding up to 320 young people including older children up to the age of 18. We also call on the Government to provide further information in relation to SEN provision in secure colleges.[93]

The JCHR expressed particular concern in its assessment of schedule 6 and its authorisation of discipline in secure colleges. The Committee received correspondence from the Government, but remained unconvinced:

> This provision of the Bill directly raises a human rights compatibility issue which has already been the subject of an inquiry and report by our predecessor Committee in the last Parliament; of a judicial decision by the Court of Appeal; and of recommendations

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[88] ibid, col 514.
[89] Explanatory Notes, paras 33–5.
[90] Ministry of Justice, *Transforming Youth Custody: Putting Education at the Heart of Detention*, February 2013.
[91] Ministry of Justice, *Fact Sheet: Secure Colleges*, accessed 18 June 2014.
[92] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, 11 June 2014, HL Paper 189 of session 2013–14, p 19.
[93] ibid, p 20.

> by the UN treaty monitoring bodies. In our view, it is clear from the reasoning of the Court of Appeal in the case of *C* v *Secretary of State for Justice* that it is incompatible with Articles 3 and 8 ECHR for any law, whether primary or secondary legislation, to authorise the use of force on children and young people for the purposes of good order and discipline. We therefore recommend that the relevant provision in schedule 4 of the Bill should be deleted, and the Bill should be amended to make explicit that secure college rules can only authorise the use of reasonable force on children as a last resort; only for the purposes of preventing harm to the child or others; and that only the minimum force necessary should be used.[94]

At report stage, Dan Jarvis (Labour MP for Barnsley Central) spoke for the Opposition. He was critical of the provisions for secure colleges. He told MPs:

> The Government have come to the House today with a set of proposals that they claim "will transform youth custody", but there are no expert organisations expressing any enthusiasm for secure colleges. The Government claim that the colleges will put education at the heart of rehabilitation, but they cannot say how it will be delivered in practice. They claim the proposals will reduce the cost of youth custody, but it is not clear where the £85 million is coming from, and they have not produced any hard evidence to support this policy.[95]

Mr Jarvis elaborated on these concerns, raising additional issues relating to safeguarding of very young children, in particular young girls, and the legality of the use of force. He proposed amendments to delete the provisions for secure colleges from the Bill. Stephen Gilbert (Liberal Democrat MP for St Austell and Newquay) thought the colleges were "a leap into the unknown that have the potential to deliver the worse outcomes for the very vulnerable young people".[96] He advocated learning from "very good examples of good practice in secure children's homes" and then "roll them out across the secure estate for children".[97] Robert Buckland (Conservative MP for South Swindon), tabled amendments concerning provision in secure colleges for those with special education needs.[98] In response to these points, Jeremy Wright, Parliamentary Under-Secretary of State for Justice, said that "further thought will be given to how those needs can be met".[99]

On the issue of safe colleges, Mr Wright said that he had heard arguments that smaller establishments, such as secure children's homes, were more effective and they should be pursued. This argument, he claimed, was not supported by the facts, telling MPs that the proportion of offenders who reoffended in the 12 months to March 2012 were 69.9 percent in young offenders institutions; 70.1 percent in secure training centres; and 67.6 percent in secure children's homes.[100] He set out how the Government intended to proceed:

> The truth is that no current model of youth custody is delivering the types of outcomes that we all want to see, or providing sufficient value for money for the taxpayer. That is why we want to consider secure colleges. I am conscious that there is an appetite to hear more detail on how secure colleges will operate than primary legislation can

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[94] ibid, pp 4–5.
[95] HC *Hansard,* 12 May 2014, col 522.
[96] ibid, col 522.
[97] ibid, cols 529–31.
[98] ibid, cols 527–8.
[99] ibid, col 538.
[100] ibid, col 535.

> provide. It is therefore worth pointing out to the House that during the Bill's passage we intend to publish and consult on our plans for secure college rules, including, where appropriate, setting out some indicative draft provisions. This will provide both Houses with more information on how we expect secure colleges to operate.[101]

Mr Wright addressed a number of points raised in the debate. He said the Government accepted that secure colleges would not be appropriate for 10 and 11-year-olds remanded or sentenced to custody, but added that no final decision had been made on who would be accommodated in secure colleges. This would follow after "careful analysis".[102] The issue of force, he said, would be subject to consultation. However, the principle behind the clause was:

> […] as a last resort, in the limited circumstances in which all attempts to resolve the situation without resorting to force have failed, and in which a young person's behaviour is having an impact on his or her own safety and welfare or that of others, some force—subject to strict conditions and safeguards—may be necessary.[103]

A small number of Government amendments—consequential to the agreement to extend secure colleges to Wales—and technical amendments were agreed. The Opposition's amendment to delete the secure colleges proposal was defeated by 295 votes to 196.[104]

Youth Cautions

Clause 32 would make changes to the new formal youth out-of-court disposal legislative framework. This framework was established by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, replacing reprimands and final warnings with youth cautions and youth conditional cautions. The clause would remove current age restrictions, thereby providing that cautions given to a 17 year old must be made in the presence of an appropriate adult, this being made in response to the judgment in *HC* v *Secretary of State for the Home Department and Commissioner of Police for the Metropolis*.[105]

Referral Orders

Clauses 33–35 would make provision in relation to youth referral orders. These:

- Would give the court a discretionary revocation power to be exercised in the interests of justice where a second referral order is imposed by the court in respect of further or additional offences;
- Would give the court the power to extend a second or subsequent referral order in respect of additional or further offences in the same way as is currently available for a first referral order; and
- Would introduce new sanctions available to the court for breach of a referral order. At present the court only has a power to revoke the order or ignore the breach. These changes would allow the court to impose a fine of up to £2,500 or extend the referral order for up to 12 months.[106]

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[101] Ibid, col 535.
[102] ibid, col 535.
[103] ibid, col 538.
[104] Ibid, col 538.
[105] *HC* v *Secretary of State for the Home Department and Commissioner of Police for the Metropolis* [2013] EWHC 982 (Admin).
[106] Ministry of Justice, *Fact Sheet: Referral Orders*, accessed 18 June 2014.

6. Part 3: Courts and Tribunals

Trial by Single Justice on Papers

Clauses 36–40 would implement the Government's strategy to remove certain high-volume, non-imprisonable summary-only offences from magistrates courts. At present, the Government argues, "magistrates courts are clogged up by these types of cases, which arrive in large volumes, are usually uncontested and have predictable financial penalties".[107] The Bill's provisions will allow a single magistrate, rather than a bench of two or three, to try and sentence adult defendants in such cases and will remove the requirement to hear these in open court. These changes will not apply if the defendant pleads guilty or requests an open court hearing.[108]

Committal to Crown Court for Sentence

The Bill was amended at report stage in relation to committals for sentencing. Introducing the amendment, Jeremy Wright, Parliamentary Under-Secretary of State for Justice, told MPs that the amendment (now clause 41) was:

> […] designed to close a gap in the sentencing power of criminal courts that could prevent an adequate sentence being imposed where it turns out that the offending is more serious than it appeared when the case was initially accepted by the youth court. We believe the gap might tend to undermine efforts to encourage youth courts to try grave crimes in suitable cases and might restrict sentencing powers unduly. The category of offences that includes cases such as those that involve allegations of serious sexual offending against under-18s, for example—also known as grave crimes—are serious enough to be capable of being sent to the crown court for trial, but not all of them necessarily require the highest sentencing powers of the crown court. It might be possible to deal with some of them satisfactorily using sentencing options available in the youth court, and if so there is an advantage in retaining them in the youth court. The youth court is particularly attuned to inquiries into the alleged activities of children, and serious sexual offences can be tried there by authorised district judge.[109]

The amendment was supported by the Opposition. Andy Slaughter (Labour MP for Hammersmith), responding, said it was "a sensible tidying up measure", but criticised the Government for trailing the measure in the papers as toughening up sentencing for youth crime when it was "about giving more discretion to magistrates".[110]

Costs of Criminal Courts

Clauses 42–43 would introduce Criminal Courts Charges, which would require courts to order an adult offender convicted of a crime to pay a charge towards the cost of their case. This would not be linked to their sentence, but would be set at a level according to the costs of the case. The charge levels would be set out in secondary legislation. The clauses mandate that the

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[107] Ministry of Justice, *Fact Sheet: Removing High Volume, Low Level 'Regulatory Cases' from Traditional Magistrates' Courtrooms (Clauses 24–28): Trial by Single Justice on the Papers*, accessed 18 June 2014.
[108] Explanatory Notes, para 37.
[109] HC *Hansard,* 12 May 2014, col 464.
[110] ibid, cols 468–9.

charges would be paid after other financial impositions already set by the court have been collected. Clause 44 would enable fines officers to vary repayments. This would not apply to those aged under 18 at the time the offence is committed and, to incentivise rehabilitation, courts would be able to remit all or part of an outstanding debt if the offender complies with the payment terms and does not reoffend within a given time period.[111] The Lord Chancellor would be required to review the operation of the charge after three years.

The JCHR found this proposal "difficult to assess", citing a "lack of clear evidence about the impact of court charges in practice".[112] It recommended the Government monitor the impact the charges on the right of defendants to a fair trial and make available to Parliament the results, together with, in the meantime, any other evidence that already existing relating to this.

Civil Proceedings Relating to Personal Injury

A new clause relating to personal injury claims was added to the Bill at report stage without division. The clause was not subject to debate. Clause 45 would change the law "to provide that in any personal injury claim where the court finds that the claimant is entitled to damages, but is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the claim, it must dismiss the claim entirely unless it is satisfied that the claimant would suffer substantial injustice as a result".[113] At third reading, Sadiq Khan, Shadow Justice Secretary, identified this as one of the clauses tabled at report stage by the Government where it was not possible to know whether the clause will "do as the Government claim or whether there will be any unintended negative consequences. What is more, there are no impact assessments, so there is no sense of how much they will cost and who will benefit".[114]

Appeals in Civil Proceedings

Clauses 46–49 would extend the scope for appeals to be made directly (leapfrogging) from the High Court (or tribunals) to Supreme Court. The Government's view is that there are:

> […] some cases which it is clear will not end in the Court of Appeal but will involve a further appeal to the Supreme Court [which] should get there more quickly. Moving step by step through the court hierarchy can lead to lengthy delays, adding to costs and damaging public confidence in the effectiveness of the justice system. Therefore the legislation will make three changes to the present arrangements to extend the potential for leapfrog appeals:
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> - Allowing a case to leapfrog if it raises issues of national importance, where the result is of particular significance or cases where the benefits of earlier consideration by the Supreme Court outweighs the benefits of consideration by the Court of Appeal;
> - Removing the requirement for all parties to consent; and
> - Allowing leapfrog appeals from decisions of the Upper Tribunal, Employment Appeals Tribunal and Special Immigration Appeals Commission.[115]

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[111] Ministry of Justice, *Fact Sheet: Criminal Courts Charge (Clauses 29–31),* accessed 18 June 2014.
[112] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill,* 11 June 2014, HL Paper 189 of session 2013–14, p 24.
[113] Explanatory Notes, para 54.
[114] HC *Hansard,* 17 June 2014, col 1074.
[115] Ministry of Justice, *Fact Sheet: Reform of Judicial Review (Clauses 32–36 and 50–57)* accessed 18 June 2014.

These changes follow plans outlined in a Government consultation, *Judicial Review: Proposals for Further Reform*, which took between September and November 2013.

Wasted Costs Orders

Clause 50 would increase the repercussions for a legal representative where a Wasted Court Order (WCO) is made. Currently, a court can make a legal representative personally liable for some costs of litigation which they have caused unnecessarily. The clause would place a duty on the courts to consider notifying the relevant regulator, and where appropriate, the Legal Aid Agency. It would apply in all civil cases as well as judicial review.[116]

Contempt of Court

The Bill would make changes to the law of contempt of court and juror misconduct, with the aim of striking a balance between the right to a fair trial and the right to freedom of expression, particularly in light of developments relating to use of the internet.[117] Clauses 51 and 52 would amend the Contempt of Court Act 1981 in relation to the statutory basis for strict liability contempt. The Act currently holds that a person may be in contempt of court in relation to a publication which interferes with the course of justice, regardless of intent, where proceedings are active at the "time of publication". A new defence for publishers or distributers would be introduced, where a publisher or distributer has made material available to the public before active proceedings and the material remains available at a time when active proceedings commence. However, this defence would be removed where the Attorney General issues a formal notice to the publisher informing them of active proceedings and identifying prejudicial material.

The JCHR described the clauses as an "improvement on the position under the current law", but was concerned by the lack of safeguards in relation to the Attorney General's power. It explained:

> […] the Government says that the Attorney General will only issue such a notice where the high threshold statutory test of "substantial risk of serious prejudice" is satisfied, but this is not stated anywhere in the legislation itself. Nor is it clear from the Bill what role the "public interest" defence in section 5 of the Contempt of Court Act 1981 should play in the Attorney General's decision whether or not to issue a notice.[118]

The JCHR doubted the Government's view that this power was compatible with a right of freedom under article 10 (freedom of expression) of the ECHR.[119] It thought that safeguards could be set out in regulations and requested the Government publish these. However, the Committee were told these were unlikely to be made available and, as a consequence, said it was unable to reach a view on the compatibility issue. It recommended the draft regulations be published.

Juries

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[116] ibid, paras 9–11.
[117] Explanatory Notes, paras 59–64.
[118] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, 11 June 2014, HL Paper 189 of session 2013–14, p 25.
[119] ibid, p 25.

Clause 53 would raise the upper age limit for jury service from 70 to 75. The Bill would also implement recommendations from the Law Commission to create criminal offences for juror misconduct, reforming the law on contempt by publication and related measures.[120] Clauses 56–59 would create four new offences relating to juror misconduct. It would be an offence:

- For a juror to research information relevant to the case they are trying;
- To intentionally share research with other jurors;
- To engage in any other conduct that it may reasonably be concluded intends to try the issue on material other than the evidence presented in court; and
- To intentionally disclose information about members of the jury and their contributions to deliberations made in proceedings before a court.

Clauses 54 and 55 would provide a judge with discretionary power to order that a juror surrender their electronic communications device for the period while on jury service. It would also enable a court security officer, on the orders of a judge, to search a juror to determine if it has been surrendered. Clause 62 would amend current legislation with regard to the criteria according to which a person may be disqualified from jury service.

7. Part 4: Judicial Review

Judicial Review in the High Court and Upper Tribunal

Part 4 would make a number of changes to the funding and conduct of judicial review proceedings. These are in addition to those found in part 3 of the Bill that also apply to judicial reviews. The Government has said that:

> These measures will not stop the crucial role that judicial review plays; it is, and will continue to be, a key way to hold public authorities to account and ensure that decisions are lawful. Rather, the Government's reforms are designed to tackle the large and growing number of unmeritorious judicial review applications which clog up our court system, put burdens on public services, and hold up reform.[121]

Changes with regard to leapfrogging are outlined above. Clause 64 would require courts to consider the likelihood of a substantially different outcome for an applicant. A fact sheet explains:

> The Government's position is that judicial reviews based on failures highly unlikely to have made a difference are not a good use of court time and money. The legislation therefore modifies the existing approach (developed by the courts in case law) so that permission to bring a judicial review or a remedy must not be granted where the court considers complained of conduct would be highly likely not to have resulted in a substantially different outcome for the applicant.[122]

With regard to financial resources, the Bill stipulates in clause 65 that an applicant would be required to provide information on funding at the outset of the judicial review. The court would be unable to grant permission without this information. Clause 66 would allow a court to consider the funding of the case in terms of cost orders. Clause 67 would establish that

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[120] Ministry of Justice, *Fact Sheet: Contempt of Court (clauses 37, 38 and 40–48)*, accessed 18 June 2014.
[121] Ministry of Justice, *Fact Sheet: Reform of Judicial Review (clauses 32–36 and 50–57)*, accessed 18 June 2014.
[122] Ministry of Justice, *Fact Sheet: Reform of Judicial Review (clauses 32–36 and 50–57)*, accessed 18 June 2014.

interveners in judicial cases (those interested in the issues considered in a judicial review case and granted permission to intervene) are presumed to pay their own costs, and any costs incurred by other parties because of their intervention.

Cost Capping Orders are dealt with in clauses 68 and 69. These would protect unsuccessful claimants against some or all of the other side's costs. The Bill would alter the current framework for these orders by making sure they are reserved for cases that receive permission and where there are "serious issues of the highest public interest and which would not be able to be taken forward without such an order".[123] Clause 68(9) would also provide the Lord Chancellor with powers to amend through regulations "the matters to which the court must have regard in determining whether proceedings are public interest proceedings".[124] The changes would also require claimants to provide details of sources of funding and would only be awarded an order once a case has been granted permission to proceed. However, clause 70 would also mean that it would not apply to Protective Costs Orders in environmental cases.

In its report on reforms to judicial review, the JCHR said it accepted that it was:

> […] a legitimate and justifiable restriction on the right of access to court for courts to refuse permission or a remedy in cases where it is inevitable that a procedural defect in the decision-making process would have made no substantive difference to the outcome, as they do under the current law.[125]

However, the Committee felt that "lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied and therefore risks incompatibility with the right of practical and effective access to court, which the European Court of Human Rights recognises as an inherent part of the rule of law".[126] It recommended that the clause be deleted, stating it was:

> […] not persuaded that there needs to be any change to the way in which courts currently exercise their discretion to consider, at both the permission and the remedy stage, whether a procedural flaw in decision-making would have made any substantive difference to the outcome.[127]

It added that, were the clause to be retained, it should "be amended so as to reflect the current approach of the courts" which would "make clear that the High Court and the Upper Tribunal have the discretion to withhold both permission and a remedy if they are satisfied that the outcome for the applicant would inevitably have been no different even if the procedural defect complained of had not occurred".[128]

With regard to court case interveners, the JCHR felt the Bill may introduce "a significant deterrent to interventions in judicial review cases, because of the risk of liability for other parties' costs, regardless of the outcome of the case and the contribution to that outcome made by the intervention", and recommended "that the relevant sub-clauses be removed in

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[123] ibid.
[124] Criminal Justice and Courts Bill, HL Bill 30 of 2014–15, clause 68(9).
[125] Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review*, 30 April 2014, HL Paper 174 of session 2013–14, p 18
[126] ibid, p 18.
[127] Ibid, p 18.
[128] ibid, pp 4–5.

order to restore the judicial discretion which currently exists".[129] The proposals limiting Cost Capping Orders to cases in which permission to proceed to judicial review has already been granted by the court, the Committee added, were "too great a restriction and will undermine effective access to justice". It recommended that:

> […] the court should have the power to make a costs capping order at any stage of judicial review proceedings, including at the initial stage of applying for permission. We also recommend that the provision for cross-capping (which limits a defendant's liability for the claimant's costs) should be a presumption not a duty, which would preserve some judicial discretion in deciding the appropriate costs order to make in the circumstances of the particular case.[130]

The JCHR was also concerned about the Lord Chancellor's power to change the matters to which the court must have regard when deciding whether proceedings are public interest proceedings. This, it argued, had "serious implications for the separation of powers between the Executive and the judiciary and we recommend that the Bill should be amended to remove that power".[131]

At report stage, the Opposition tabled a series of amendments that sought to delete a number of the Bill's judicial review proposals, in particular those relating to the highly likely test and to interveners. Andy Slaughter (Labour MP for Hammersmith) explained Labour's opposition, describing part 4 of the Bill as "a frontal assault on the key legal remedy of judicial review". [132] He added:

> Alongside new fees, cuts in legal aid and shorter time limits, the cumulative effect of the proposals in the Bill is to hobble the principal method by which the administrative court can prevent unlawful conduct by the state in the way in which it, in all its manifestations, makes decisions.[133]

Mr Slaughter said his party viewed judicial review as an "essential check on Executive power", as did "every serious judicial and professional body that has spoken on the matter".[134] He said that his party's amendment on the highly likely test was in line with the recommendations made by the JCHR. He added that his party's amendment regarding interveners would delete the Bill's clause. Mr Slaughter said:

> The role of interveners is most often to assist the court, and the most frequent interveners are organisations such as Liberty and Justice, whose expertise has proven invaluable in many cases. Often, in an adversarial system, it is only the intervener who identifies the core issue for the court to decide.[135]

Mr Slaughter concluded that the Government plans were "designed to hobble judicial review to such an extent that its true purpose—to hold the state to account—may be severely weakened, if not lost".[136] Julian Huppert (Liberal Democrat MP for Cambridge) shared concerns

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[129] ibid, p 5.
[130] ibid, p 4.
[131] ibid, p 33.
[132] HC *Hansard,* 17 June 2014, col 966.
[133] ibid, col 966.
[134] ibid, col 966.
[135] ibid, col 968.
[136] ibid, col 969.

about the implications of the clause regarding interveners. He said he accepted that there were some abuses, but thought there needed to be more flexibility than in the clause as drafted. His amendment 51 proposed an alternative.[137] Dr Hwyel Francis (Labour MP for Aberavon and Chair of the JCHR) proposed a number of amendments recommended by his committee. In particular, his amendment with regard to cost-capping was to ensure "the Bill does not go too far in curtailing one of the most important developments in recent years, which has increased access to judicial review to hold government to account".[138] John Redwood (Conservative MP for Wokingham) supported the proposals in part 4 which he said were "really quite cautious".[139] He said it made "the common sense point that there are certain cases where even if the process or the way the decision was taken was not strictly correct, if none the less it had been done properly the outcome was the same, there is no real point in proceeding with the judicial review".

At division, the Opposition amendments were both defeated. The amendment relating to the highly likely test was defeated 290 votes to 226,[140] and the amendment concerning interveners was defeated 293 votes to 225.[141]

Planning Proceedings

Clause 71 would introduce changes brought about through schedule 11. This provides that "challenges to a range of planning-related decisions and other actions may only be brought with leave of the High Court, and that challenges to awards of costs connected with certain planning decisions may be brought by way of statutory review".[142] Clause 72 would amend current provisions, therefore "allowing for legal challenges to planning related decisions and other actions brought under sections 61N (neighbourhood development orders) and 106C (development consent obligations) of the Town and Country Planning Act 1990, and sections 13 (national policy statements) and 118 (orders granting development consent) of the Planning Act 2008".[143]

At report stage, the Government brought forward amendments to these clauses. Shailesh Vara, Parliamentary Under-Secretary of State for Justice, said that, as originally drafted, the clauses created "a permission stage for statutory challenges under section 288 of the Town and Country Planning Act 1990 in relation to English matters".[144] Following amendments tabled at Committee by Robert Neill (Conservative MP for Bromley and Chislehurst) that sought to harmonise these procedures across planning challenges, the Government had decided to amend the clause "to extend the permission stage to other planning-related statutory challenges; to simplify procedures to enable challenges to costs awards connected to some planning and listed building decisions to be challenged as part of the same application; and to standardise the start time for various planning-related statutory challenges".[145] Mr Vara explained:

> It will affect section 287 of the Town and Country Planning Act 1990, which relates to challenges to decisions concerning simplified planning zones, highways and rights of way

[137] HC *Hansard,* 17 June 2014, col 972.
[138] ibid, col 980.
[139] ibid, col 983.
[140] ibid, col 1000.
[141] ibid, col 1004.
[142] Explanatory Notes, para 528.
[143] ibid, para 538.
[144] HC *Hansard,* 17 June 2014, col 965.
[145] ibid, col 965.

> orders, and relief of statutory undertakers from obligations. It will also affect section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990, which concerns challenges to listed building consent procedures; section 22 of the Planning (Hazardous Substances) Act 1990, which relates to challenges to hazardous substance consent decisions; and, finally, section 113 of the Planning and Compulsory Purchase Act 2004, which relates to challenges to development plans.
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> It makes sense to have consistency across these different types of challenges and I am grateful to my hon. Friend the Member for Bromley and Chislehurst for bringing the issue to my attention. I agree with him that requiring leave in some types of cases but not in others could create difficulties for the new planning court, at a time when we are trying to make things simpler and speed up planning cases. The efficiency of the court system is a matter for Government to consider across both England and Wales, and these amendments apply to the whole jurisdiction.[146]

8. House of Commons: Third Reading

Following completion of report stage, the House of Commons gave the Bill a third reading without division. In his concluding statement, Chris Grayling, Justice Secretary and Lord Chancellor, reiterated the importance of the Bill, which he said:

> […] toughens up sentences for serious and repeat offenders and strengthens the justice system. I have always been clear that those who break the rules should face the consequences and that protecting the public is our top priority. As a result of the action that the Government are taking, we are reducing crime, toughening up the justice system and giving victims the support they both need and deserve. We are making sure that hard-working families feel safe and secure in their local communities. This Bill is yet another step in delivering our promises and guaranteeing that security.[147]

Mr Grayling said that the Government had listened to Parliament and the Bill had been improved as a result, noting additions to the Bill on disqualified drivers and malicious communications. He added that the Government were interested in points raised relating to child grooming and were committed to considering whether changes to child grooming laws were needed. The Justice Secretary turned to concerns expressed about secure colleges, stating that "secure colleges represent an opportunity to change the way we detain and rehabilitate young offenders and prevent them from embarking on a life of crime".[148] He repeated that no final decision had been made about the details and that such provisions would be subject to consultation during the passage of the Bill. On judicial review, Mr Grayling told MPs that the reforms would stop challenges that were PR stunts and gave the example of a challenge that was made against his decision to grant a licence to exhume Richard III's body. [149] He explained that the reforms were subject to consultation and were "aimed at improving—not scrapping—the judicial review process so that it is not open to abuse, and so that genuinely arguable cases can proceed quickly to final resolution".

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[146] ibid, col 965.
[147] ibid, col 1070.
[148] ibid, col 1071.
[149] HC *Hansard*, 17 June 2014, col 1072.

Sadiq Khan, Shadow Justice Secretary, responded for the Opposition. He told MPs there was "no point beating about the bush—this is a poor Bill".[150] He argued that part 1 of the Bill was "about repairing damage done" by previous reforms undertaken by the Government. On secure colleges, he claimed the Justice Secretary "calls them borstals when speaking to his back benchers, but uses softer language when he is talking to others". He argued that there was no evidence to support the Government's claims that secure colleges would work, describing the plan as "the Justice Secretary's ideologically fuelled hobby horse". Plans for judicial review were "ironic", he thought, "on the eve of the Magna Carta's 800th anniversary" as the Government were "depriving citizens and communities of their rights to challenge power". Mr Khan reserved criticism for the 18 new clauses and schedules added to the Bill at report stage, 14 of which he said "have not even been discussed".[151] He added that while he welcomed the provisions for knife crime, it was significant that Mr Grayling had not mentioned it himself. He concluded by saying that his party did not support the Bill and hoped the House of Lords would "refine and improve" it.[152]

A number of backbenchers contributed to the remainder of the debate. Angela Bray (Conservative MP for Ealing Central and Acton) was "delighted" her amendment on malicious communication was accepted.[153] Anne Coffey (Labour MP for Stockport) welcomed the Bill's support for victims, but was disappointed her amendments about the cross-examinations of witnesses in sex abuse cases were not adopted.[154] Julian Huppert (Liberal Democrat MP for Cambridge) said there was still work to be done on plans for interveners and hoped the Bill could be further amended to include a new offence relating to what he called "revenge porn".[155] Guy Opperman (Conservative MP for Hexham) welcomed provisions on drug testing in prisons, the amendment on possession of a knife and judicial review. He applauded the Government on the latter saying it had "tackled something that has been patently obvious to High Court judges, practitioners and everyone who has been involved in the payment of taxpayers' money for judicial review".[156] Yasmin Qureshi (Labour MP for Bolton South-East) and Sarah Champion (Labour MP for Rotherham) were both opposed to secure colleges. Ms Qureshi advocated the effectiveness of smaller units,[157] and Ms Champion was concerned, in particular, with the lack of detail in terms of the role of qualified teachers in the colleges or the level of education that would be offered.[158]

[150] ibid, col 1073.
[151] ibid, col 1074.
[152] ibid, col 1075.
[153] ibid, cols 1075–6.
[154] ibid, cols 1076–8.
[155] ibid, cols 1078–9.
[156] ibid, col 1079.
[157] ibid, col 1080.
[158] ibid, col 1079.