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Crime and Courts Bill

Bill No 115 of 2012-13

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This Bill would establish a new National Crime Agency and make a number of changes to the administration of justice. It also deals with the law of self-defence as it applies to householders defending themselves from intruders; makes changes to community sentences and to immigration appeal rights; and introduces a new drug driving offence.

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Summary

The *Crime and Courts Bill* which was introduced in the Lords, covers a wide range of subjects. Part 1 of the Bill would provide the statutory basis for the new National Crime Agency (NCA), which the Government hopes will be fully operational by the end of 2013. The NCA is to tackle serious organised crime, encompassing the work of a number of existing organisations. These include the Serious Organised Crime Agency (SOCA) which was set up by the previous government in 2006. The National Crime Agency will have four "commands", three dealing with organised crime, border policing and economic crime and the fourth comprising the Child Exploitation and Online Protection Centre. As is currently the case with SOCA, it will be possible to designate its officers with powers of police officers and also those of revenue and customs officers, and immigration officers. Key differences are the breadth of its remit (because it brings together the work of other organisations too) and the ability, in limited circumstances, to give directions to chief constables.

Part 2 of the Bill contains a variety of provisions to do with courts and justice.

- It would create a single county court and a single family court for England and Wales.

- In line with a recommendation made by the House of Commons Justice Committee, the Bill would repeal provisions in the *Children, Schools and Families Act 2010* intended to amend reporting restrictions in certain family proceedings.

- It would enable the jurisdiction for appeals by barristers against disciplinary decisions (and certain other matters) to be transferred from the Visitors to the Inns of Court to the High Court.

- The Bill makes further changes to the law relating to judicial appointments, amongst other things, to improve judicial diversity. It also contains provisions about judicial deployment, to introduce flexibility. This would allow court judges to sit in tribunals, and for tribunal judges to sit as court judges.

- Clauses 23 and 24 of the Bill deal with the enforcement of financial penalties. The principal change would provide for the cost of enforcing any sums due under a financial penalty imposed on conviction (e.g. a fine or compensation order) to be borne by the offender. At present, the state bears the cost of enforcing unpaid financial penalties.

- Clause 28 of the Bill would give the Lord Chancellor power to make an order permitting the recording and broadcasting of court proceedings, which is currently prohibited (other than in the Supreme Court).

- Clause 29 of the Bill would abolish scandalising the judiciary as a form of contempt of court in England and Wales. It was added to the Bill by way of an amendment moved by Lord Pannick. The Government supported the amendment and it was agreed without division.

- Clause 30 of the Bill deals with the law of self-defence as it applies to householders who use force to defend themselves or others from intruders in their home.

- Clause 31 and Schedule 15 of the Bill cover community and other non-custodial sentencing. The principal change set out here would require a court sentencing an offender to a community order to include at least one requirement imposed for the purpose of punishment, and/or to impose a fine.

- Clause 32 and Schedule 16 of the Bill would introduce deferred prosecution agreements, which would be used to tackle corporate financial and economic crime.

Part 3 of the Bill contains miscellaneous provisions, including various changes to immigration appeal rights. These include abolishing the full right of appeal against family visitor visa refusal decisions, removing an in-country right of appeal for persons excluded from the UK, and providing for immigration and nationality judicial reviews to be transferred to the Upper Tribunal. It also proposes extending the powers available to immigration officers investigating serious and organised immigration and customs crimes.

Clause 37 introduces a new offence of driving or being in charge of a motor vehicle with a concentration of a controlled drug above a specified limit and makes further provision for the taking of preliminary tests to determine the level of drugs in a person's blood or urine. Different specified limits may be set for different controlled drugs, including a specified limit of zero in some instances.

Clause 38 is the latest of a series of attempts in various bills to remove the word "insulting" from section 5 of the *Public Order Act 1986* which makes it an offence to use "threatening, abusive or insulting words or behaviour, or disorderly behaviour". The Government resisted this amendment, and strongly holds the view that the word "insulting" should be retained in section 5.

1 Introduction

The *Crime and Courts Bill* is due to have its Second Reading in the Commons on 14 January 2012. It is a wide-ranging Bill which is jointly managed by the Home Office and the Ministry of Justice.

This Research Paper broadly follows the order of clauses in the Bill, which is in three parts. Part 1 would establish the National Crime Agency, which is will replace the Serious Organised Crime Agency, although its remit will be considerably wider than this. Part 2 contains reforms of courts, tribunals and judicial appointments, and also deals with the use of force in self defence at a person's place of residence and changes the framework of community sentences. Part 3 makes various amendments to immigration appeal rights, along with a number of miscellaneous changes such as introducing a new drug driving offence. It would also remove the word "insulting" from section 5 of the *Public Order Act 1986* following a Government defeat.

The Bill was first introduced into the Lords on 11 May as HL Bill 4 of 2012-13, and had its Second Reading on 28 May 2012. Its Committee stage ran from 18 June 2012 to 13 November 2012, and its Report stage from 27 November to 12 December. It had its Third Reading on 18 December, and was introduced in the Commons the next day.

Information on the Bill's passage through the Lords is available on the *Crime and Courts Bill* pages of the Parliament website, and the Government has prepared *Explanatory Notes.* The Home Office website also has a series of *Crime and Courts Bill* pages.

Three committees have so far scrutinised the Bill whilst it was going through the Lords:

- Delegated Powers and Regulatory Reform Committee, *Crime and Courts Bill [HL]*, 31 May 2012, HL Paper 12 2012-13
- Constitution Committee, *Crime and Courts Bill [HL]*, 18 June 2012, HL Paper 17 2012-13[1]
- Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-12

Lords Library Note 2012/020, *Crime and Courts Bill*, published on 23 May 2012, contains further background information.

[1] See also Government response in the form of a letter from Home Office Minister, Lord Henley and Ministry of Justice spokesperson Lord McNally, *Select Committee on the Constitution: 2nd report of session 2012-13 – Crime and Courts Bill*, 11 July 2012

2 The National Crime Agency

2.1 Background

Organised crime groups are essentially businesses. Their activities may include drug and people trafficking; financial crime and fraud against businesses and private individuals, intellectual property theft and counterfeiting; organised acquisitive crime; VAT and excise duty evasion and other forms of fraud against the public sector. Many organised crime groups are involved in more than one of these activities and some have involvement in almost all of them. It has been estimated that more than half of all known organised criminal groups have some involvement with the illegal drugs trade.[2]

The previous Government estimated that the total economic cost of organised crime was between £20 billion and £40 billion each year.[3] These figures remain the Government's "best estimate", and it intends to conduct further research on this.[4] The latest law enforcement estimate is that there are over 7,000 organised crime groups impacting on the UK, comprising about 30,000 individuals.[5]

Dealing with serious organised crime becomes a particular challenge because it so often crosses police force and national borders. This has implications for the balance of local and national police structures. On the one hand, community policing and local intelligence are important in disrupting organised crime, an idea which is often expressed as the "golden thread" which links local policing to tackling problems such as organised crime or terrorism on a cross border and international level. On the other hand, central co-ordination is also extremely important, and is not always easy to achieve within the current structure of 43 territorial police forces. Her Majesty's Inspectorate of Constabulary (HMIC) published a thematic report on the police service's response to organised crime in 2009, which concluded that:

> (…) despite evidence of impressive results achieved by a few individual forces and some collaborative efforts, the national response overall is blighted by the lack of a unifying strategic direction, inadequate covert capacity and under-investment in intelligence gathering, analysis and proactive capability.[6]

HMIC published a further report later that year which noted:

> In general the police operational response to the threat of SOC has been one of 'asking' rather than 'tasking'. In other words forces or national bodies can only request action; they cannot task it. However a key building block of any successful joint venture is that forces/authorities should meet and reach shared judgements about those taking part in SOC, those who matter, and priorities to target – and then be free to act on that assessment. There is a need for a more coherent and consistent approach to the attack on organised crime across England and Wales.[7]

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2 ACPO *Organised Crime Group Mapping*, 2009 cited in Cabinet Office/Home Office *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime*, Cm 7665, July 2009

3 Home Office, *One Step Ahead; A 21st Century strategy to defeat organised crime*, Cm 6167, March 2004, p8 and Home Office/Cabinet Office, *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime*, Cm 7665, July 2009, p 7

4 HM Government, *Local to Global: Reducing the risk from organised crime*, 2011, p 32

5 Home Office, *Crime and Courts Bill Fact Sheet: the National Crime Agency – Overview of Part 1*, May 2012 p1

6 Her Majesty's Inspectorate of Constabulary, *Getting organised: A thematic report on the police service's response to serious and organised crime,* April 2009

7 HMIC, *Getting Together- A better deal for the public through joint working*, June 2009

2.2 The Labour Government's approach

The previous Government made a number of changes to the policing landscape to improve central co-ordination in the fight against organised crime. These included the establishment in 2006 of the Serious Organised Crime Agency (SOCA) through the *Serious Organised Crime and Police Act 2005*. SOCA brought together the National Crime Squad, the National Criminal Intelligence Service, and relevant staff from Customs and Excise and the Immigration Service.[8] From April 2008, as a result of the *Serious Crime Act 2007*, SOCA absorbed the Assets Recovery Agency (ARA). This Agency had been established under the *Proceeds of Crime Act 2002* to recover the proceeds of "criminal conduct" using both criminal and civil proceedings. The merger followed criticisms of ARA's record.[9] The Labour Government set out what it described as its "strong record of success" in a 2009 strategy document on its approach to tackling serious organised crime:

> The formation of SOCA in 2006 brought together specialised capabilities from the National Crime Squad, the National Criminal Intelligence Service, and relevant staff from Customs and Excise and the Immigration Service. SOCA has subsequently absorbed the Assets Recovery Agency, enabling it to take a more holistic approach to the finances of organised criminals. Likewise, the formation of the UK Border Agency in 2008 brought together 25,000 immigration and customs staff with the full range of powers to strengthen the UK's border and make it harder to smuggle goods, people and cash into and out of the UK.
>
> But just as important have been developments in multi-agency responses to organised crime, and in particular the creation of the Organised Crime Control Strategy (OCCS). Through the OCCS, agencies and departments jointly work on thematic programme boards addressing, for example, drugs, fraud and organised immigration crime, as well as targeting the operating environment of organised crime and the cross-cutting enablers, such as technology and criminal finances. There have been notable successes, with agencies working together to achieve a greater impact than they could have done individually.
>
> Alongside the OCCS, the Organised Crime Partnership Board (OCPB) has also achieved great progress in multi-agency working. Set up in 2008, this body has brought together agencies including SOCA, the Police, UKBA, HMRC and prosecutors.[10]

2.3 The Government's proposals for change

The Coalition Agreement promised that the Government would:

> (…) create a dedicated Border Police Force, as part of a refocused Serious Organised Crime Agency, to enhance national security, improve immigration controls and crack down on the trafficking of people, weapons and drugs. We will work with police forces to strengthen arrangements to deal with serious crime and other cross-boundary policing challenges, and extend collaboration between forces to deliver better value for money. [11]

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8 Background is provided in Library Research Paper 04/88, *The Serious Organised Crime and Police Bill – the new Agency; and new powers in criminal proceedings*, 2 December 2004

9 Background on these changes is provided in Library Research Paper 07/52, *The Serious Crime Bill*, 8 June 2007

10 Cabinet Office/Home Office *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime*, Cm 7665, July 2009

11 HM Government, *The Coalition: our programme for government*, May 2010, p21

In July 2010, the Government published a consultation paper, *Policing in the 21st Century*, which proposed a number of changes, including the introduction of Police and Crime Commissioners.[12] The paper proposed "simplifying national arrangements, including creating a new National Crime Agency that will lead the fight against organised crime, protect our borders and provide services best delivered at national level":

> 4.32 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. [13]

The paper also announced that the National Policing Improvement Agency would be abolished. The NPIA was set up under the *Police and Justice Act 2006*. It took on the functions of a number of predecessor bodies, including the police training agency Centrex, and the Police Information Technology Organisation (PITO).[14] *Policing in the 21st Century* acknowledged the work done by the Agency but said that it would be "phased out" as part of the streamlining process:

> 4.44 The NPIA has done much to bring about welcome changes to policing. In particular it has acted as a catalyst for identifying areas for efficiency gains within forces, encouraging greater collaboration and identifying where economies of scale can be realised through national procurement frameworks. It has succeeded in the first stage of rationalising a number of different agencies responsible for supporting police forces. But now is the right time to phase out the NPIA, reviewing its role and how this translates into a streamlined national landscape. [15]

On 8 June 2011, Theresa May announced the formation of the National Crime Agency in a statement to the Commons:

> The National Crime Agency will be a crime-fighting organisation. It will tackle organised crime, defend our borders, fight fraud and cybercrime, and protect children and young people. With a senior chief constable at its head, the NCA will harness intelligence, analytical capabilities and enforcement powers. Accountable to the Home Secretary, the NCA will be an integral part of our law enforcement community, with strong links to local police forces, police and crime commissioners, the UK Border Agency and other agencies.
>
> (…)
>
> For the first time, there will be one agency with the power, remit and responsibility for ensuring that the right action is taken at the right time by the right people—that agency will be the NCA. All other agencies will work to the NCA's threat assessment and prioritisation, and it will be the NCA's intelligence picture that will drive the response on the ground. That will be underpinned by the new strategic policing requirement.
>
> As well as having the ability to co-ordinate and task the response to national crime threats by the police and other agencies, the NCA will also have its own specialist operational and technological capabilities, including surveillance and means to deal with fraud and threat-to-life situations. This is a two-way street; the NCA will be able to

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12 Home Office, *Policing in the 21st Century: Reconnecting police and the people*, Cm 7925, July 2010
13 ibid, p25 and p29
14 Background is in Library Research Paper 06/11, *The Police and Justice Bill*, 27 February 2006
15 Home Office, *Policing in the 21st Century: Reconnecting police and the people*, Cm 7925, July 2010, p31

> provide its techniques and resources in support of the police and other agencies, just as it will task and co-ordinate the response to national-level crime. [16]

Further detail was set out in *The National Crime Agency: A plan for the creation of a national crime-fighting capability* (hereafter referred to as the *National Crime Agency Plan)* published the same day.[17]

Then the Queen's Speech on 9 May 2012 announced that a Bill would be "introduced to establish the National Crime Agency to tackle the most serious and organised crime and strengthen border security".[18]

2.4 Reactions

The Association of Chief Police Officers welcomed the statement:

> The National Crime Agency offers an opportunity to raise our game against some of the most harmful and dangerous individuals in the UK. Organised crime has international and national dimensions, but the harm it causes is played out in local communities and streets, in the form of drug-related crime, gun crime, robbery, people trafficking and much more.[19]

During the debate which followed the Home Secretary's statement on the NCA, the Shadow Home Secretary Yvette Cooper described the changes as "hardly a new nirvana":

> She says that there was no cross-Government strategy on organised crime, but then she says the organised crime command will build on the work of the Serious Organised Crime Agency, which was set up by Labour in 2005 to take the fight to organised crime. It had a conviction rate of more than 90%. She says that the National Crime Agency will be a crime-fighting organisation with intelligence at the heart of what it does, with the combined powers of police, customs and immigration officers, but that is what SOCA is. Whereas yesterday we had control orders and son of control orders, today we have SOCA and SOCA plus. It is hardly year zero and hardly a new nirvana.[20]

In the Debate on the Humble Address, Ms Cooper described the reform as "sensible enough" but not compensating for cuts in policing budgets:

> We support it; it is sensible enough, it is right and there are serious national crime issues that need to be addressed, but let 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.[21]

2.5 How will the NCA be structured?

There will be four "commands" in the NCA, together with a central "intelligence hub" and a national cyber crime centre. The Home Office website conveniently sets this out:

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16 HC Deb 8 June 2011, cc232-4
17 Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, Cm 8097, 8 June 2011
18 Cabinet Office, *Her Majesty's Most Gracious Speech to both Houses of Parliament on 9 May 2012*
19 ACPO, *ACPO comment on the establishment of the National Crime Agency*, 8 June 2011
20 HC Deb 8 June 2011 c234
21 HC Deb 10 May 2012 c184

The NCA will be made up of four commands:

- the **Organised Crime Command** will target organised crime groups operating across local, national and international borders. The command will work with police forces and other agencies to ensure that prioritised and appropriate action is taken against every organised crime group identified
- the **Border Policing Command** will ensure that all law enforcement agencies operating in and around the border work to clear, mutually-agreed priorities, ensuring illegal goods are seized, illegal immigrants are dealt with and networks of organised criminals are targeted and disrupted, both overseas and at ports up and down the UK
- the **Economic Crime Command** will provide an innovative and improved capability to deal with fraud and economic crimes, including those carried out by organised criminals
- the **Child Exploitation and Online Protection Centre** will work with industry, government, children's charities and law enforcement to protect children from sexual abuse and bring offenders to account

All four commands will also benefit from:

- an intelligence hub, which will build and maintain a comprehensive picture of the threats to the UK from organised criminality
- a national cyber crime centre, providing expertise, support, intelligence and guidance to police forces and the commands of the NCA[22]

The *National Crime Agency Plan* provided the following chart to illustrate that "the individual commands will work as part of a single organisation, creating a substantial combination of expertise, capabilities and intelligence":

[22] Home Office, *How the NCA will operate*, accessed 3 January 2013

The agency will be accountable to the Home Secretary and would have "a clear relationship with the police and other law enforcement agencies and with Police and Crime Commissioners".[23]

The Home Office website contains further information on the Bill,[24] and this includes a series of factsheets on the National Crime Agency.[25] Further background is also provided on pages 1-10 of Lords Library Note 2012/020, *Crime and Courts Bill* which was prepared for Second Reading in the Lords.

2.6 How will the NCA relate to Police and Crime Commissioners?

Police and Crime Commissioners were introduced under the *Police and Social Responsibility Act 2011*[26] and elections were held on 15 November 2012.[27] Section 77 of the 2011 Act requires the Home Secretary to issue a "strategic policing requirement". Police and Crime Commissioners and chief constables are required to have regard to this strategic policing requirement in exercising their respective roles.[28] In particular, Police and Crime Commissioners must have regard to the requirement when preparing their Police and Crime Plans for the force area.[29] The Home Secretary issued the first statutory *Strategic Policing Requirement* in July 2012. The Strategic Policing Requirement is intended to "underpin the relationship between police forces in England and Wales and the proposed National Crime Agency (from 2013)."[30] The relationship with Police and Crime Commissioners in the context of the NCA's tasking functions was the subject of debate in the Lords – see section 2.11 of this Research Paper.

2.7 The "shadow" NCA

As the *National Crime Agency Plan* made clear would happen, a shadow body has been set up in advance of the legislation being passed. The Home Office announced in October 2011 that it had appointed Keith Bristow, previously Chief Constable of Warwickshire Police as the first Director General of the NCA.[31] He took up the post in December 2011[32] and a number of other senior appointments have also been made.[33] Mr Bristow gave evidence about progress in establishing the NCA to the Home Affairs Committee on 17 January 2012[34] and again on 16 October 2012.[35]

The Government's aim is that the NCA will be fully operational by December 2013.[36]

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23 Ibid, p22
24 Home Office website *Crime and Courts Bill* pages accessed 3 January 2013
25 Home Office website *Crime and Courts Bill - Part 1: National Crime Agency*, accessed 3 January 2013
26 Background on their introduction is give in Library Research Paper 10/81, *The Police and Social Responsibility Bill* and Library Standard Note 6104, *Police and Crime Commissioners*
27 The results of the elections are analysed in Library Research Paper 12/73 *Police and Crime Commissioner Elections, 2012*
28 See for example section 77 of the *Police Reform Act 2011* and the *Policing Protocol Order 2011* SI 2011/2744
29 Ibid section 5(5)
30 Home Office
31 Home Office Press Release, *Head of the National Crime Agency announced*, 10 October 2011
32 Home Affairs Committee, *Uncorrected transcript of oral evidence (To be published as HC 617-i)* 16 October 2012. It should be noted that this is uncorrected evidence and neither witnesses nor Members have yet had the opportunity to correct the record. The transcript is not yet an approved formal record of the proceedings.
33 See the *Senior Appointments* section of the National Crime Agency pages on the Home Office website, accessed on 2 January 2013
34 Home Affairs Committee, *Minutes of Evidence*, 17 January 2012, HC1553 2011-12
35 Home Affairs Committee, *Uncorrected transcript of oral evidence (To be published as HC 617-i)* 16 October 2012. It should be noted that this is uncorrected evidence and neither witnesses nor Members have yet had the opportunity to correct the record. The transcript is not yet an approved formal record of the proceedings.
36 Home Office website, *National Crime Agency*, accessed 3 January 2013

2.8 A British FBI?

When the Serious Organised Crime Agency was introduced, it was dubbed "a British FBI" in the press, although the comparison was rejected at the time by the Association of Chief Police Officers and the then Director General of SOCA.[37] The new National Crime Agency has also been described as "a British FBI" in the press, but Keith Bristow rejected the comparison in his oral evidence to the Home Affairs Select Committee in October 2012:

> Keith Bristow: To be clear, we are not developing a British FBI. We do not have those different jurisdictions where we have federal offences and state offences. What we are doing here is integrating a whole law enforcement response. My very strong view-otherwise I would not have applied for this job, nor do I believe I would have obtained it-is that this is an opportunity to join up the whole law enforcement effort against criminals and threats that do not respect geographic or agency boundaries, and tackle those more effectively and cut crime. (…)
>
> There is much that we can learn from the FBI, but the model we are developing is quite different from the model that exists in the United States, because we don't have federal offences and we all operate within the same jurisdiction.[38]

2.9 What is the difference between the NCA and SOCA?

Remit

Clearly, the fact that the NCA has three "commands" in addition to the Organised Crime Command (which broadly covers SOCA's functions) means that it will have a considerably wider remit.

"Tasking" ability

Another key difference lies in its ability to direct other law enforcement agencies.

Lord Henley, then a Home Office minister, touched on both these points during his opening speech in the Bill's Second Reading debate in the Lords:

> The question-why do we need a new agency when the Serious Organised Crime Agency has only been operating for six years?-has quite rightly been posed. I pay tribute to all those working in SOCA. They have had many successes and have earned a high reputation in their dealings with overseas law enforcement agencies, but the threat posed by serious and organised crime is changing and our response needs to adapt and evolve if we are to counter the threat effectively.
>
> The National Crime Agency will have a wider remit to tackle serious and organised crime at the borders, fight fraud and cybercrime and protect children from sexual exploitation. For the first time, the agency will produce a single, authoritative intelligence picture on organised criminal gangs and their activities that will provide the basis for a co-ordinated national response.
>
> Working in collaboration with other law enforcement agencies, the National Crime Agency will prioritise resources and ensure a joined-up approach to the activities undertaken at the local, national and international level to disrupt organised crime gangs and bring their members to justice.

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[37] For a discussion of this issue, see Library Research Paper 04/88, *The Serious Organised Crime and Police Bill – the new Agency; and new powers in criminal proceedings*, 2 December 2004, pp11-12

[38] Home Affairs Committee. *Uncorrected transcript of oral evidence (To be published as HC 617-i)* 16 October 2012. It should be noted that this is uncorrected evidence and neither witnesses nor Members have yet had the opportunity to correct the record. The transcript is not yet an approved formal record of the proceedings.

> The National Crime Agency's relationship with police forces and others will be based on a partnership, with the mutual exchanges of information and the provision of two-way operational support. Importantly, however, the Bill provides that the director-general should, in exceptional circumstances, be able to direct police forces in England and Wales to undertake a specific task, for example to take action against a particular criminal gang based in the force area.
>
> I fully expect that this power will be rarely used, but it is a necessary back-stop to underpin the strategic policing requirement that supports chief officers and police and crime commissioners in effectively balancing local and national priorities. [39]

Sir Ian Andrews, Chair of the Serious Organised Crime Agency, highlighted the "tasking" capacity in his evidence to the Commons Home Affairs Select Committee, during its inquiry on the *New Landscape of Policing* in 2011:

> 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.[40]

The Director General of the NCA, Keith Bristow, also highlighted this ability to "task", or direct, other law enforcement organisations in his (uncorrected) evidence to the Home Affairs Committee on 16 October 2012:

> Q32 Steve McCabe: When the Serous Organised Crime Agency was established, we had witnesses at the time and I was a member of the Committee, and there were certainly high expectations of what that agency would undertake, and no doubt it did good work. Would you not say however, that it did not quite fulfil its promise?
>
> Keith Bristow: I think SOCA have done some very good work, and made a very real difference. I have heard the Chairman comment on a number of occasions about the international work that SOCA has done, but let us be clear, we would not be making this change if everything that we needed to be delivered within a modern context had been delivered. This is about building on the very good work that SOCA has done. It is about a different model. SOCA was never given the remit to lead the overall law enforcement response. There was never a proposition that they had the powers to task, whether directed or voluntary. There was never the breadth of responsibilities that the NCA will have. To be clear, what I am building is a law enforcement agency that will do all of that to a world-class standard. [41]

Further information on "tasking" is available in the Home Office factsheet *Crime and Courts Bill: The National Crime Agency - Tasking and Co-ordination*.[42]

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39 HL Deb 28 May 2012 cc 973-4

40 Home Affairs Select Committee, *New Landscape of Policing*, 12 September 2011, HC 939 2010-12, p35

41 Home Affairs Committee. *Uncorrected transcript of oral evidence (To be published as HC 617-i)* 16 October 2012. It should be noted that this is uncorrected evidence and neither witnesses nor Members have yet had the opportunity to correct the record. The transcript is not yet an approved formal record of the proceedings.

42 May 2012

Status and governance

Another difference which generated some debate in the Lords is the status of the two bodies. The Serious Organised Crime Agency is not a crown body.[43] It is an Executive Non-Departmental Public Body (NDPB) of the Home Office. It is led by a Board with a majority of non-executive members. The Board is responsible for ensuring that that SOCA discharges its statutory responsibilities and meets the strategic priorities set under statute by the Home Secretary.

By contrast, the NCA will be a crown body without incorporation,[44] and will be classified as a "Non Ministerial Department". Non Ministerial Departments (NMDs) are departments in their own right, established to deliver a specific function; part of government, but independent of Ministers. The precise nature of relationships between NMDs and Ministers varies according to the individual policy and statutory frameworks, but the general effect is to remove day-to-day administration from ministerial control. Examples include Her Majesty's Revenue and Customs and the Crown Prosecution Service. Cabinet Office Guidance published in 2011 states that NMDs are "usually headed up by a statutory board",[45] although this is not always the case.

2.10 The Bill

Clause 1 would establish the NCA, consisting of NCA officers under the direction and control of the Director General. It also sets out the NCA's crime-reduction function of "securing that efficient and effective activities to combat organised crime and serious crime are carried out". This may be by the NCA or by other law enforcement agencies or other functions.

Schedule 1 gives further detail. Paragraph 5 states that the NCA can carry out activities in relation to any kind of crime when discharging its functions.[46] The Explanatory Notes state that this reflects the various strategies which may be needed to combat organised crime, including disruption tactics. Lord Henley gave additional explanation in response to a probing amendment during the Bill's Committee stage in the Lords, when Opposition Home Office spokesman Lord Rosser had queried whether it would result in friction with police forces. Lord Henley said this was "not about interfering in local policing or taking over the work of individual police forces", but said that "sometimes the most effective way of disrupting a crime network is to tackle the lower-level, seemingly less serious crime to have the greatest impact and stop the crime group operating".[47] Part 2 of schedule 1 sets out the arrangements for appointing officers, for secondments between police forces and the NCA, and for "NCA specials", volunteer officers who can be appointed on a part time, unpaid basis in a similar way to the police Special Constabulary. There is no comparable scheme for SOCA. In Committee, Lord Henley said that the Government expected many to be recruited on the basis of particular specialist or technical skills, such as an understanding of complex financial products to help counter fraud, or of information technology to help tackle cybercrime.[48]

Clause 2 gives the Home Secretary power to determine strategic priorities, which are to be set in consultation with "strategic partners". These are defined in **clause 15** and include Scottish Ministers, the Northern Ireland Justice Department, the Chief Officers of the Police Services of Scotland and of Northern Ireland and those representing the views of chief officers and local policing bodies (such as Police and Crime Commissioners).

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43 paragraph 20, schedule 1 *Serious Organised Crime and Police Act 2005*
44 Explanatory Notes, p18 and paragraph 1, schedule 1 of the Bill
45 Cabinet Office, *Categories of public bodies: a Guide for Departments*, April 2011, p6
46 Paragraph 5, schedule 1
47 HL Deb 18 June 2012 c1593
48 Ibid c1602

Clause 3 covers operations and, as the *Explanatory Notes* put it, "enshrines the operational independence of the Director General and determines how this relates to the strategic direction set by the Home Secretary". The Director General will have to publish an annual plan, having consulted relevant ministers and partners. **Schedule 2** sets out the duty of the Secretary of State to publish a framework document. There were complaints from the Opposition about the fact that the Government had not published a draft of this to inform debate on the Bill. The Government promised to provide at least an outline of this in time for Report stage in the Lords[49] and did so in an attachment to a letter from Home Office and Justice ministers Lord Taylor of Holbeach and Lord McNally to Baroness Smith and Lord Beecham.[50]

Schedule 2 also sets out the Director General's duty to issue an annual report.

Clause 4 covers the important issue of "tasking" as part of relationships between the NCA and other agencies. The *Serious Organised Crime and Police Act 2005* makes provision for voluntary and "directed arrangements" between SOCA and law enforcement agencies such as the police, but any directions are made by the Home Secretary.[51] By contrast, clause 4 of this Bill gives the Director General the power to direct Chief Officers to perform certain tasks, although only with the consent of the Home Secretary. This can only happen if the Director General considers that performance of the task would assist the NCA to exercise functions; if it is "expedient" for the directed person to perform the task; and if satisfactory voluntary arrangements cannot be made in time. Similar limitations occur in the 2005 Act, although in this case the judgement is for the Home Secretary to make.[52] **Schedule 3** sets out the detail for relationships with other agencies, including exchange of information and use of police facilities.

Clause 5 covers the duty to publish information, the details of which are to be set out in the Framework Document. Like SOCA, the NCA will not be subject to the *Freedom of Information Act 2000*. However, as some of the other bodies which will have some functions transferred to the NCA are subject to FOI, this caused some controversy – see below.

Clauses 8 to 9 and **schedule 5** cover the powers which could be designated to the Director General and to other NCA officers. **Clause 8** would allow the Secretary of State to designate the Director General as having the powers and privileges of a constable, the powers of a Revenue and Customs Officer and/or the powers of an immigration officer. Paragraph 4 of schedule 5 provides that the Secretary of State must appoint an advisory panel to make recommendations about what operational powers the Director General should have. The *Serious Organised Crime and Police Act 2005* does not contain equivalent provisions and Baroness Smith expressed some puzzlement at this in Committee[53] and the issue was raised again on Report. The Home Office minister Lord Taylor of Holbeach explained that this was to ensure that an appointee to the post of director-general had the proper skill base to exercise the operational functions to go with the job.[54]

Clause 9 would allow the Director General to designate NCA officers with operational powers, including the powers and privileges of a constable, the powers of an officer of

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49 See for example HL Deb 20 June 2012 cc1780-84

50 *Crime and Courts Bill Government Amendments for the Lords Report Stage* and *Outline Framework Document for the National Crime Agency*, 20 November 2012

51 sections 23 and 24 of the *Serious Organised Crime and Police Act 2005*

52 section 24(1)

53 HL Deb 20 June 2012 c1825

54 HL Deb 27 November 2012 cc149-150

Revenue and Customs or the powers of an immigration officer. Similar provisions exist in the *Serious Organised Crime and Police Act 2005.*[55]

Clause 10 and **schedule 6** provides for inspection by Her Majesty's Inspectorate of Constabulary, and requires the Home Secretary to make regulations to bring the NCA within the remit of the Independent Police Complaints Commission. The Bill as originally introduced in the Lords had this as a power rather than a duty, and the change resulted from the Government's acceptance of a Labour amendment moved by Lord Rosser.[56]

Clause 11 and **schedule 7** covers disclosure of information, including restrictions on this.

Clause 12 deals with labour relations. NCA officers with operational powers will be able to belong to a trade union, but will not be able to strike. The clause prohibits trade unions or others from calling officers with such powers out on strike.

Clause 14 and **schedule 8** would abolish both SOCA and the NPIA

2.11 Debate in the Lords

In the Lords Second Reading debate, the Opposition Home Office spokesperson, Baroness Smith of Basildon said that whilst Labour "broadly welcome(d) the creation of the National Crime Agency" there were "significant points of detail that the Bill either fails to address" and that it raised issues that were a cause for concern.[57]

Counter- terrorism functions

Arguably the most significant amendment to Part 1 of the Bill was through a Government defeat. This removed a clause[58] which would have allowed the Home Secretary to give counter-terrorism powers to the new agency by means of a super-affirmative order.[59] Currently the Metropolitan Police leads on counter-terrorism.

The Home Affairs Committee discussed this issue in its September 2011 report, *New Landscape of Policing*, concluding:

> 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.[60]

During the Bill's Second Reading, Lord Henley made it clear that the Government would not be making a decision on this before the Olympic Games:

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55 section 43
56 HL Deb 20 June 2012 c1826
57 HL Deb 28 May 2012 c978
58 Clause 2 in the Bill as introduced in the Lords
59 Background on this type of delegated legislation can be found in Library Standard Note 6509, *House of Commons Background Paper: Statutory Instruments* 18 December 2012
60 Home Affairs Select Committee, *New Landscape of Policing*, 12 September 2011, HC 939 2010-12, p43

> With the creation of this powerful new crime-fighting agency, it is sensible that we build in flexibility to confer on the NCA counterterrorism functions if, in the future, there is a compelling case for doing so. This is not the time for a review of counterterrorism policing. For the present, we need to focus on delivering a safe and secure Olympics and on firmly establishing the National Crime Agency in fact as well as in law. I recognise that any decision in this area should be subject to particularly careful consultation and scrutiny, and that is why we have made this order-making power subject to the super-affirmative procedure.[61]

The House of Lords Delegated Powers and Regulatory Reform Committee reported on the Bill on 31 May 2012 said that the idea of adding to a statutory body's functions by subordinate legislation was "well established", and did not make any recommendations on the issue.[62] However, the Lords Constitution Committee cited concerns about "excessive demands for enabling powers in the name of "flexibility". It questioned whether Ministers should have this "Henry VIII" power to amend the primary legislation by order given the great importance of the subject matter.[63] The Joint Committee on Human Rights recommended that the relevant clause be deleted from the Bill:

> 15. We are concerned about the lack of clarity that the wide order-making power introduces into the Bill. It is not clear, for example, which particular "counterterrorism functions" the clause contemplates. We do not see the necessity for including such a provision before the intended review of the current counter-terrorism policing structures in England and Wales has been carried out. In our view, the potential human rights implications of a decision to confer counter-terrorism functions on the NCA are sufficiently significant to warrant primary rather than secondary legislation, to ensure that Parliament has the fullest opportunity to scrutinise the possible implications. We recommend that clause 2 be deleted from the Bill. [64]

In Committee, the Liberal Democrat, Lord Alderdyce, moved an amendment intended to clarify whether the Government was content that it had the support of the Northern Ireland Executive for the changes.[65] Lord Henley said the Government recognised "the particular sensitivities of the arrangements in Northern Ireland" and that progress was being made.[66] The amendment was withdrawn. Then, during the clause stand part debate in committee, Lord Rosser said that this question "should not be dealt with by the government order, super-affirmative or otherwise" but by "primary legislation after full debate."[67] Lord Henley pointed to the recommendation of the Home Affairs Committee, and said that the Home Secretary would have to consult any bodies she considered affected by the Order. Primary legislation could be a lengthy process and it was important not to limit the NCA's "ability to respond to the changing threat in the future".[68]

Baroness Smith of Basildon returned to the issue on Report, moving an amendment to leave out clause 2. She said it would be "extremely unsatisfactory" to give the Government the power to transfer counterterrorism to the NPA without "the full consideration in Parliament that a primary legislation route would allow".[69] A number of peers spoke in favour of the

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61 HL Deb 28 May 2012 c974

62 Delegated Powers and Regulatory Reform Committee, *Crime and Courts Bill [HL]*, 31 May 2012, HL Paper 12 2012-13, p3

63 Constitution Committee, *Crime and Courts Bill [HL]*, 18 June 2012, HL Paper 17 2012-13

64 Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13, p10

65 HL Deb 18 June 2012 c1607

66 Ibid c1608

67 Ibid c1627

68 ibid c1630

69 HL Deb 18 June 2012 cc1560-1572

amendment, including Lord Blair of Broughton (crossbench) who said that the decision deserved primary legislation,[70] and Lord Condon (also crossbench), who also supported the position of the Constitution Committee. Lord Dear (crossbench) said it seemed "sensible and proper" that Parliament should legislate to move counterterrorism to the NCA "if that case was proved", and "on balance" he supported the Government. Lord Harris of Haringey questioned why it was necessary to legislate for this super-affirmative order before the Home Office had even considered the issues or before there had been a debate both within the police service and outside.[71] Lord Taylor of Hollbeach said there would be no wholesale review of the current counter-terrorism structures until after the establishment of the NCA, but that it was critical that in creating the NCA, its ability to respond to the "changing threat picture" was not limited.[72] The order-making power afforded the "necessary flexibility".

Baroness Smith pushed the amendment to a vote, and the Government was defeated by 222 votes to 201.[73]

"Architecture" and accountability structures

Labour wanted to introduce a National Crime Agency Board along the lines of the SOCA Board, and introduced amendments in Committee[74] and on Report[75] to achieve this. In the debate on Report, Baroness Smith of Basildon said that the Government was "scrapping the corporate governance structure that existed for SOCA and are instigating top-down direction from the Secretary of State, despite the fact that the new agency will be designated a non-ministerial department, unlike SOCA, which was a non-departmental government body."[76] Lord Taylor of Holbeach argued a statutory board for the NCA was not necessary, and that this was a "tried and tested model for a non-ministerial department".[77] The amendment was withdrawn.

Child exploitation and human trafficking

One issue which proved particularly controversial when the Government first announced their plans for the NCA in July 2010 was the inclusion of the Child Exploitation and Online Protection Centre (CEOP) within the new structure. CEOP, which deals with the protection of children from sexual abuse, was established in 2006 and the Government has described its work as a "significant success story in UK policing".[78] In October 2010, the Chief Executive, Jim Gamble, resigned saying he did not believe the decision to assimilate CEOP into the National Crime Agency was in the best interests of children and young people.[79] In the *National Crime Agency Plan*, the Government emphasised that CEOP would retain its operational independence and its "well-known brand".[80] The Home Affairs Committee welcomed the Government's assurances.[81]

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70 Ibid c115
71 Ibid c119
72 Ibid c122
73 ibid cc123-126
74 HL Deb 18 June 2012 cc1560-1572
75 HL Deb 27 November 2012 cc94-104
76 ibid c94
77 ibid cc100-101
78 Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, Cm 8097, 8 June 2011, p21
79 "Online child protection chief Jim Gamble resigns", *BBC News*, 5 October 2010. For further discussion of this see Home Affairs Select Committee, *New Landscape of Policing*, 12 September 2011, HC 939 2010-12, pp36-7, and Lords Library Note 2012/020, *Crime and Courts Bill*¸ 23 May 2012 pp5-6
80 Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, Cm 8097, 8 June 2011, p21
81 Home Affairs Select Committee, *New Landscape of Policing*, 12 September 2011, HC 939 2010-12, p37

In Committee, the Conservative, Lord McColl, moved a series of amendments to clarify how the work of CEOP and the UK Human Trafficking Centre would be incorporated into the NCA, and to ensure that human trafficking would be recognised as a serious organised crime in the Bill.[82] Lord Henley said he was satisfied that clause 1 was sufficiently broad to encompass human trafficking and he "categorically" assured Lord McColl "that CEOP and the Human Trafficking Centre, both currently part of the Serious Organised Crime Agency, will continue their important work as part of the National Crime Agency in future".[83]

"Tasking": the role of Police and Crime Commissioners

Lord Rosser moved amendments in Committee[84] and on Report[85] to place a duty on the Director General of the NCA to notify Police and Crime Commissioners before making a request to a chief constable to perform a task. Responding on Report, Lord Taylor of Holbeach set out how he saw this would work:

> I expect voluntary tasking between the NCA and partners will take place on a routine, day-by-day basis, based on shared priorities and mutual co-operation. I see no need for police and crime commissioners to be routinely notified, any more than they would necessarily be routinely notified when one police force provides mutual aid to another, which is a common enough occurrence, as the noble Lord will know. However, I accept that directed tasking, and indeed directed assistance, is of a different order. That is why we have included in the outline of the framework document a requirement on the director-general to notify the Home Secretary and the relevant PCC, as soon as feasible-which is rather similar to the wording in the amendment-if he issues a direction to the chief constable of a police force to perform a task or to provide assistance. [86]

Lord Rosser noted that these voluntary agreements could have a significant impact on resources, but withdrew the amendment.[87]

Resources

The *National Crime Agency Plan* said that the total cost of the NCA "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." [88]

The Home Office's Impact Assessment on the National Crime Agency, published in April 2012, said that work done so far on the Agency's design had:[89]

> (…) not identified material new costs or any other considerations that might jeopardise the commitment to deliver the NCA from within precursor budgets. It may, however, lead to some marginal costs associated with the NCA's establishment. One-off transition costs will be kept to a minimum by using existing estates and infrastructure and will be managed within overall budgets.

The Home Office factsheet states that the budget for the first operational year would be around £400 million:

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82 HL Deb 18 June 2012 cc1575-1587
83 Ibid c1584
84 HL Deb 20 June 2012 cc1788-1798
85 HL Deb 27 November 2012 cc134-139
86 Ibid, c138
87 Ibid c139
88 Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, Cm 8097, 8 June 2011, p13
89 Home Office, *The National Crime Agency: Impact Assessment* IA Number HO0066, 27 April 2012, p8

> 14. The NCA will have a wider reach than SOCA and a deeper reach across law enforcement. It will be delivered within the budget of its precursor organisations. It will do this through more effective prioritisation and smarter use of assets; its own and those of others. SOCA (which includes CEOP), will form the largest component of the NCA"s budget.
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> 15. For the first fully operational year (2014/15) we expect the NCA budget to be around £400 million. It is too early to say what the final budget will be as there may be additional functions which transfer into the agency and other supplementary funding streams which the NCA, like SOCA, is likely to have access to. [90]

In Committee, Baroness Smith of Basildon moved an amendment to give the Secretary of State an explicit duty to ensure the NCA was provided with sufficient resources to discharge its functions effectively and efficiently. She pointed to the additional tasks which the NCA was being required to perform:

> While we understand that the Government are saying that the budgets will migrate with the organisations, which we certainly welcome, in reality we have to look at the cuts that those organisations have already sustained and the loss in their budgets and the savings they have found, in many cases to their credit. The National Policing Improvement Agency has found, I understand, around a £100 million reduction in its budget. Its headcount has gone from 2,200 to 1,400 and it is facing further deep reductions to its budget over the remainder of the financial review period. Clearly, if the NCA is to operate in the same spending envelope as its predecessors, it is unclear how it can manage what it does now and be the co-ordinating body for the organisations that have been moved under its control.
>
> (…)
>
> The Government want the NCA to do more, and they are right to do so. The NCA is to undertake completely new functions such as the Economic Crime Command, the Border Policing Command and the new National Cyber Crime Unit, although we still do not have the framework document so it is difficult to make an assessment of what that will look like. It is still quite vague. The implication is that the NCA budget comprises solely of the existing constituent budgets and that any new functions it performs, such as those I have outlined, must be funded out of the budgets of those existing agencies, even if there are further cuts to come to them. In the debate we have just had about child trafficking, the Minister was clear that the wording in the Bill is adequate to deal with these extra tasks, yet it will be an extra task, and no funding will follow it. [91]

Lord Condon also raised concerns about start up costs, and expressed the hope that there would be flexibility about the budget.[92] Responding, Lord Henley said that the NCA would be able to make more effective use of resources than its predecessor organisations:

> It will, no doubt, be difficult for the NCA, which, like SOCA, will have to live within its budget and the review settlement. The NCA's budget will be based on the budgets of the precursor organisations. It will have to deliver that wider remit through enhanced intelligence, tasking and co-ordination arrangements that I hope will make more effective use of its resources-its own assets and those of others. Creating the agency

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90 Home Office Crime and Courts Bill Fact Sheet, *The National Crime Agency - what it will do and how it will do it*, May 2012, p3

91 HL Deb 18 June 2012 c1588

92 Ibid, c1590

> will also provide opportunities to rationalise some functions, remove duplication in others and generate efficiencies. [93]

The amendment was withdrawn.

Freedom of Information

SOCA is currently exempt from the *Freedom of Information Act 2000*.[94] However some of the other organisations passing functions to the NCA are public authorities which are subject to the Act. The human rights organisation Liberty, and the Joint Committee on Human Rights both raised concerns about this fact. Liberty points out that the Act already has "an extensive exemption regime which ensures that information relating to national security, law enforcement or criminal investigations does not have to be revealed.[95] The Joint Committee stated that it was not uncommon for freedom of information (FoI) legislation to apply to certain of an organisation's functions but not others.[96]

In Committee, the Liberal Democrat peer Baroness Hamwee moved an amendment to insert a new clause making the NCA subject to the Freedom of Information Act, saying that this would give a "proactive tool to the citizen".[97] For Labour, Lord Rosser, favoured an approach which would mean a partial exemption:

> Our Amendment 66 qualifies the National Crime Agency exemption to cover only those functions subject to exemption prior to 1 April 2012, which I believe was the date on which the NPIA functions were transferred to SOCA. Schedule 8 provides that the NCA will be exempt from freedom of information legislation. However, the functions of the NPIA and the UK Border Agency, which the Bill proposes to be covered by the NCA, were not previously exempt from the Freedom of Information Act. As yet, we have had no real explanation or justification for that exemption, especially as an extensive exemption regime already exists under the Freedom of Information Act.
>
> SOCA, of course, is exempt from the operation of the Freedom of Information Act, but, as I said, as the National Crime Agency's functions extend beyond those undertaken by SOCA, so the extended exemption provided for in the Bill is significant and needs justification.[98]

Lord Henley said that the confidence the NCA's partners had in sharing information could be lost:

> In short, the National Crime Agency's operational effectiveness could, we believe, be materially weakened by application of the Freedom of Information Act, and it would be quite wrong to apply such a handicap to the new agency. I have to make that quite clear-and I suspect that the Opposition, in their attitude to SOCA and the Act that created it back in 2005, are in agreement on a large part of it. As I said, it would be wrong to place such a handicap on it. We are committed to ensuring that there is no loss of public transparency as a result of this decision, but we expect the agency to publish more information than its predecessors because of the open, proactive publication that it aims to adopt.[99]

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93 Ibid
94 Section 23 *Freedom of Information Act 2000*
95 Liberty, *Liberty's Committee stage briefing on the Crime and Courts bill in the House of Lords*, June 2012, p5
96 Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13, p13
97 HL Deb 18 June 2012 c1639
98 Ibid
99 Ibid c1641

Baroness Hamwee's amendment was withdrawn, and Lord Rosser's was not moved.

The issue was returned to on Report, when Baroness Hamwee moved another amendment which would have limited the FoI exemption to information relating directly to crime reduction or criminal intelligence functions. She called it a "matter of some principle".[100] Lord Taylor of Holbeach said that "the decision to exempt the NCA from the FOI Act was not taken lightly":

> In short, we remain resolute in our decision to maintain the NCA's exemption from the FOI Act. To do otherwise would jeopardise the NCA's operational effectiveness and ultimately result in lower levels of protection for the public. While partial application of the FOI Act might, at face value, look attractive, it is simply not a viable option for an integrated crime-fighting agency. In the mean time, the whole purpose of the duty to publish will be to provide the public with as much information about the organisation's activities as possible.[101]

Baroness Hamwee withdrew her amendment.

[100] HL Deb 27 November 2012 c158
[101] Ibid c161

3 Administration of Justice

3.1 Civil and family proceedings in England and Wales

Establishing a single county court

The proposal to introduce a single county court was included in the Queen's Speech. County courts deal with civil (non-criminal) matters. Types of civil case dealt with in the county courts include, but are not limited to, claims in contract, tort (civil wrongs such as negligence and personal injury) and claims for the recovery of land. It also encompasses the small claims track. While more complex cases or those involving large amounts of money will appear at the High Court; the vast majority of civil cases take place in the county courts.

At present, there are approximately 170 county courts in England and Wales. They have their own legal identity and serve a defined geographical area. Kenneth Clarke, then Lord Chancellor and Secretary of State for Justice, suggested that the structural reforms would "create a better balance of work and resources" and allow people using the court "the simplest and quickest way so that they can get on with their lives and businesses."[102] The proposal can be traced back through a number of earlier initiatives. Sir Henry Brooke (a retired Court of Appeal Judge) was commissioned by the Judicial Executive Board to conduct an inquiry into the question of civil court unification in January 2008. The Judicial Office published his report, *Should the Civil Courts be Unified?*, in August 2008. While Sir Henry's report concluded that it was not necessary to unify all the civil courts, it did suggest that consideration should be given to whether the county court should have a single national jurisdiction.

In March 2011, the Government produced a consultation paper entitled *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system* (CP6/2011). The consultation paper suggested significant reforms to the administration of the county courts. It proposed, amongst other things, introducing a single county court jurisdiction for England and Wales. The consultation concluded in June 2011.

In its paper, the Government argued that the current system, with geographical and jurisdictional boundaries creates "inefficiencies, in that they limit the court's jurisdiction to the geographical area in which the court is located or in some cases the particular jurisdiction which they possess."[103]

The Government also contended that the creation of a single county court jurisdiction could have a number of benefits, including: better use of judicial resources; reducing delays in hearing and determination of cases by removing high volume bulk work from the individual county courts; rationalising of HM Courts and Tribunals Service estates; making economies of scale through the elimination of back office duplication. Following a previous consultation, the Government agreed the closure of 49 county courts, stating that this would increase courtroom utilisation.[104]

The *Equality Impact Assessment* published by the Government in tandem with the proposals in March 2011 acknowledged that county court users might be affected by the proposals through increased travel costs if cases were transferred to courts outside their locality once old geographical boundaries were removed. It also stated that users might benefit from reduced waiting times.

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[102] "Crime and Courts Bill to create single county court system", *Law Society Gazette*, 10 May 2012

[103] Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system* (CP6/2011), March 2011, para 247

[104] *Ibid*, paras 252-253 and 257

The response to the consultation,[105] published by the Ministry of Justice in February 2012, stated that the Government had received "strong support" for the changes. Prior to Second Reading of the Bill in the House of Lords, the Law Society indicated that it supported measures for a unified county court which it said "should allow for more efficient deployment of judges and use of the courts."[106]

Establishing a single family court

Current family court structure

At present, depending on their nature and complexity, family proceedings may be heard in three court tiers:

- magistrates' courts (also known as Family Proceedings Courts);
- county courts (including care centres); and
- the High Court of Justice.

Cases are allocated to a particular court (and, within each court, to different levels of judiciary or different individual judges) in accordance with the *Allocation and Transfer of Proceedings Order 2008*[107] and a Practice Direction, *Allocation and Transfer of Proceedings*.[108]

Family Justice Review

The Family Justice Review was originally commissioned by the previous Government in early 2010 and was led by a panel of experts with an independent chair, David Norgrove. The Review published an interim report in March 2011[109] and a final report in November 2011.[110]

The Interim Report recommended that the family court structure should be simplified and that a single family court should be created by statute. It recommended that there should be a single point of entry, in place of the current three tiers of court. All levels of family judiciary (including magistrates) would sit in the family court and work would be allocated depending upon case complexity.[111] This was intended to have the following benefits:

- clarity for court users in providing a single point of entry when applications are made to court;
- opportunities to use the court estate more flexibly as between different tiers of the family court;
- opportunities for greater efficiency in tying the work of the different court jurisdictions more closely together; and

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105 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

106 Law Society, *Parliamentary Brief: The Crime and Courts Bill*, 28 May 2012

107 SI 2008/2836

108 [2009] 1 FLR 365

109 *Family Justice Review Interim Report*, March 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Assembly Government

110 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government

111 *Family Justice Review Interim Report*, March 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Assembly Government, p11

- consistency in case allocation through agreed initial assessment standards.[112]

The Final Report confirmed this recommendation. The Report acknowledged that the three different types of family courts had worked together more closely in recent years but reiterated that difficulties and inconsistencies remained, "with wide variations nationally in how different cases are allocated to different courts, despite national guidance".[113] This was stated to cause confusion and uncertainty for families about where cases would be heard, "particularly important for litigants in person".[114] The Report spoke of the current family court structure as being "quite rigid":

> Applications often need to be made to specific courts in certain areas of the country, making it more difficult for HMCTS to realise efficiencies in processing applications.

The Final Report stated that most respondents had supported the recommendations of the Interim Report.[115] A single family court would over time also promote "a greater sense of cohesion and improved links between all members of the family judiciary, including magistrates".[116]

Government response

In February 2012, the Government published its response to the Family Justice Review,[117] and agreed to establish a single family court for England and Wales, with a single point of entry. The Government also agreed that the High Court's status should be preserved in relation to its international work and its inherent jurisdiction. Proceedings in the family court would be allocated to the appropriate level of judiciary based on factors such as case type and complexity. The Government said that the creation of a single family court would "facilitate wider reforms to enable the more efficient use of court resources, and more effective administration of proceedings".[118]

Judicial proposals for the modernisation of family justice

On 2 November 2011, Mr Justice Ryder was appointed by the President of the Family Division, with the agreement of the Lord Chief Justice, to prepare a judicial response to the Family Justice Review and to make judicial proposals for the modernisation of family justice. Mr Justice Ryder's report, *Judicial proposals for the modernisation of family justice*, was published on 30 July 2012 and contained a series of proposals to improve the workings of family courts, which he said were "judicial solutions to the problems which are identified in the Family Justice Review".[119] His recommendations were endorsed by the Lord Chief Justice. When the report was published the *Crime and Courts Bill [HL],* including provision for a new single Family Court, was already before Parliament.

Mr Justice Ryder said that the launch of the single family court would be "the vehicle for the implementation of the judicial family modernisation programme". He went on to say that the programme "is intended to create a significant change of culture: one in which strong judicial

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112 *Ibid,* para 3.151, p81

113 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, p72

114 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, para 2.155, p72

115 The Final Report (p188) states that the question, "Do you agree that there should be a single family court?" was answered by a total of 412 respondents, of which 309 (75%) answered Yes, 23 (6%) answered No, and 80 (19%) respondents did not answer Yes or No but made comments on the question.

116 *Ibid,* para 2.162, p74

117 *The Government Response to the Family Justice Review: A system with children and families at its heart,* Cm 8273, February 2012

118 *Ibid* p44

119 Judiciary of England and Wales, *Judicial proposals for the modernisation of family justice*, July 2012, p1

governance and evidence based good practice will inform the structures, processes and decisions of the court".[120]

The report set out detailed information about the new single family court, including matters related to its structure and case management.

The Bill

Clause 16 would establish a single family court in England and Wales by inserting a new Part 4A into the *Matrimonial and Family Proceedings Act 1984.* The family court would exercise the jurisdiction and powers conferred on it by statute. **Schedules 10 and 11** set out amendments connected to the establishment of the family court. Rules and secondary legislation would make further provision relating to the operation of the new court.

The clause would also establish a single county court. **Clause 16(1), (2)** and **(5)** would create a single county court with a national jurisdiction for England and Wales. It would amend the *County Court Act 1984* by inserting a new section A1. The new provision would have the effect of removing the geographical boundaries in the existing county court structure. **Schedule 9** makes further amendments to the 1984 Act and also amends a wide range of other legislation referring to the existing county courts. The amendments would have the effect, amongst other things, of allowing a wider range of judges to sit, on a flexible basis, in the new single county court as "judges of the county court", although the Explanatory Notes indicate that in practice, Circuit judges and district judges would remain the principal judges of the new county court.

Each of the new family court and the new county court would be a court of record with a seal.

Debate

When introducing the Bill at Second Reading in the House of Lords, Lord Henley said that the creation of the single family court would make it easier for users to navigate their way through the system, and enable cases to be allocated to the appropriate level of judiciary without the need to transfer proceedings to a different level of court, thereby reducing costs and delays.[121]

In Committee, the Opposition Justice Spokesperson Lord Beecham indicated the Opposition's agreement to the principle of having single courts, but moved amendments on the detail of the scheme. One of Lord Beecham's proposed amendments would have required a review of the creation of the single courts and the publication of a report within 18 months of commencement of the relevant provisions.[122]

Justice Minister Lord McNally said that there would be a review of the new single county court and family court within five years: "This timeframe will allow the new county and family courts to bed down and so enable the full benefits to be fully and properly evaluated".[123]

Lord Beecham withdrew his amendment but returned to this issue on Report and moved an amendment to require a periodic review of "the whole system, not a series of separate, unconnected reports dealing with different parts of the system". He considered it essential, particularly in the light of changes to the legal aid system, "to measure the impact, to review

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120 *Ibid,* p2
121 HL Deb 28 May 2012 c975
122 HL Deb 25 June 2012 cc40-1
123 *Ibid*

the possible difficulties, some of which are already beginning to emerge, and, if necessary, to correct them".[124]

Lord McNally resisted the amendment and spoke of existing obligations and commitments to review. He specifically mentioned the Government's awareness of the problems posed by litigants in person and said that the Government was "working urgently to take immediate action to assess self-represented parties affected by our legal aid changes, as well as developing a long-term strategy for the future".[125]

Lord Beecham pressed for a review of changes being implemented both by statute and by other means.[126] The House divided and the amendment was defeated by 218 votes to 177.

In Committee, Government amendments were agreed to Schedule 10 to implement a recommendation of the Delegated Powers Committee. The first rules to be made specifying the functions of judges of the family court which could be performed by legal advisers or their assistants would be subject to the affirmative procedure. Any subsequent rules would continue to be subject to the negative procedure.[127] On Report, Lord Beecham moved a probing amendment designed to define the decisions which could be delegated "in a way that would avoid legal advisers assuming the role of the court itself in making effectively legal decisions".[128] In response, Lord McNally acknowledged that the Joint Committee on Human Rights had observed that the power awarded to legal advisers could be used quite widely and had expressed concerns that there may be an appearance of a lack of independence or impartiality if legal advisers were allowed to make decisions other than administrative decisions. He emphasised the Government's intention that legal advisers and assistant legal advisers to the family court would not make decisions which were final or conclusive to the parties' rights, except that uncontested divorce applications would be dealt with administratively by legal advisers. Discussions on secondary legislation were continuing. The rule-making power would be exercised only with the consent of the Lord Chief Justice and after consulting with the Family Procedure Rule Committee.[129]

Repeal of Part 2 of the Children, Schools and Families Act 2010

Following calls for the press and public to be allowed to attend family proceedings, changes were made to court rules, effective from April 2009. Duly accredited media representatives (but not the wider public) are now able to attend certain family proceedings held in private, subject to a power for the court to direct their exclusion.

The court rule changes did not alter the statutory reporting restrictions for family proceedings, meaning that the media are able to report only limited information about the proceedings they are now able to attend. Provisions intended to amend these reporting restrictions were enacted in Part 2 of the *Children, Schools and Families Act 2010* (CSFA 2010) but these provisions have not been brought into effect. In July 2011, the House of Commons Justice Committee recommended that Part 2 of the CSFA 2010 should not be implemented.[130] In October 2011, the Government accepted the Committee's recommendation.[131]

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124 HL Deb 4 December 2012 c547
125 HL Deb 4 December 2012 c552
126 *Ibid*
127 HL Deb 25 June 2012 c66
128 HL Deb 4 December 2012 c559
129 HL Deb 4 December 2012 c560-2
130 Justice Committee, *Operation of the Family Courts*, 14 July 2011, HC 518 2010-12, para 281
131 Cm 8189, *Government Response to Justice Committee's Sixth Report of Session 2010–12:Operation of the Family Courts*, October 2011, pp31-2

A Library standard note, *Confidentiality and openness in family courts* provides further information.[132]

Clause 16(4) would repeal Part 2 of the *Children, Schools and Families Act 2010.*

3.2 Youth courts and gang-related injunctions

The *Policing and Crime Act 2009* introduced a new form of injunction to deal with gang-related violence. The police and local authorities can apply to a county court (or the High Court) for an injunction against an individual who has been involved in gang-related violence. The court can place a range of prohibitions and requirements on the behaviour and activities of the person, for example, prohibiting someone from being in a particular place or requiring them to participate in rehabilitative activities. The 2009 Act did not restrict the age at which the injunction could be given, but there were practical difficulties in enforcement with those aged 14-18. To deal with these, the *Crime and Security Act 2010* introduced a lower age limit of 14 for these injunctions, and at the same time provided powers for the court to make a supervision order or detention order where an injunction has been breached. In effect, therefore, these changes extended the orders to those aged 14-18 with effect from 12 January 2012.[133] Further background is in Library Research Paper 09/97.

Clause 17 and **schedule 12** of the *Crime and Courts Bill*, which was introduced on the second day of the Bill's Report stage, would mean that applications for gang-related injunctions for 14-17 year olds would be made to the youth court, sitting in its civil capacity, rather than county court or High Court. Introducing the amendments, Lord Ahmad of Wimbledon, the Government Justice spokesperson, explained as follows:

> When gang injunctions were originally established, it was felt that the civil courts were best placed to hear the applications due to their expertise in handling civil injunctions, and this remains the case for adults. However, following discussions with practitioners, we have come to the conclusion that the youth courts are best placed to deal with gang injunctions for 14 to 17 year-olds. It is our belief that youth courts have the appropriate facilities and expertise to deal with young people and that they will thus be able to handle these cases more efficiently and effectively for all those involved.[134]

For the Opposition, Lord Beecham commended the Government for "this very sensible amendment."[135]

3.3 Judicial Appointments

Clause 18 of the Bill relates to judicial appointments. The judicial appointments system has undergone significant changes in recent years, following the establishment of the Judicial Appointments Commission (JAC) under the *Constitutional Reform Act 2005*.[136] Further reforms to the appointment process were made under the *Tribunals, Courts and Enforcement Act 2007* (which modified and relaxed eligibility requirements for appointment to help encourage diversity in the judiciary). Full details of these reforms and the previous Government's subsequent proposals for reform under the *Governance of Britain* consultations can be found in the historic Library Standard Note *Judicial Appointments* (SN/HA/4717). Further details on the current functions of the JAC can be found in the House

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132 SN/SP/6102 Last updated: 7 January 2013

133 SI 2011/3016; See also *Injunctions to prevent gang-related violence* on the Home Office website, accessed 4 January 2012

134 HL Deb 4 December 2012 c545-6

135 Ibid c546

136 N.B, The JAC is only responsible for judicial appointments in England and Wales, There is a separate Commission to appoint judges to the Supreme Court (this process is governed by Part 3 of the *Constitutional Reform Act 2005)*

of Lords Library Note *Crime and Courts Bill* (LLN 2012/020), but in short, it is currently made up of fifteen Commissioners including lay members, judges and members of the legal profession. The Commission makes recommendations for judicial appointments to the Lord Chancellor, who may accept the Commission's selection, require it to reconsider its selection, or reject it. The JAC is currently under a statutory duty to have regard to the need to encourage diversity in the range of persons available for selection for appointments,[137] although section 63 of the 2005 Act provides that selection must be "solely on merit."

In spite of these reforms, the issue of judicial appointments had continued to attract interest. Arguments have frequently focused on three main issues: diversity, judicial independence and accountability.[138] In 2011 Kenneth Clarke, then Lord Chancellor, launched a consultation, *Appointments and Diversity: A Judiciary for the 21st Century*[139] which considered reforms which had been suggested by the Advisory Panel on Judicial Diversity in a report which it had published in 2010.[140] The Government's consultation proposed a variety of further changes to the judicial appointments process. The Government published its response to the consultation in May 2012, outlining the provisions that would be taken forward in legislation.[141]

The relevant provisions in the Bill can be found at **Clause 18** and **Schedule 13** (Schedule 12 as introduced in the Lords) and would made a number of changes to the appointments system and the JAC.[142]

Amongst other things, Part 1 of Schedule 13 provides for there to be no more than the equivalent of twelve full time Supreme Court judges (rather than exactly twelve). The Schedule also makes provision about the selection of these judges. It provides for the selection panels for the Supreme Court to be made up of odd numbers of people, with a minimum of five members. The selection panel would have to include at least one serving Supreme Court judge, at least one non-legally qualified member and at least one member of the following bodies: the JAC; the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission (the provision notes that more than one of the requirements may be met by the same person's membership of the panel. As originally drafted, where the selection panel was appointing the President of the Supreme Court (and via a different provision, the Lord Chief Justice), the Lord Chancellor would have been eligible to sit as a member of the panel. This provision was dropped on Report (see commentary below).

Part 2 of Schedule 13 contains provisions to facilitate greater diversity amongst the judges and would allow for the diversity consideration to be taken into account by the selecting body where two applicants are of equal merit (sometimes referred to as "the tipping point

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[137] *Constitutional Reform Act 2005*, section 64

[138] See, for example: House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report Session 2010-2012, HL Paper 272, 28 March 2012; Centre Forum, *Guarding the guardians? Towards an Independent, Accountable and Diverse Judiciary*, March 2012; Horne, A. *The Changing Constitution: A Case for Judicial Confirmation Hearings?*, Study of Parliament Group Paper No. 1, 2010. For a more detailed assessment of some of these issues, the Constitution Unit at University College London is running a research project entitled *The Politics of Judicial Independence*. Full details can be found on the Constitution Unit's website: http://www.ucl.ac.uk/constitution-unit/ (as at 21 December 2012)

[139] Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century* (CP 19/2011) 21 November 2011

[140] Judiciary of England and Wales, *The Report of the Advisory Panel on Judicial Diversity* ,March 2010

[141] Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century - Responses to the Public Consultation* (CP 19/11) 11 May 2012

[142] A number of legal academics have commented on the original provisions (some of which have since been amended). See, for example: G. Gee *The Crime and Courts Bill and the JAC*, UK Const. L. Blog, 1 November 2012, and P. O'Brien, *Three Thoughts about the Crime and Courts Bill and Judicial Appointments,* UK Const. L Blog 2 July 2012

principle.") It would amend Section 63 of the *Constitutional Reform Act 2005* (judicial appointments to be made solely on merit). It also introduces full time equivalent maximums (rather than exact number of judges) for the Court of Appeal and High Court.

Part 3 of the Schedule would amend provisions about the membership of the JAC by allowing the Lord Chancellor (with the agreement of the Lord Chief Justice) to make regulations about the number of Commissioners, the selection of Commissioners and Commissioners' terms of office. It would amend Schedule 12 to the 2005 Act removing some of the detailed provisions of that Schedule and introducing new regulation making powers. Under the new arrangements, the number of Commissioners who were holders of judicial office on the JAC would still have to be less than the number of Commissioners (including the chairman) who were not holders of judicial office.

Part 4 of the Schedule provides for the transfer of the Lord Chancellor's current role in making selection decisions in relation to particular court based appointments below the High Court to the Lord Chief Justice and for the transfer of this function in relation to tribunal appointments in the First Tier and Upper Tribunal to the Senior President of Tribunals. The Explanatory Notes state that the Lord Chief Justice would acquire the power to appoint persons to a number of judicial offices below the High Court and would acquire the power to decide upon selections made by the JAC in relation to a number of other courts-based judicial offices where Her Majesty The Queen has the power to appoint. The Lord Chancellor would retain the power to decide upon selections by the JAC or selection panel in relation to appointments to the High Court and above. He would also retain overall responsibility and accountability for judicial terms and conditions of appointment and service.

Any regulations relating to the judicial selection process would be subject to the affirmative resolution procedure and in relation to regulations dealing with the Supreme Court, these would be subject to the agreement of the senior judge of the Court (which would usually be the President) of the Supreme Court) and consultation with the judiciary and devolved administrations. In relation to regulations concerning judicial appointments in England and Wales, these would be subject to agreement with the Lord Chief Justice.

Part 5 of Schedule 13 would allow the Lord Chief Justice (with the concurrence of the Lord Chancellor) to temporarily appoint a judge of the Senior Courts to exercise relevant functions as a Head of Division where that Head of Division was incapacitated or the office was vacant. The Heads of Division include the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court.

Part 6 of Schedule 13 would abolish the office of Assistant Recorder (a fee paid appointment with a fixed term of appointment). The Explanatory Notes indicate that from April 2000, no further appointments were made to that office, but residual references remain in legislation.

Commentary on the proposals and amendments

In its report on the Bill, the JCHR devoted some attention to the issue of judicial appointments. It stated, amongst other things, that:

> The Bill makes provision concerning judicial appointments. It would allow the Lord Chancellor to sit as a member of the selection commission for the appointment of the President of the Supreme Court and the Lord Chief Justice, in place of the current power of veto over the recommendation of the selection commission. We recommend that the Bill be amended to remove the provision allowing the Lord Chancellor to sit as a member of the selection commission for the appointment of the President of the Supreme Court and the Lord Chief Justice, and to make the current process more transparent by requiring the Lord Chancellor to make public, without identifying

> candidates, any exercise of the power to reject, or request the selection commission to reconsider, its recommendation.
>
> There are also measures in the Bill to promote diversity in judicial appointments. We welcome these provisions, concerning the availability of part-time working, and the introduction of a tie-break where candidates are of equal merit, which should have a positive impact on judicial diversity. In our view, however, the Bill does not go far enough in this respect. We are not satisfied with the Government's explanation for not extending to the Lord Chancellor and the Lord Chief Justice the statutory duty which already applies to the Judicial Appointments Commission, to have regard to the need to encourage diversity in the range of people available for selection for appointment, and believe its inclusion in the Bill would be wholly compatible with the Government's stated commitment to improving judicial diversity.[143]

The JCHR also enquired why the Government had not taken the opportunity to lay down in statute the rules governing the selection exercises for senior judicial appointments to international courts such as the European Court of Human Rights. The Government has indicated that there are "a number of issues which will need to be considered arising out of the recent selection exercises for the UK judicial office holders at the European Court of Human Rights and the European Court of Justice", and that "it is intended to discuss the process for making these international appointments with the Foreign Secretary."[144]

The proposals on judicial appointments were also considered by the House of Lords Constitution Committee.[145] The Committee considered a number of the detailed provisions contained in (the then) Schedule 12 to the Bill. In particular, it warned that a role should be retained for Parliament in determining the size of the Supreme Court as the Bill included a provision that would allow for a possible reduction in the size of the Supreme Court.[146] The Committee also expressed concerns over a number of matters, including: the role of the Lord Chancellor in relation to the appointment of the Lord Chief Justice and the President of the Supreme Court; the absence of an express diversity duty on the Lord Chancellor and the Lord Chief Justice; the absence of proposals to increase the retirement age for certain senior judges; and the absence of proposals about government lawyers becoming judges.[147]

A series of what were described as "technical amendments" to Schedule 2 were moved by the Government in Committee and agreed without a vote.[148] There was an attempt to increase the retirement age for Supreme Court judges to 75 in Committee.[149] Lord McNally promised to keep the matter "under review" but suggested that the Government was not minded to make this change. He noted that following retirement, members of the Supreme Court may go on to the supplementary panel. As a member of that panel, they might be asked to act as a judge of the Supreme Court. The relevant amendment was withdrawn.

On Report, a further group of Government amendments (some of which were described as "technical amendments to the judicial appointment and diversity provisions") were agreed

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[143] Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13

[144] *Ibid*, para 48

[145] House of Lords Constitution Committee, *Crime and Courts Bill [HL]*, 18 June 2012, HL Paper 17 2012-13

[146] The relevant provision in Schedule 13 would allow for salaried part-time working at the Supreme Court, but the Committee noted that the way that the provision was drafted, combined with correspondence with the Lord Chancellor had made plain that the provision could allow for "greater flexibility for the Court to operate below the mandatory current level of twelve Justices if this is agreed by the President of the Court.". *Ibid*, paras 10-11

[147] *Ibid*, para 13

[148] HL Deb 27 June 2012 c273. A large series of Government amendments which were not debated were also agreed at HL Deb 27 June 2012 cc292-94

[149] HL Deb 27 June 2012 c274

without debate.[150] Importantly, the Government dropped one of its proposals relating to the role of the Lord Chancellor in the selection process for the roles of the Lord Chief Justice and the President of the UK Supreme Court. Lord McNally explained that the amendments responded to concerns that had been expressed "by removing from the Bill those provisions relating to the Lord Chancellor's ability to sit on the selection panel for the Lord Chief Justice and the President of the Supreme Court."

He said:

> [W]e remain of the view that the Lord Chancellor should have a role in these senior appointments. Accordingly, while we will revert to the existing arrangements in that the Lord Chancellor will not sit on the selection panel but will decide whether to accept the selection, reject it or ask the panel to reconsider its selection, we intend to augment these to ensure that the Lord Chancellor is engaged earlier in the selection process. Taking on board the comments raised in Committee, we now propose that the selection panel consults the Lord Chancellor during the selection process. This already occurs in relation to Supreme Court appointments but will be new in relation to the appointment of a Lord Chief Justice.
>
> We have shared the draft indicative regulations with noble Lords relating to the appointment process and these provide for this consultation by the panel in relation to all appointments to the Supreme Court and to certain senior judges in England and Wales, such as the Lord Chief Justice and Lords Justice of Appeal. In addition to this, we will, as I have said, restore the current position whereby the Lord Chancellor will receive the selection panel's report and, in the light of that, decide whether to accept or reject the panel's recommendations, or alternatively ask the panel to reconsider its recommendation. I hope that noble Lords will agree that this approach now establishes an appropriate mechanism for the Lord Chancellor's views to be heard, while safeguarding the impartiality of the selection process.[151]

This move was welcomed by Lord Pannick QC (a member of the Lords Constitution Committee) and Lord Beecham.

At Third Reading, an amendment was proposed by the Government on the issue of judicial diversity. The amendment to encourage diversity, which was agreed, would add a new Section 137A to the *Constitutional Reform Act 2005* to place a statutory duty on the Lord Chancellor and Lord Chief Justice of England and Wales to "take such steps as the office-holder considers appropriate for the purposes of encouraging judicial diversity."[152]

The Minister, Lord McNally, also indicated in debate that a "tipping point" principle could be applied to appointments to the Supreme Court. He stated that the Government's view was that the tipping point provision contained in s 159 of the *Equalities Act 2010* already applied to such appointments, but that if there could be a contrary legal view, he could see merit in putting the matter beyond doubt and that the Government would therefore give further consideration to a proposed amendment on that issue.[153]

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[150] HL Deb 4 December 2012 cc579, c592, c595, cc597-600
[151] HL Deb 4 December 2012 c596
[152] HL Deb 18 December 2012 c1509
[153] HL Deb 18 December 2012 c1507. The former Lord Chancellor, Jack Straw, touched on this point in his Hamlyn Lecture of December 2012. For a summary of this, see: "Jack Straw on judicial appointments: 'Labour went too far'", *The Guardian*, 4 December 2012

3.4 Chief Executive of the Supreme Court

At Third Reading, the former President of the Supreme Court, Lord Phillips of Worth Matravers, proposed an amendment which would have amended the *Constitutional Reform Act 2005* to provide that the Chief Executive of the Supreme Court would be appointed by the President of the Supreme Court (rather than the Lord Chancellor).[154] The amendment was the subject of significant debate.[155] The Minister, Lord McNally, accepted that the amendment "reflected concern about the present arrangements [...] and the ramifications of those arrangements for the independence of the court" and recognised that it was "a matter of great constitutional importance". The Minister promised "meaningful discussions" with a view to addressing the issue "as soon as possible." The amendment was withdrawn.

3.5 Deployment of the judiciary

Clause 19 and Schedule 14 of the Bill relate to the deployment of judges. Deployment of the judiciary is a function referred to in the *Constitutional Reform Act 2005* and the *Tribunals Courts and Enforcement Act 2007.* The Explanatory Notes indicate that although responsibility for these matters in England and Wales currently lie with the Lord Chief Justice and the Senior President of Tribunals, "within the court system, the arrangements for deploying judges are largely uncodified" and the judges of the First Tier Tribunal and Upper Tribunal cannot at present be deployed into the courts. The Government explains that the purpose of the clause and schedule are to resolve these difficulties. At Second Reading, Lord Henley said that:

> The deployment of the judiciary is properly a matter for the Lord Chief Justice and the Senior President of Tribunals. The Bill does not change that, but it affords them greater flexibility by expanding the list of judicial office holders who are capable of sitting in each court or tribunal. Such flexibility will enable the available pool of judges to be used to best effect, thereby further contributing to the quicker resolution of cases.[156]

Schedule 14 is detailed and is divided into seven parts. It expands the lists in statute of the various judicial office holders who are able to sit in each type of court and tribunal. The Government made various amendments to the Schedule (as first introduced).[157] The amendments had the effect (amongst other things) of introducing a new appointments process for deputy High Court judges (involving a JAC selection process) and a limited exemption from this requirement where there is an urgent need and it is expedient as a temporary measure to make a temporary appointment. Lord McNally described this as "an important reform to increase transparency regarding these appointments."[158]

3.6 Transfer of immigration or nationality judicial review applications

Background

The Labour government attempted to legislate to transfer responsibility for immigration and nationality judicial reviews to the Upper Tribunal, with limited success.[159]

The *Tribunals, Courts and Enforcement Act 2007* allowed certain judicial review cases to be transferred from the High Court to the Upper Tribunal, but not immigration (including asylum) or nationality cases. This was due to concerns expressed in Parliament about the sensitive nature of these cases, which often give rise to disputes over internationally-binding principles

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[154] HL Deb 18 December 2012 c1488
[155] HL Deb 18 December 2012 cc1488-1500
[156] HL Deb 28 May 2012 c975
[157] See: HL Deb 2 July 2012 cc502-7
[158] *Ibid*
[159] See Library Research Papers 09/47, *Borders, Citizenship and Immigration Bill [HL]*; 09/65, *Borders, Citizenship and Immigration Bill [HL]: Committee Stage Report*

concerning the right to liberty and freedom from torture or inhuman or degrading treatment or punishment.[160] The then Government accepted that the bar on transferring these cases should not be lifted until there had been an opportunity to review how the Upper Tribunal had been working.

The issue was debated again during the passage of what became the *Borders, Citizenship and Immigration Act 2009*. The Bill as originally introduced would have lifted the statutory bar in the 2007 Act, to allow the transfer of any immigration or nationality judicial review case to the Upper Tribunal. Parliament rejected this proposal, but agreed on a compromise measure which allowed for the transfer of judicial reviews related to decisions on 'fresh clams' for asylum.[161] The Upper Tribunal has dealt with 'fresh claim' judicial reviews since October 2011.

The Government considers that a power to enable the transfer of all immigration and nationality judicial review cases to the Upper Tribunal is now needed because:[162]

- *They are placing an unsustainable burden on the Administrative Court* - the Government says that the total number of these cases has doubled over five years, and that they currently form around 70 per cent of the Court's caseload, causing delays for all types of case. It further contends that many of the immigration and nationality cases are relatively straightforward to deal with.

- *The Upper Tribunal has the appropriate expertise to deal with them* - the Government argues that the experience of the Upper Tribunal has been positive, and that judges in the Upper Tribunal (who may be joined by judges from the Administrative Court) have a high level of expertise in immigration and nationality cases.

The Joint Committee on Human Rights has noted that a systematic review of how the Upper Tribunal has exercised its judicial review powers has not been carried out, and has urged the Government to consider amending the Bill in order to ensure that cases where life, liberty or freedom from torture are at stake continue to be decided by High Court judges.[163]

The Bill

Clause 20 would remove the restrictions in existing legislation, in order to allow for applications for judicial review or for permission to apply for judicial review in any type of immigration, asylum or nationality case to be transferred from the High Court in England, Court of Session in Scotland, or High Court in Northern Ireland, to the Upper Tribunal. Categories of cases would be transferred after directions had been issued by or on behalf of the Lord Chief Justice. The Government anticipates that the transfers would take place "in staged fashion."[164]

The clause, which was introduced as a Government amendment at Lords Committee stage, did not prove to be as controversial in the Lords as previous attempts to restrict access to the higher courts in immigration and nationality cases.[165] Lord Woolf (a former Lord Chief Justice of England and Wales) and Lord Beecham (speaking on behalf of the Opposition) indicated their support for the changes, which Lord Woolf said were regarded as a "lifeline" for the High Court. Only Lord Avebury contended that "the arguments against the Upper Tribunal being

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160 See for example HL Deb 13 December 2006 cc68-69GC
161 s53, *Borders, Citizenship and Immigration Act 2009*
162 HL Deb 2 July 2012 cc494-5
163 Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13, paragraph 75
164 HL Deb 2 July 2012 c500
165 HL Deb 2 July 2012 cc494-501

entrusted with this responsibility still hold good". He suggested various other ways in which the volume of immigration judicial reviews could be reduced, highlighting that a large number of appeals are withdrawn, or conceded by the UK Border Agency (UKBA) before reaching a full hearing. Lord McNally did not dispute this, but said that the UKBA was improving its approach to these cases.

3.7 Appeals relating to regulation of the Bar

Current position

Appeals in disciplinary hearings for barristers (and certain other matters) are currently heard by High Court judges sitting in their capacity as Visitors to the Inns of the Court. This appeals procedure differs from the procedure relating to solicitors found guilty of professional misconduct who have a right of appeal to the High Court.

In 2009, the previous Government published the draft *Civil Law Bill* which proposed (among other things) to replace the current arrangements with a right of appeal to the High Court where the appeal would be heard by judges sitting in their own right. The Bar Standards Board endorsed the proposal, and the provision was welcomed by the House of Commons Justice Committee which conducted pre-legislative scrutiny of the draft Bill.[166]

On 10 January 2011, the Government announced that it would not be proceeding with the proposed *Civil Law Reform Bill,* stating, "in the present financial situation we need to focus our resources on delivering our key priorities".[167]

The Bill

On Report in the House of Lords, the crossbench peer Baroness Deech, who is Chair of the Bar Standards Board (which regulates barristers) moved an amendment to introduce a new clause to deal with appeals relating to the regulation of the Bar. The new clause would abolish the jurisdiction of High Court judges to sit as Visitors to the Inns of Court and would confer on the Bar Council and the Inns of Court the power to confer rights of appeal to the High Court in relation to the matters that were covered by the Visitors' jurisdiction. Baroness Deech said that this transfer of the Visitors' jurisdiction "is something that the senior judiciary and the Bar Standards Board have been working towards for a number of years".[168]

Replying for the Government, Lord Ahmad of Wimbledon said that the Government supported the amendment and agreed that the practice of High Court judges sitting as Visitors to the Inns of Court was inappropriate. He said that the proposal to abolish the role of judges sitting as Visitors was supported by the Lord Chief Justice, the Bar Standards Board, the General Council of the Bar and the Inns of Court. Enabling appeal to the High Court instead would "improve administrative efficiency and transparency, and at the same time make the appeal arrangements for barristers more consistent with those for solicitors".[169]

The amendment was agreed without vote and is now **Clause 22.**

3.8 Enforcement of criminal financial penalties

Clauses 23 and **24** of the Bill deal set out new measures on the enforcement of criminal financial penalties.

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166 Justice Committee, *Draft Civil Law Reform Bill: pre–legislative scrutiny,* 31 March 2010, HC 300 2009-10, p54
167 HC Deb 10 January 2011 c8WS
168 HL Deb 4 December 2012 c606
169 HL Deb 4 December 2012 c606-7

The current law

Where a person is subjected to a financial penalty on conviction, for example a fine or a compensation order, the costs of enforcing this penalty if the offender defaults currently fall on the state. Responsibility for enforcing an unpaid financial penalty lies primarily with fines officers based at the court, who have the power to take certain enforcement actions without the need for court hearings or orders.[170]

There are various ways in which an offender can pay the amount he owes. If he is able to, he may pay in a single lump sum. Otherwise, the court may make a collection order at the same time as it imposes the financial penalty, which will allow the offender to pay in instalments. A third option is for the court to make an attachment of earnings order (AEO) or an application for benefit deductions (ABD). Under an AEO or an ABD, instead of the offender making payments to the court, deductions are instead taken at source from the offender's earnings or benefits (by the employer or the Department for Work and Pensions respectively) before he receives them.

If an offender defaults on a collection order and is not already subject to an AEO or ABD, then the fines officer must make one. If the offender is already subject to an AEO or ABD then the fines officer must either issue a "further steps" notice or refer the case to a magistrates' court.

A further steps notice will advise the offender that the fines officer intends to take one of the following enforcement steps:

- the issuing of a distress warrant, under which goods or money may be seized from the offender to meet the amount due;
- the registration of the outstanding sum in the register of judgments and orders;
- the taking of enforcement proceedings in the High Court or county court; or
- the making of a clamping order in respect of the offender's vehicle.[171]

If the fines officer instead refers the case to a magistrates' court, then the steps open to the court include varying the payment terms or reserve terms, taking any of the enforcement steps open to the fines officer, increasing the fine by up to 50 per cent, or discharging the collection order and exercising any of the court's standard fine enforcement powers (including imprisonment in default).

The Bill

Clause 23(1) of the Bill would provide for the cost of collecting any sums due under a financial penalty imposed on conviction to be borne by the person liable to pay the sum, rather than by the state. The sum due under the principal financial penalty would be treated as increased by the amount of the collection costs charged. The collection costs would therefore be recoverable in the same way as the principal penalty and default would be subject to the same sanctions.

Clause 23(2) would clarify that the role of fines officers is not to be treated as involving the making of judicial decisions or the exercise of judicial discretion for the purposes of section 2(5) of the *Courts Act 2003*. The 2003 Act permits the Lord Chancellor to contract out the functions of court staff unless these functions involving the making of judicial decisions or the

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[170] *Courts Act 2003*, Schedule 5

[171] A magistrates' court may subsequently order the sale of the clamped vehicle if the outstanding sum remains unpaid one month after the vehicle was clamped

exercise of judicial discretion. Clause 23(2) would therefore give the Lord Chancellor the clear ability to contract out the functions of fines officers.

Clause 24 of the Bill would amend Schedule 5 to the 2003 Act by providing for the exchange of social security and finances information between specified Government departments and agencies. This information would be used to facilitate the making of a decision by the court or a fines officer as to whether to make an AEO or an ABD against an offender.

Debate in the Lords

Clauses 23 and 24 of the Bill did not attract a great deal of debate and were added to the Bill without amendment or division.

Most of the substantive debate related to an amendment moved by Lord Touhig in Committee, which would have required the offender's means to be taken into account when calculating any additional costs of collection.[172] He said that means-testing was already used when calculating the original financial penalty; it should therefore also be applied to the calculation of additional costs to ensure that an offender's income would not be forced below an unsustainable level.

In response, Baroness Northover stressed that the provision was aimed at those "who deliberately evade payment".[173] She acknowledged the need to make allowances for the fact that some offenders lead chaotic lives and were vulnerable. The additional costs would not therefore apply to those who either pay as ordered or who remain in contact with the court and comply with any payment plans set up by fines officers. She said that additional costs would be fixed and proportionate to the actual costs of collection, and that it would be inappropriate to require fines officers to exercise judicial discretion by undertaking a means assessment. She also noted that the court would have the power to remit part or all of the collection costs under existing powers set out in section 85 of the *Magistrates' Courts Act 1980*. This could be exercised if an offender wished to challenge a fines officer's decision on additional costs, for example on the grounds of vulnerability or incorrect financial information that had led to a substantially higher penalty.

The amendment was withdrawn.

3.9 Enforcement services - Bailiffs

An amendment on bailiffs moved by Baroness Meacher at Third Reading (now **clause 26**) was agreed on division. On Report, Baroness Meacher had moved a more ambitious amendment that would have introduced independent regulation of bailiffs, but this was not pressed.

In moving this amendment, Baroness Meacher said its objective is to provide protection for vulnerable people (such as disabled or mentally ill, or mothers with young children or the elderly) from aggressive bailiffs. The amendment would provide complainants with access to the Legal Ombudsman if the internal complaints processes fail to resolve a dispute. Baroness Meacher assured the House that the Legal Ombudsman was both able and willing to take on this role.[174] She argued that only an independent complaints ombudsman could deliver redress in a way that would be consistent with principles of administrative justice; award financial restitution where appropriate; publish data on good and bad practice; and make recommendations for improvements.

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[172] HL Deb 2 July 2012 c533
[173] HL Deb 2 July 2012 c537
[174] HL Deb 18 December 2012 c1475

The amendment attracted a great deal of debate during Third Reading. Lord Lucas, who is also chair of the Enforcement Law Reform Group, argued that the bailiff industry itself wants proper regulation and a complaints system.[175] Lord Kirkwood agreed with Baroness Meacher that with the introduction of welfare reforms, April 2013 marks a significant change to the risks faced by low-income households against a very difficult financial background.[176] He argued that it was essential to have in place a proper appeals system, a competent complaints service and licences that can be withdrawn if bailiffs abuse the rules.[177] Lord Beecham complained that the Government was taking far too long to respond to its consultation on bailiff reform; 7 months have now passed.[178] In supporting the amendment, he stressed that it was important to get some movement here. Lord Bishop of Lichfield argued that the present system of certification of private bailiffs by county courts fails to monitor behaviour; it is intimidating and costly for vulnerable people to bring complaints and there is no power for a court to award redress.[179]

Baroness Meacher had been willing to withdraw her amendment if the Minister made a commitment that an independent appeals process would be quickly introduced to cover bailiffs.[180] In his response, Lord McNally, said that he could make no such commitment. In giving his reasons, he said that the Government was already looking to tackle problem of aggressive bailiffs and had set out its proposals in the '*Transforming Bailiff Action'* consultation paper.[181] He said that it was important to await the response to the consultation, as its proposed reforms have the best chance of delivering long-term success. In asking the House not to press this amendment, he acknowledged that there would be an onus on him to make rapid progress on this issue, but he declined to suggest a timescale.[182]

Further, the Minister said that this amendment would not address the issue of aggressive bailiffs, nor would it supply debtors with an independent complaints process which would meet their needs. He argued that the *Legal Services Act* contemplates a service relationship between professionals, such as solicitors and their clients, which is not present between bailiffs and debtors. Under this amendment, debtors would not be able to complain to the Legal Ombudsman because the bailiff is not providing them with a service as required for complaints under the Act. In his view, it was neither appropriate nor sensible to try to force the regulation of bailiffs into this framework, since it was not constructed to address the circumstances in question.[183] This assessment was refuted by Baroness Meacher.

It should be noted that the whole issue of aggressive bailiff action, and the need to protect vulnerable people in society, has been raised on a number of separate occasions over the years. As mentioned by the Minister, a consultation paper, '*Transforming Bailiff Action',* was published by the Ministry of Justice on 17 February 2012.[184] This paper sets out reforms to achieve various Government objectives, including: providing more protection against aggressive bailiffs; proportionate debt effective enforcement; a fair, transparent and sustainable costs regime that provides adequate remuneration; and minimising excessive regulation on business while ensuring effective protection for the vulnerable. The consultation closed on 14 May 2012. A Government response setting out the proposals it

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175 HL Deb 18 December 2012 c1477
176 HL Deb 18 December 2012 c1478
177 HL Deb 18 December 2012 c1479
178 HL Deb 18 December 2012 c1482
179 HL Deb 18 December 2012 c 1480
180 HL Deb 18 December 2012 c1477
181 Ministry of Justice, '*Transforming bailiff action – How we will provide more protection against aggressive bailiffs and encourage more flexibility in bailiff collections'*, 'consultation paper CP 5/2012, 17 February 2012
182 HL Deb 18 December 2012 c 1484-1485
183 HL Deb 18 December 2012 c 1484-1485
184 Ministry of Justice, '*Transforming bailiff action – How we will provide more protection against aggressive bailiffs and encourage more flexibility in bailiff collections'*, 'consultation paper CP 5/2012, 17 February 2012

intends to take forward and a timetable for when they may be introduced was expected to be published in the autumn, but has not yet appeared. Further background information is available from a Library standard note.[185]

3.10 Supreme Court security officers

Clause 27 of the Bill would insert additional sections to the *Constitutional Reform Act 2005*, which would make provision for Supreme Court security officers who would operate in any building where the business of the Supreme Court or the Judicial Committee of the Privy Council was carried out.

The clause is the result of an amendment tabled by Lord Pannick QC and Lord Phillips of Worth Matravers. When he introduced the amendment, Lord Pannick explained that:

> The amendment seeks to give security officers at the United Kingdom Supreme Court the same powers as those available to court security officers in the other courts of England and Wales under Sections 52 to 57 of the *Courts Act 2003*. Those sections give court security officers statutory powers to search people, to exclude or remove people from court buildings or to restrain them in court buildings, and to seize, retain and dispose of offensive articles in court buildings. The provisions also create a criminal offence of assaulting or obstructing a court security officer.[186]

Lord Pannick explained that there was a gap in the law as the 2003 Act only confers powers on staff appointed and then designated as security officers by the Lord Chancellor in relation to those courts where he is responsible for running an efficient and effective service. In the case of the Supreme Court, the *Constitutional Reform Act 2005* vests in the President of the court the power to appoint staff, and the chief executive is under a duty to run an efficient and effective service. The powers conferred by the *Courts Act 2003* are therefore not at present available to Supreme Court security officers.

The Government accepted the amendment, which was agreed without a division.

3.11 Cameras in courts

Clause 28 of the Bill would give the Lord Chancellor powers to bring forward secondary legislation which would allow the recording and broadcasting of court proceedings.

The current law and Government proposals for reform

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.[187]

In September 2011 Kenneth Clarke, then Lord Chancellor and Justice Secretary, announced plans to remove the ban on cameras in courts.[188]

In May 2012, the Ministry of Justice published *Proposals to allow the broadcasting, filming, and recording of selected court proceedings*.[189] The document detailed the Government's intention to change the law to remove the ban on cameras in court and the broadcast of sound and image recordings in limited circumstances, initially allowing judgments and legal

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185 'Proposed reform of bailiffs', Library standard note SN/HA/6230, 18 May 2012, [online] (accessed 19 December 2012)

186 HL Deb 4 December 2012 c648

187 Section 41 of the *Criminal Justice Act 1925* and section 9 of the *Contempt of Court Act 1981.* For the Supreme Court see section 47 of the *Constitutional Reform Act 2005*.

188 HC Deb 6 Sept 2011 c18WS

189 Ministry of Justice, *Proposals to allow the broadcasting, filming, and recording of selected court proceedings*, 10 May 2012

arguments in cases before the Court of Appeal (Criminal and Civil Divisions) to be broadcast. It also stated that over a longer period the Government would extend broadcasting to judges' sentencing remarks in the Crown Court.[190]

The Government said its proposals were part of a commitment to open justice and transparency, and set out its belief that people would have more confidence in the justice system if they were more informed about it.[191]

The document proposed that use of the footage would be restricted to news, current affairs and educational programmes. It would not be used in light entertainment, satirical programmes, advertising or promotion, as is the case with the agreements already in place for broadcast from the Supreme Court and Parliament.[192] Broadcasting would only be allowed by recognised media organisations using authorised cameras installed in the court rooms for the purpose of filming footage for broadcast.[193]

The document stated that victims, witnesses, jurors and defendant would not be filmed in any circumstances. Filming would not, therefore, give defendants an opportunity for theatrical public display.[194]

The Government's proposals were welcomed by broadcasters. A joint statement in May 2012 from ITN, the BBC and Sky News said that broadcasting proceedings would lead to "greater public engagement and understanding of our legal system".[195]

Victim Support welcomed the proposal but cautioned that proper safeguards must be in place to protect witnesses and victims from the added stress of cameras in court.[196]

The Law Society was generally supportive of the proposals but expressed some reservations about the risk of "selective and sensational reporting".[197] The Bar Council and the Criminal Bar Association voiced their qualified support in September 2011 when the proposals were initially announced.[198]

The Bill

Clause 28 of the Bill would take forward the Government's proposals. It would enable the Lord Chancellor, with the agreement of the Lord Chief Justice, to make an order setting out the specific circumstances in which the existing statutory prohibitions on visual and sound recordings in courts would be lifted. Any order made under clause 28 would be subject to the affirmative resolution procedure.[199] The court or tribunal would retain discretion to stop filming in any particular case if it would interfere with justice.

Reaction to the Bill

The House of Lords Delegated Powers and Regulatory Reform Committee was concerned that there was nothing on the face of the Bill to prevent an order being made in the future to

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190 Ibid, p19
191 Ibid, p7
192 Ibid, p19
193 Ibid, p21
194 Ibid, p20
195 Sky News press release, *Joint statement from Sky News, ITN & BBC re: Cameras in court*, 9 May 2012
196 Victim Support press release, *Victim Support responds to televised sentencing*, 6 September 2011
197 Law Society, *Law Society's response to the legislative programme outlined in the Queen's Speech*, May 2012
198 Bar Council press release, *Bar Council and Criminal Bar Association voice qualified support for courtroom cameras*, 6 September 2011
199 Clause 39(4)(g)

authorise the filming and broadcasting of witnesses, parties, victims, jurors or defendants (though reassurances were given in the delegated powers memorandum).[200]

The Joint Committee on Human Rights report on the Crime and Courts Bill urged caution and expressed concern that the change may discourage certain vulnerable witnesses and victims from testifying in criminal trials, and strip certain vulnerable defendants of necessary protection.[201] It called on the Government to conduct a more comprehensive public consultation, carry out a more detailed impact assessment and conduct a review of the operation of the power before making any extension to the new broadcasting powers. The Committee also recommended that the Bill be amended to confine the scope of the power to filming and broadcasting of judges and advocates in appellate proceedings.[202]

The civil liberties organisation Liberty, whilst supporting the Government's policy of increasing public understanding of the justice system, also raised concerns about the "sweeping" reforms on the face of the Bill as proposed.[203] The law reform and human rights organisation Justice expressed similar concerns.[204]

Debate in the Lords

As introduced in the Lords, the Bill provided for the order made by the Lord Chancellor to be subject to negative procedure. In Committee, the Government moved an amendment for orders under **clause 28** to be subject to the affirmative procedure.[205] Baroness Northover said that use of the affirmative procedure would strengthen the "triple lock" provided by the Lord Chancellor, Lord Chief Justice and the scrutiny of Parliament so that each and every extension of court broadcasting would also have to be debated and approved by both Houses.

Lord Beecham stated that he supported the principle of the clause but sought further safeguards. He spoke to an amendment, later withdrawn, that would have required the Lord Chancellor to confirm to Parliament that various principles (including the protection of witnesses and victims) had been adhered to before extending the categories of proceedings that could be broadcast.[206]

Baroness Hamwee raised concerns that broadcasting might cause counsel to "play to the gallery".[207] This concern was echoed by Lord Thomas, who feared that court proceedings would be made public entertainment with sentencing remarks only being used in high-profile cases involving salacious details or celebrities.[208] He mentioned the case in Norway of a defendant[209] who had used the broadcasting of his case as a way of getting his message to the public.[210] Lord Thomas was also concerned that the media would soon create pressure for the faces of the defendant or the victim's family to be shown at the point of sentencing.

At Second Reading, Baroness Kennedy had raised a number of concerns, including the risk of television companies only being interested in the "sensational, the salacious and the

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200 *Crime and Courts Bill Delegated Powers Memorandum by the Home Office and Ministry of Justice,* DPRR/12-13/07, p44
201 Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13
202 ibid p 20
203 Liberty, *Second Reading Briefing on the Crime and Courts Bill in the House of Lords*, May 2012, p12
204 Justice, *Crime and Courts Bill 2012, Briefing for Committee Stage, House of Lords*, June 2012, para 7
205 HL Deb 2 July 2012 c553
206 HL Deb 2 July 2012 c547
207 HL Deb 2 July 2012 c549
208 HL Deb 2 July 2012 c549
209 Anders Breivik
210 See "Anders Breivik pleads not guilty at Norway murder trial", *BBC News*, 16 April 2012

grotesque" and the risk of potential "drift" allowing more proceedings to be broadcast. She also raised the possibility of judges being vilified and criticised if press comment took the view that the sentences they passed were not tough enough.[211] On Report she moved an amendment which, as suggested by the Joint Committee on Human Rights, would have limited the use of cameras to appellate proceedings.[212] She ultimately withdrew her amendment but said she did so giving a warning about the serious implications of taking cameras into courts and what it would do to the justice system.[213]

By contrast, Lord Pannick spoke in favour of the measures and submitted that the concerns expressed by others were unfounded. He said broadcasting would "enhance the public understanding of our justice system", and that "justice should be seen to be done".[214]

3.12 Scandalising the judiciary

Clause 29 of the Bill would abolish scandalising the judiciary as a form of contempt of court in England and Wales. It was added to the Bill by way of an amendment moved by Lord Pannick. The Government supported the amendment and it was agreed without division.

The current law

Scandalising the judiciary is a centuries-old form of contempt of court that is committed by publishing material likely to undermine the administration of justice or public confidence therein. This might include, for example, publishing abuse towards a judge or suggesting that he or she is corrupt or partial.

The last recorded successful prosecution for scandalising the judiciary in England and Wales was in 1931,[215] and in 1985 Lord Diplock referred to the matter as "virtually obsolescent".[216] However, it received renewed attention in March 2012 when the Attorney General for Northern Ireland (John Larkin) was granted permission to bring proceedings for scandalising the court against former cabinet minister Peter Hain. The proceedings were based on comments Mr Hain had made criticising Lord Justice Girvan's handling of a judicial review case in Northern Ireland.[217] An Early Day Motion tabled by David Davis called for the Northern Ireland Attorney General to "end this serious attack on free speech by withdrawing the proceedings for contempt"; it attracted 153 signatures.[218] The case against Mr Hain was set aside in May 2012 after he wrote to Mr Larkin to clarify his comments and to make clear that they were not intended to undermine the administration of justice in Northern Ireland or the independence of the Northern Ireland judiciary.[219]

The Bill

In the wake of the Peter Hain affair Lord Lester of Herne Hill, Lord Pannick, Lord Bew and Lord Mackay of Clashfern tabled an amendment to the Bill to abolish scandalising the judiciary as a form of contempt of court under the common law of England and Wales and Northern Ireland.[220] Lord Pannick described scandalising the judiciary as a "legal relic" that would have remained as such but for the Attorney General of Northern Ireland "breathing life" into it. The amendment received cross-party support.

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211 HL Deb 28 May 2012 c1038
212 HL Deb 10 December 2012 c861
213 HL Deb 10 December 2012 c870
214 HL Deb 2 July 2012 c550
215 *Colsey*, The Times 9 May 1931
216 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 at 347A
217 "Peter Hain faces contempt case over book's criticism of judge", *Guardian*, 27 March 2012
218 Early Day Motion 2984, Session 2010-12
219 "Peter Hain contempt case will not proceed", *Independent*, 17 May 2012
220 HL Deb 2 July 2012 cc 555-566

In response, Justice Minister Lord McNally said that the Government was sympathetic to the amendment. However, he asked for it to be withdrawn for the time being as the Government needed to "consider the issue further and consult others, particularly the judiciary and the devolved Administrations, before taking a final view".[221] The amendment was withdrawn on this understanding.

The Law Commission had been planning to review the offence of scandalising the court as part of a wider review of contempt that it is currently undertaking.[222] However, it brought forward its review of the offence to tie in with the Government's commitment to look at the issue ahead of Report stage. It issued a consultation paper in August 2012 that sought views on its provisional proposal that the offence should be abolished without replacement.[223] The consultation closed on 19 October 2012. Of the 46 responses received, 32 were in favour of this proposal.[224]

Lord Pannick moved a revised version of the amendment on Report, which provided for the abolition of scandalising the judiciary in England and Wales.[225] It also made clear that the abolition would not prevent proceedings for contempt being brought against a person for conduct that would also have constituted some other form of contempt of court as well as scandalising the judiciary.[226]

Lord McNally expressed the Government's support for the revised amendment, and it was added to the Bill without division. The amendment now appears as **clause 29** of the Bill.

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221 HL Deb 2 July 2012 c564

222 Law Commission website, *Areas of Law: Criminal - Contempt* [accessed 7 January 2013]

223 Law Commission Consultation Paper No 207, *Contempt of Court: Scandalising the Court – A Consultation Paper*, August 2012

224 Law Commission, *Contempt of Court: Scandalising the Court*, HC 839, December 2012

225 The revised amendment did not extend to Northern Ireland as the original amendment had done, on the basis that this is a devolved matter that is being examined by the authorities in Northern Ireland

226 HL Deb 10 December 2012 cc871-876

4 Use of force in self-defence

Clause 30 of the Bill would introduce a new test for determining whether a householder had acted lawfully in using force in self-defence at his or her place of residence. For detailed background on this issue, please see Library Standard Note 2959 *Householders and the criminal law of self defence*.

4.1 The current law

A householder may be liable to criminal prosecution if he uses force against an intruder resulting in the intruder's death or injury. However, he will have a complete defence if the force he used was reasonable and was exercised either in self-defence, defence of another, defence of his property, or in the prevention of crime.[227]

The test to be applied is whether the use of force was necessary at all and, if so, whether the degree of force actually used was reasonable in the circumstances. The question of whether the force used in any particular case was reasonable will be answered on the basis of the circumstances and the danger as the householder believed them to be. This is so even if the householder's belief was a mistaken one honestly held, unless the mistake was due to his or her self-induced intoxication.[228] The court may also take account of the householder's physical characteristics in deciding whether the force used was reasonable[229] but not – save in exceptional circumstances – any psychiatric conditions that may have made the householder perceive the circumstances as more dangerous than a reasonable person would have done.[230]

The householder is not expected to undertake a detailed risk analysis before deciding whether to use force:

> If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.[231]

Section 76 of the *Criminal Justice and Immigration Act 2008* established a statutory framework (based on existing case law) for assessing reasonableness. It was aimed at "clarifying" the operation of the common law and section 3 defences, rather than amending them. The explanatory notes to the Act provide further information:

> 533. In line with the case law, notably from the leading case of Palmer v R [1971] A.C. 814, the defence will be available to a person if he honestly believed it was necessary to use force and if the degree of force used was not disproportionate in the circumstances as he viewed them. The section reaffirms that a person who uses force is to be judged on the basis of the circumstances as he perceived them, that in the

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[227] The use of force in self-defence or in defence of property is governed by the common law, while the use of force in the prevention of crime is governed by section 3 of the *Criminal Law Act 1967*. There will inevitably be a degree of overlap between the common law defence and the statutory one, as a householder who uses force against an intruder will often be doing so both in self-defence and to prevent crime. However, to date the courts have interpreted the two defences in the same way: see *Archbold Criminal Pleading, Evidence and Practice*, 2012, para 19-42

[228] *R v O'Grady* [1987] QB 995, *R v Hatton* [2005] EWCA Crim 2951

[229] "Circumstances which would not be seen as threatening by a robust young man may appear so to a frail elderly woman": Smith and Hogan, *Criminal Law*, 11th edition, 2005, p331

[230] *R v Martin* [2001] EWCA Crim 2245

[231] *Palmer v R*, 1971 AC 814

> heat of the moment he will not be expected to have judged exactly what action was called for, and that a degree of latitude may be given to a person who only did what he honestly and instinctively thought was necessary. A defendant is entitled to have his actions judged on the basis of his view of the facts as he honestly believed them to be, even if that belief was mistaken.[232]

A joint statement by the Crown Prosecution Service (CPS) and the Association of Chief Police Officers provides further guidance to members of the public. It states:

> Anyone can use reasonable force to protect themselves or others, or to carry out an arrest or to prevent crime. You are not expected to make fine judgements over the level of force you use in the heat of the moment. So long as you only do what you honestly and instinctively believe is necessary in the heat of the moment, that would be the strongest evidence of you acting lawfully and in self-defence. This is still the case if you use something to hand as a weapon.
>
> As a general rule, the more extreme the circumstances and the fear felt, the more force you can lawfully use in self-defence.[233]

When deciding whether to prosecute a householder who has used violence against an intruder, CPS legal guidance advises prosecutors of the need to strike a balance between "the public interest in promoting a responsible contribution on the part of citizens in preserving law and order" and "discouraging vigilantism and the use of violence generally".[234] The guidance suggests that prosecutors should have particular regard to the nature of the offence being committed by the intruder, the degree of excessiveness of the force used by the accused, the extent of the injuries sustained by either or both parties, and whether the accused was making "an honest albeit overzealous attempt to uphold the law rather than taking the law into his own hands for the purposes of revenge or retribution".[235]

There is also specific guidance for the police to consider when deciding whether to arrest an individual who claims to have been acting in self-defence. It stresses that it will not always be necessary to arrest the individual prior to interviewing him, and that the police "must consider whether the suspect's voluntary attendance is a practicable alternative for carrying out the interview".[236]

For some illustrative cases of how the current law has been applied in recent years, please see section 6 of Library Standard Note 2959 *Householders and the criminal law of self defence*.

4.2 Calls for reform

Over the last ten years there have been repeated calls from a number of Conservative backbenchers for the current test of "reasonable force" to be replaced with a test under which householders would not be prosecuted unless their actions were "grossly disproportionate".

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232 *Criminal Justice and Immigration Act 2008: Explanatory Notes*, paras 532-534. Section 148 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* will amend section 76 of the 2008 Act by making clear that it applies to the common law defence of defence of property, and by making clear the existing common law position that a person is not under a duty to retreat (although the possibility that they could have retreated is an element to be considered when deciding whether the degree of force used was reasonable). Section 148 has not yet been commenced.

233 CPS website, *Householders and the use of force against intruders* [accessed 7 January 2013]

234 CPS website, *Legal guidance: self-defence and the prevention of crime* [accessed 7 January 2013]

235 Ibid

236 Home Office, *Police and Criminal Evidence Act 1984 (PACE): Code G – Code of Practice for the Statutory Power of Arrest by Police Officers*, pp9-10

Several Conservative Members have previously sought (unsuccessfully) to introduce such a test by way of Private Members' Bills.[237]

Writing in the *Sunday Telegraph* in December 2009, the then shadow Home Secretary Chris Grayling indicated that any future Conservative government would review the law on self-defence. He said that "prosecutions and convictions should only happen in cases where courts judge the actions involved to be 'grossly disproportionate'".[238]

In September 2012, a number of Conservative backbenchers were quoted in the Sunday Telegraph making renewed calls for a "grossly disproportionate" test.[239] Nick de Bois, a member of the Justice Committee, said it was "time to raise the bar so that victims of crime do not find themselves facing prosecution for defending their own homes". Patrick Mercer and Priti Patel expressed similar views.

However, during a House of Lords debate in February 2010 both Labour and the Liberal Democrats expressed support for the current law of reasonable force, arguing that it worked well and that adequate protection was provided by the "exercise of prosecutorial discretion and the good sense of the jury".[240]

Others have argued that a change to "grossly disproportionate" could encourage vigilantism and would effectively sanction extrajudicial punishment. Paul Mendelle QC, speaking when he was chairman of the Criminal Bar Association, said:

> "You would have, in effect, sanctioned extrajudicial execution or capital punishment for an offence, burglary, that carries a maximum of 14 years — which is the sentence that Parliament decided was appropriate." He warned that the change could also make householders less safe. "Burglars, knowing that they could be killed, might be more likely to carry weapons and/or use extreme violence. So it would be wholly counterproductive," he said.[241]

Michael Wolkind QC, who has acted as defence counsel in a number of high profile prosecutions involving self-defence, said:

> "If I manage to tackle a criminal and get him to the ground, I kick him once and that's reasonable, I kick him twice and that's understandable, three times, forgivable; four times, debatable; five times, disproportionate; six times, it's very disproportionate; seven times, extremely disproportionate — in comes the Tory test — eight times, and it's grossly disproportionate. It is a horrible test. It sounds like state-sponsored revenge. I don't understand why sentencing should take place in the home. Why can't it go through the courts? Why can't the jury, as they always do, decide what is reasonable?"[242]

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[237] See for example Patrick Mercer's *Criminal Law (Amendment) (Householder Protection) Bill 2004/05* (background in Library Research Paper 05/10 Criminal Law (Amendment) (Householder Protection) Bill) and Anne McIntosh's *Criminal Law (Amendment) Protection of Property) Bill 2005/06* (background in Library Research Paper 05/83 The Criminal Law (Amendment) (Protection of Property) Bill

[238] "Chris Grayling: A Tory government would seek to protect the rights of the victim", *Sunday Telegraph*, 20 December 2009

[239] "Conservative MPs demand greater rights for householders against burglars", *Sunday Telegraph*, 9 September 2012

[240] HL Deb 25 February 2010 cc1085-1087

[241] "Fears of 'licence to kill' as Tories bid to change self-defence law", *Times*, 25 January 2010 [*electronic version available via subscription only*]

[242] Ibid

Keir Starmer, Director of Public Prosecutions, has also expressed support for the existing law on reasonable force, emphasising that there are "many cases, some involving death, where no prosecutions are brought".[243]

4.3 The Bill

Clause 30 would amend section 76 of the *Criminal Justice and Immigration Act 2008* to state that in a "householder case" (where a person defends themselves or others from intruders in their home), the degree of force used by the householder would not be regarded as reasonable if it was "grossly disproportionate" in the circumstances as the householder believed them to be. As the Explanatory Notes to the Bill state, "In other words, it could be reasonable for householders to use disproportionate force to defend themselves from burglars in their homes".

The amendment is limited to householders defending themselves or others in their dwellings.[244] In other circumstances where people might be required to defend themselves, for example if they are attacked on the street or if they are defending property or preventing crime, the current law on reasonable force would continue to apply.

4.4 Debate in the Lords

Clause 30 was introduced to the Bill by way of a Government amendment on Report, which provoked heated debate.

Lord McNally said:

> The Government feel strongly that householders, acting in extreme circumstances to protect themselves or others, cannot be expected to weigh up exactly how much force is necessary to repel an intruder. There may be a fine line between actions that are proportionate in the circumstances and those which might be regarded as disproportionate. The Government think householders should be given the benefit of any doubt and that Section 76 of the 2008 Act should be amended accordingly. As long as householders have done only what they believed was reasonable in the circumstances, it should not matter if those actions were disproportionate when viewed with the benefit of hindsight.[245]

Lord Beecham suggested that all the Government's proposal would add to the present state of the law was confusion, as the difference between disproportionate force and grossly disproportionate force was unclear. He was also concerned that the proposal might unintentionally cause heightened risk to homeowners and lead to more householders being injured and killed.[246]

Lord Woolf stated that he regarded the amendment as "a very bad example of where statutory interference with the common law is wholly unnecessary".[247]

Lord Pannick stated that the law was very clear on this subject and that the official specimen directions to juries provide all the protection that the householder needs.[248] He said that the

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[243] "DPP rejects call for change in self-defence law", *BBC News*, 28 December 2009

[244] People who live in buildings which serve a dual purpose as a place of residence and a place of work (i.e. a shopkeeper who lives above the shop) would be able to rely on the defence regardless of which part of the building they were in when confronted with the intruder, so long as there was some internal access between the two parts

[245] HL Deb 10 December 2012 c 881

[246] HL Deb 10 December 2012 c883

[247] HL Deb 10 December 2012 c885

[248] See Judicial Studies Board, *Crown Court Bench Book: Directing the Jury*, March 2010, p293

Minister had not referred to any cases of unjust conviction or even unjust prosecutions that should not have been brought, and argued that the possibility that such cases might conceivably occur was a weak basis for proposing reform of the law.[249]

Baroness Kennedy described the amendment as "the poorest kind of legislative endeavour", and said that it sought to "appeal to a fear in the public that is already met by law".[250] She also expressed her belief that the provision was incompatible with articles 2 and 8 of the European Convention on Human Rights, which require the criminal law to provide adequate protection for the rights to life and physical integrity.

Lord Pannick agreed, stating:

> It is one thing to allow the householder to use proportionate force and to assess that on the basis of what they honestly and reasonably understand the facts to be at the time they act in circumstances of shock and distress. It surely is a very different matter for Parliament to authorise the use of disproportionate force.[251]

Lord Beecham asked whether the Government had consulted the judiciary or the police and on the proposed changes and whether they had conducted an impact analysis.[252] Lord McNally did not respond to this specific point. He explained that the Lord Chancellor's purpose in bringing forward the amendment was to clarify the situation and reassure the general public. He stated that the Government was "trying to rebalance the law so that householders will not be thought of as criminals but ... quite properly, as victims".[253]

Lord McNally said the Government believed the amendment was compatible with the ECHR, as set out in the Home Office and Ministry of Justice *Supplementary ECHR Memorandum*.[254]

Lord Beecham said that the amendments had been "spatchcocked into the Bill at virtually the last minute".[255] He explained that he was treating the debate as a Second Reading debate and so the opposition would not be voting.[256]

The amendment was agreed on division by 206 votes to 55.

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249 HL Deb 10 December 2012 c888
250 HL Deb 10 December 2012 c886
251 HL Deb 10 December 2012 c888
252 HL Deb 10 December 2012 c 883
253 HL Deb 10 December 2012 c890-891
254 HL Deb 10 December 2012 c891 and Ministry of Justice *Supplementary ECHR Memorandum*, 27 November 2012
255 HL Deb 10 December 2012 c882
256 HL Deb 10 December 2012 c882 and c884

5 Dealing non-custodially with offenders

Clause 31 and **Schedule 15** would make changes to the way offenders are dealt with non-custodially. The provisions cover community order, restorative justice, compensation orders and financial penalties.

5.1 The current law

Community order requirements

A community order will consist of one or more of the requirements listed in section 177 of the *Criminal Justice Act 2003*, which are as follows:

- an **unpaid work** requirement, requiring the offender to undertake a specified number of hours of unpaid work in the community;
- an **activity** requirement, requiring the offender to undertake a specified activity such as literacy training or restorative justice activities;
- a **programme** requirement, requiring the offender to attend an accredited programme designed to tackle offending behaviours;
- a **prohibited activity** requirement, requiring the offender to refrain from doing certain activities (such as attending football matches or frequenting pubs);
- a **curfew** requirement, requiring the offender to be at a particular place (usually at home) during specified hours;
- an **exclusion** requirement, prohibiting the offender from going to specified places;
- a **residence** requirement, requiring the offender to live at a particular address;
- a **foreign travel prohibition** requirement, preventing the offender from travelling abroad (either generally or to specific locations);[257]
- a **mental health treatment** requirement, requiring the offender to submit to medical treatment to improve his mental condition;
- a **drug rehabilitation** requirement, requiring the offender to submit to treatment to reduce his dependency on or propensity to misuse drugs;
- an **alcohol treatment** requirement, requiring the offender to submit to treatment with a view to reducing or eliminating his dependency on alcohol;
- an **alcohol abstinence and monitoring** requirement, requiring the offender to abstain from consuming alcohol (either altogether or beyond a specified limit) and to submit to monitoring of his abstention by electronic or other means;[258]
- a **supervision** requirement, requiring the offender to attend regular meetings with a probation officer; and

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[257] This requirement was added to section 177 of the 2003 Act by section 72 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which came into force on 3 December 2012.

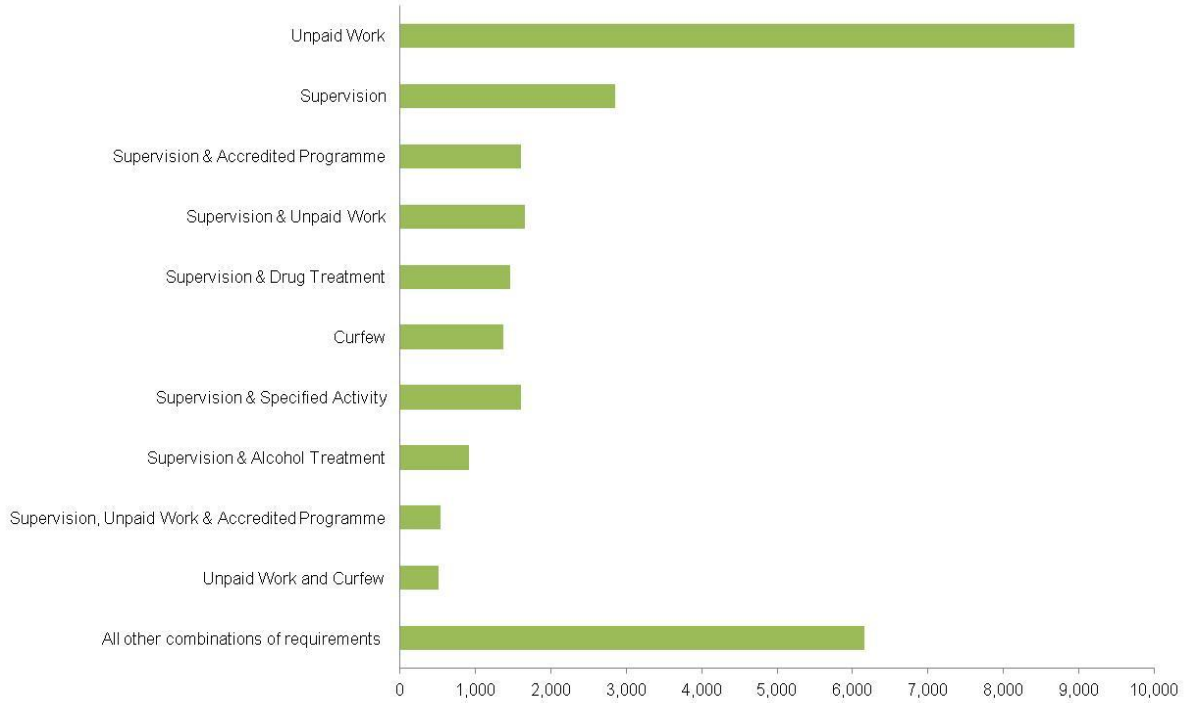
[258] This requirement was added to section 177 of the 2003 Act by section 76 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. It has not yet been brought into force.

- in a case where the offender is aged under 25, an **attendance centre** requirement, requiring the offender to attend a centre run by the probation service.

Three of the above requirements – a mental health treatment requirement, a drug rehabilitation requirement and an alcohol treatment requirement – can only be imposed where the offender has indicated his willingness to comply with it. An offender cannot be forced to undergo any of these three treatment requirements against his will.

In addition to any of the above requirements (but not on its own), the court may also include an **electronic monitoring** requirement as part of a community order. This requires the offender to wear a tag that can monitor his whereabouts. The purpose of an electronic monitoring requirement is to monitor the offender's compliance with any of the other requirements (e.g. a curfew requirement) that have been imposed as part of his order.

Most frequently-used combinations of requirements for starts of community orders, England and Wales, April - June 2012



Source: Table 4.3, Offender management caseload statistics, Ministry of Justice

Restorative justice

Restorative justice aims to promote accountability through reconciliation. The focus moves away from the relationship between the state and the offender, to the importance of making amends for the harm done to the victim. It can incorporate mediation between the victim and the offender, wider "conferencing" drawing in others affected by the crime together with supporters and professionals, and "circles" or sentencing panels, which draw on members of the wider community.

To date, sentencing involving restorative justice elements has only been introduced on a statutory basis in relation to youth offending. Certain young offenders may be sentenced to a referral order or a reparation order under the *Powers of Criminal Courts (Sentencing) Act*

2000, both of which can involve the offender making reparation to the victim and/or the wider community.[259]

Participation in restorative justice by adult offenders can currently be provided for in a number of ways. One out-of-court example involves the police imposing restorative justice conditions on an offender as part of a conditional caution.[260] Another example involves the court sentencing an offender to a community order with a "specified activity" requirement that requires the offender to participate in (for example) a restorative justice conference.

Compensation orders

Compensation orders require offenders to make financial reparation directly to the victim to compensate for the loss, damage or injury they have caused. The court may impose a compensation order on an offender in respect of any personal injury, loss or damage arising from the offence of which he has been convicted. Currently the maximum amount of compensation a magistrates' court can order is £5,000 per charge whilst the Crown Court has unlimited powers.[261]

5.2 Government proposals for reform

In March 2012 the Government published a consultation document *Punishment and Reform: Effective Community Sentences*, in which it set out its proposals to reform community sentences to make them effective both at reducing re-offending and providing robust and credible punishment.[262] The Government set out its concern that community sentences were not working well enough and lacked credibility as an effective punishment. Some of the proposals included the introduction of an Intensive Community Punishment,[263] requiring a punitive element in every community order and the use of electronic monitoring to track offenders to prevent reoffending. The consultation also proposed a power to confiscate offenders' assets, measures to ensure more effective and flexible use of fines and the use of pre-sentence restorative justice processes.

Many of these proposals, such as the punitive element in every community order and the pre-sentence use of restorative justice, now appear in the Bill.[264] However, the Government has chosen not to legislate on some of the proposals from the consultation including the Intensive Community Punishment and the confiscation of offenders' assets.[265]

5.3 The Bill

The proposed changes to community sentences are set out in **Clause 31** and **Schedule 15**.

Part 1 of the schedule would require a court sentencing an offender to a community order to include in that order at least one requirement imposed for the purpose of punishment, and/or to impose a fine on him. This requirement would not apply where there were "exceptional circumstances" relating to the offence or the offender that would make the imposition of a punitive element and/or a fine unjust.

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259 See the following sections of the Ministry of Justice website for further details: *Youth Justice: Reparation Order*; *Youth Justice: Referral Order*; and *Youth Justice: Restorative Justice* [accessed 7 January 2013]

260 See the Crown Prosecution Service website, *Legal guidance: restorative justice– restorative justice as part of conditional cautioning* [accessed 7 January 2013] for further details

261 Section 131, *Powers of Criminal Courts (Sentencing) Act 2000*

262 Ministry of Justice, *Punishment and Reform: Effective Community Sentences,* Cm 8334, March 2012

263 A combination of Community Payback, significant restrictions on liberty through an electronically monitored curfew, exclusion and a foreign travel ban, a driving ban and a fine

264 Ministry of Justice, *Punishment and Reform: Effective Community Sentences, Government Response*, Cm 8469, October 2012

265 Instead of a power to confiscate offenders' assets the Bill would instead allow courts to take into account an offender's assets when fixing the value of a financial penalty (see Part 6 of Schedule 15)

Part 2 would provide for courts to be able to defer the passing of sentence at the pre-sentence stage to allow for restorative justice to take place.

Part 3 would remove the £5,000 limit on compensation orders imposed in the magistrates' courts for adults. The cap would remain for offenders aged under 18.

Part 4 deals with the electronic monitoring of offenders and introduces location monitoring as part of sentence, not just for the purpose of monitoring the offender's compliance with any other requirements included in the order as is currently allowed. Part 4 would also place a duty on the Secretary of State to issue a code of practice relating to the processing of data gathered in the course of electronic monitoring of offenders under electronic monitoring requirements.

Part 5 would remove an uncommenced provision of the *Legal Aid Sentencing and Punishment of Offenders Act 2012* that would have given courts the power to take no action if an offender was brought back to court as a consequence of breach of a community order.

Part 6 deals with offender assets and financial circumstances. It would allow courts to request statements of assets and to take an offender's assets into account when fixing a financial penalty. Currently defendants in cases where a fine is a possible outcome are required to complete a means information form which includes details of income but not assets.[266]

Part 7 was introduced as a result of a Government defeat on division at Third Reading. It would require each probation trust to make appropriate provision for the delivery of services to female offenders, including for women to carry out unpaid work and to participate in rehabilitative programmes designed with the particular needs of women in mind.

Part 8 would provide for information data sharing between the Department for Work and Pensions, HM Revenue and Customs and HM Courts & Tribunals Service (and their equivalents in Northern Ireland) for the purposes of enabling a court to deal with an offender in fixing and enforcing financial penalties.

5.4 Reaction to the Bill

Reaction to this part of the Bill has mainly concentrated on the proposal for every community order to include a punitive element as set out in Part 1 of Schedule 16.

The Howard League for Penal Reform described this proposal as "at best unnecessary and at worst detrimental".[267] The Prison Reform Trust has expressed concern that an emphasis on making community sentences more punitive may undermine their success at reducing reoffending.[268] The Prison Reform Trust has also queried whether there would be sufficient safeguards for vulnerable groups (including those with learning disabilities, mental health issues and substance misuse problems) to ensure that those with particular support needs are not made subject to inappropriate punitive requirements.[269] The group Make Justice Work expressed their concern that the proposals would undermine the ability of the courts to exercise discretion when imposing community sentences.[270]

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[266] Ministry of Justice, *Punishment and Reform: Effective Community Sentences, Government Response*, Cm 8469, October 2012, p23

[267] The Howard League for Penal Reform, *Briefing paper for Peers on the Crime and Courts Bill, Committee Stage in the House of Lords,* October 2012, p2

[268] Prison Reform Trust, *Crime and Courts Bill, House of Lords, Committee Stage*, October 2012, p2

[269] Ibid, p4

[270] Make Justice Work, *Parliamentary briefing to Peers*, 12 November 2012

On Part 2, the Prison Reform Trust stated that the provision to allow courts to defer sentencing at the pre-sentence stage was the biggest development in restorative justice in England and Wales since legislation introducing referral order panels to the youth justice system in 1999.[271] The Trust stated that three issues were crucial to the success of this part:

> ...ensuring the quality of restorative justice, building judicial confidence and building capacity to deliver quality restorative justice facilitation and outcomes locally.[272]

On the extension to the use of electronic monitoring proposed in **Part 4**, the Criminal Justice Alliance raised concerns about its proportionate and appropriate use and the potential impact on civil liberties.[273] The Howard League raised the possibility that electronic monitoring might end up being used as a substitute for face-to-face relationships and support, suggesting that "an over-reliance on technology will come at the expense of tailored support with staff contact time and interventions that help people change their lives".[274]

5.5 Debate in the Lords

The Bill as introduced to the House of Lords contained a holding clause on the subject of community and other non-custodial sentencing. In Committee on 30 October 2012, this was replaced, following the conclusion of the Government's consultation, with a new clause and a schedule. The first of the two days of committee stage debate on the new provisions was therefore treated as a Second Reading debate to allow for this style of debate to take place, with line by line analysis taking place on the second day.[275]

Debate at all stages focussed primarily on Part 1 of the Schedule and the proposed introduction of a mandatory punitive element in every community order. There was also some significant debate on Part 2 of the Schedule on restorative justice, with the House accepting (without division) an amendment moved by Baroness Linklater regarding the role of victims. A Government defeat at Third Reading resulted in a new Part being added to the Bill to make specific provision for female offenders. Other key amendments debated but not agreed related to young adult offenders and reorganisation of the probation service.

Part 1- a mandatory punitive element for community orders

Lord McNally began by setting out the Government's position: that the new provisions would strengthen the community sentencing framework to ensure that non-custodial sentences provided robust punishment, were effective in reducing reoffending and gave a better deal for victims. He expressed the Government's determination to increase public confidence that community orders provide a proper sanction for criminal behaviour. The ensuing debate focussed on a number of specific areas.

The need for a mandatory punitive element

Lord Ramsbotham (crossbench) moved an amendment to remove part 1 of the schedule from the Bill altogether, describing it as totally unnecessary and counterproductive.[276] Baroness Butler-Sloss (crossbench) agreed, making what she referred to as "the very obvious point" that every community order will be a form of punishment for the offender because it is mandatory. She said she found the words "punitive" and "punishment" to be

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271 Prison Reform Trust, *Crime and Courts Bill, House of Lords, Committee Stage*, October 2012, p6
272 Ibid p7
273 Criminal Justice Alliance, *Crime and Courts Bill Briefing, Committee Stage, House of Lords*, 13 November 2012
274 The Howard League for Penal Reform, *Briefing paper for Peers on the Crime and Courts Bill, Committee Stage in the House of Lords*, October 2012, p3
275 HL Deb 30 October 2012 c515
276 HL Deb 13 November 2012 c1415

unnecessary, inappropriate and profoundly unattractive.[277] The Liberal Democrat Baroness Linklater described the provisions as "simply crude, inappropriate and very unlikely to realise outcomes that are positive or helpful in any way in the long run".[278]

Lord Ramsbotham withdrew his amendment to remove Part 1 but retabled it at Report stage. In response, Lord McNally reiterated the Government's view that Part 1 was necessary to give victims and the public confidence that community orders effectively punish offenders. Lord Ramsbotham pressed his amendment to a division but it was defeated by 156 votes to 32.[279]

The scope of "exceptional circumstances"

Lord Rosser pointed out that currently one third of community orders do not contain a punitive element because the courts have not considered that appropriate. He asked whether the Government's position was that in these cases the courts had been getting their sentencing wrong, or whether the Government expected that "exceptional circumstances" would be found by the courts in almost a third of cases with the result that things would continue much as they are now.[280]

On the second day of committee stage debate, Lord Woolf urged the House to get rid of the word "exceptional". He spoke of the difficulties the term might cause to judges when deciding what is and is not exceptional in this context.[281] Baroness Hamwee noted that since a high proportion of offenders suffer from mental illness, substance misuse and dependency the term exceptional would in fact be widely drawn.[282]

Several amendments offered alternatives to the phrase "exceptional circumstances", including "particular circumstances", "special circumstances", or just plain "circumstances".

Lord McNally referred to the community sentencing consultation, in which the Government had said it envisioned "exceptional circumstances" covering only around five per cent of cases.[283] He said that substituting "exceptional circumstances" for any of the alternatives that had been proposed would significantly lower the threshold at which courts could decide not to impose a requirement that fulfils the purpose of punishment.[284] Later in the debate he returned to the point stating:

> There are noble Lords who believe that "exceptional" covers around a third of offenders. That is exactly the problem we are trying to address because the idea that somehow a third of offenders cannot be punished is what undermines public confidence. That is why we are making the point that exceptional circumstances apply to a very narrow group and that it is possible to put a punishment element into a much wider range of sentences while giving the court the flexibility to take account of the circumstances of the person before it. However, as I said in the earlier debate, we are going to resist those who want to amend the Bill so that there is a three-lane highway of exceptions from what we are trying to do.[285]

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277 HL Deb 13 November 2012 c1419
278 HL Deb 13 November 2012 c1423
279 HL Deb 10 December 2012 c915
280 HL Deb 30 October 2012 c520
281 HL Deb 13 November 2012 c1418
282 HL Deb 13 November 2012 c1419
283 HL Deb 30 October 2012 c549
284 HL Deb 13 November 2012 c1428
285 HL Deb 13 November 2012 c1432

The amendments to remove or replace the word exceptional were considered again at Report stage but did not make any further progress.[286]

Restrictions on the discretion of sentencers

Several speakers expressed concern about the restrictions that would be placed on sentencers' discretion. For example, Lord Woolf described the provisions as "offensive to the judiciary, who strive to ensure that each person dealt with by them is sentenced to the appropriate sentence".[287]

Lord Rosser and Lord Beecham tabled a group of amendments that sought to clarify which specific requirements the courts could impose as part of a community order to fulfil the mandatory punitive element.[288] Lord Rosser referred to previous comments by Lord McNally to the effect that "somebody who may never have got up before noon in his life might classify learning to read and write as a punishment", and that "the punitive concept is widely drawn and is very much in the hands of the sentencer".[289] He asked the minister to clarify whether this meant that a community order with a requirement to take a course developing reading and writing skills would be regarded as meeting the requirement for a mandatory punitive element.

In response, Lord McNally said:

> In theory, a single requirement, activity or programme along the lines that we talked about could fulfil this duty if a court felt it was appropriate for that particular offender. However, there will also be occasions where the court may decide that a purely or primarily punitive requirement is an appropriate response to a particular offence. We would not wish courts' discretion to be limited so that they are required to impose both punishment and rehabilitation in cases where they do not believe both are necessary.[290]

He said that the Government recognised the force of the argument made by practitioners who had responded to the community sentencing consultation that any of the existing community order requirements could be punitive for a particular offender. He went on:

> The courts are best placed to decide, on a case-by-case basis, what is punitive for a particular offender. That is why the Bill is drafted to give courts the flexibility to impose any community order requirement to fulfil the duty to include a punitive element, so long as they can be confident, on the evidence before them, that the requirement will genuinely prove to be punitive for that offender.[291]

He said that in practice, however, there were some requirements that the courts were more likely to make use of than others, and that the Government expected to see a rise in the use of requirements such as curfews, unpaid work, prohibited activities and exclusions.[292]

The lead amendment was withdrawn.

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286 HL Deb 10 December 2012 cc902-915
287 HL Deb 30 October 2012 c529
288 HL Deb 13 November 2012 c1430 onwards
289 HL Deb 13 November 2012 c1430
290 HL Deb 13 November 2012 c 1433
291 HL Deb 13 November 2012 c 1433
292 HL Deb 13 November 2012 c1435

The balance between punishment and rehabilitation

Lord Rosser queried whether the impact of the mandatory punitive element might well be less provision in future community orders for rehabilitative or non-punitive elements as a means of reducing reoffending.[293] Lord Ponsonby pointed out that the Government's original impact assessment of the proposals, which was published in March with the consultation, acknowledged that they would have an adverse impact on reoffending rates by causing primarily rehabilitative requirements to be replaced by primarily punitive requirements.[294]

Lord McNally reassured the House that it was not the Government's intention to detract from the five purposes of sentencing currently set out in section 142(1) of the *Criminal Justice Act 2003* (reparation, rehabilitation, punishment, crime reduction and public protection). He said that courts would continue to be required to have regard to all five purposes, and that it would be a matter for them as to what weight they placed on each requirement when sentencing any particular offender.[295]

He added that the duty on the court to ensure that a combination of elements in a community order was the most suitable for the offender would remain, as would the duty to ensure that the elements combined were compatible with each other.[296] Lord McNally made a commitment to discuss this and other provisions in the Bill with the Sentencing Council to determine whether any changes would be needed to existing sentencing guidelines.[297]

Part 2 – deferring sentencing to allow for restorative justice

Whilst there was much support for the plans to extend restorative justice, several speakers raised the issue of resources. Baroness Linklater commented that:

> The whole process will be extremely complex and expensive, and it will be vital to ensure that the quality of delivery is of the best and not rolled out in a piecemeal fashion. It would be a disaster if expectations were raised without adequate quality delivery. That would destroy confidence and set the programme back for a long time.[298]

Baroness Linklater later moved an amendment that sought to make clear that any restorative justice activities imposed by the court must "meet the needs of the victim" as well as those of the offender.[299] Lord Ahmad, for the Government, welcomed the widespread support from across the House for this part of the schedule and agreed to consider Baroness Linklater's amendment before Report stage.

On Report Baroness Linklater moved an updated version of her amendment, which specified that restorative justice activities should give victims "an opportunity to talk about, or by other means express experience of, the offending and its impact".[300] She said this would put the victim at the centre of the process. Lord Ahmad agreed that restorative justice, when used appropriately, could be an extremely positive experience for victims, and said that the amendment would strengthen their role in the process. The amendment was agreed without division.

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293 HL Deb 30 October 2012 c522

294 HL Deb 30 October 2012 c530 . See also Ministry of Justice, *Impact assessment: Consultation on sentences in the community and the future shape of probation services*, 4 January 2012, para 54

295 HL Deb 13 November 2012 c1435

296 HL Deb 13 November 2012 c1439. Duties contained in section 148(2)(a) and 177(6) of the *Criminal Justice Act 2003*

297 HL Deb 13 November 2012 c1440

298 HL Deb 30 October 2012 c535

299 HL Deb 13 November 2012 c1440

300 HL Deb 10 December 2012 c 942

Proposed new part – female offenders and young adult offenders

Baroness Linklater moved an amendment that she said was intended to "make good the remarkable lack of reference in this Bill to women who offend".[301]

The amendment would have added a new Part to Schedule 15 requiring all probation areas to make appropriate provision for the delivery of services to female offenders, including provision for women to carry out unpaid work or participate in programmes in women-only groups. Speaking to the amendment, Baroness Linklater said that it "echoed the thinking" of the 2007 report by Baroness Corston into women with particular vulnerabilities in the criminal justice system:

> Jean Corston recommended that there should be separate, specially tailored services locally available, so that the disruption to family life, particularly to children, is minimised as far as is humanly possible. It is self-evident that the needs of the children and families of women who have offended have a huge bearing on their capacity to attend programmes, for programmes to be effective and for reoffending to be reduced. It also has a crucial impact on the risk of orders being breached.[302]

Lord Ramsbotham spoke to a similar amendment he had tabled that would have made equivalent specific provision for young adult offenders.[303]

In response, Lord McNally outlined the work the Government is doing on the issue of female and young offenders. He spoke of the new women's champion in the Ministry of Justice, Helen Grant, and of funding arrangements for specialist support services and the specialist commissioning frameworks in place for probation trusts. He said he hoped that he had demonstrated that the Government took the needs of female and young adult offenders seriously and that a bespoke statutory duty was not required. Lord McNally also pointed out that female-only unpaid work or programme groups may not always be appropriate, particularly if this would result in female offenders having to travel long distances.

He said he would reflect on the points raised and would consider whether the issues involved would be best handled by way of amendments to the Bill or by other means. On this basis Baroness Linklater withdrew her amendment.

On Report, Baroness Linklater reintroduced her amendment in conjunction with an amendment moved by Baroness Hamwee to refer to probation services providing programmes "with the particular needs of women in mind", rather than "in groups consisting only of women". Baroness Linklater acknowledged the work the Government was already undertaking in relation to female offenders, but insisted that "it absolutely needs statutory protection to ensure continuity and maintain the necessary priority and profile among all the competing demands on the public purse".[304]

Lord McNally agreed that it was "important that the criminal justice system is properly responsive to the needs of female offenders". However, he reiterated his view that the Government's strategy on women offenders would not be improved by a statutory commitment in the Bill. The amendments were withdrawn.[305]

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301 HL Deb 13 November 2012 c1444
302 HL Deb 13 November 2012 c1444. See also Home Office, *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system*, 2007
303 HL Deb 13 November 2012 c1445
304 HL Deb 10 December 2012 c946
305 HL Deb 10 December 2012 c951

At Third Reading Lord Woolf moved a consolidated version of Baroness Linklater and Baroness Hamwee's amendments. He asked the minister if he could indicate why, some five years after the publication of the Corston report, "the amendment should not be the first recognition in legislation of what the report recommended".[306] Baroness Corston endorsed Lord Woolf's comments, and urged the Government "not to waste any more time".

Lord McNally expressed his wholehearted agreement with the arguments that had been made for improving outcomes for female and young adult offenders. However, he argued that the focus should be on "supporting local areas to make further improvements", rather than "creating new statutory duties for [probation] trusts".[307]

Lord Woolf pressed his amendment to a division where it was agreed by 187 votes to 159.[308]

Lord Ramsbotham had retabled his amendment on young offenders at third reading. However, having listened to the debate on Lord Woolf's amendment (particularly with regard to the question of resources), he decided against moving it as he considered that it would be more sensible for Lord Woolf's amendment to go to the Commons and be debated as fully as possible.

Proposed new part – reorganisation of probation services

Complaints had been made at various stages of debate that the Government had not completed its consultation on probation services in time to be considered alongside the changes proposed by Clause 30 and Schedule 15.[309] Lord Ramsbotham said that the debate on community sentences could have been improved if the results of the consultation had been available.[310]

Lord Rosser tabled an amendment in Committee which he said was intended to enable the Government to say more about their intentions for the future of the probation service. Lord McNally stated that the Government was aiming to set out its vision for the future of the system over the next few weeks and the amendment was withdrawn.[311] A similar amendment was introduced on Report but made no further progress.[312]

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306 HL Deb 18 December 2012 c1511
307 HL Deb 18 December 2012 c1517
308 HL Deb 18 November 2012 c1519
309 See the Ministry of Justice consultation *Punishment and reform: effective probation services*, Cm 8333, March 2012
310 HL Deb 30 October 2012 c524. See the Ministry of Justice consultation *Punishment and reform: effective probation services*, Cm 8333, March 2012
311 HL Deb 13 November 2012 c1459
312 HL Deb 10 December 2012 c957

6 Deferred prosecution agreements

Clause 32 and **Schedule 16** of the Bill would introduce deferred prosecution agreements (DPAs). DPAs would be a new tool for prosecutors to use in tackling corporate financial and economic crime and would be based largely on similar practices in the United States.

6.1 The current law

General principles of corporate criminal liability

A limited liability company is a distinct entity with a separate legal personality from its shareholders, directors and officers. Generally speaking, a company is therefore capable of committing criminal offences in the same way as an individual person.[313]

However, for offences requiring proof of a mental element (such as dishonesty, wilfulness or recklessness) it can in practice be difficult to bring a successful criminal prosecution against a company. This is because under the common law the prosecution must be able to prove that the requisite mental element of the offence was exercised by the "directing mind" of the company. The scope of a company's directing mind (as developed by case law) is limited and uncertain but is likely to include its officers and the main board members.[314] The company cannot be held criminally responsible for the actions of a more junior individual outside its directing mind. Given the size and complexity of many modern day companies, it can therefore be extremely difficult to prove that a member of the company's directing mind possessed the requisite mental element for a criminal offence.

In some cases, statute has made alternative provision for determining a company's criminal liability in order to avoid the difficulties associated with the common law "directing mind" test. Many regulatory offences set out in statute (for example certain offences under environmental law) adopt a "strict liability" approach, meaning that the offence does not require proof of any mental element but is committed by action alone.

Another example is section 7 of the *Bribery Act 2010*, which introduced a new offence of a failure by a commercial organisation to prevent bribery. Under section 7, a commercial body corporate or partnership commits an offence if a person "associated" with it bribes another person intending to obtain or retain business (or an advantage in the conduct of business) for the organisation. Under section 8 of the 2010 Act, an "associated person" is anyone who performs services for or on behalf of the organisation: so it would cover employees, agents and subsidiaries among others. There is no need for the prosecution to prove that the directing mind of the organisation was involved in any way.

Current approaches to tackling corporate economic crime

At present, prosecutors have two main options when dealing with a commercial entity alleged to have committed a financial or economic crime.

The first option is to bring a criminal prosecution against the entity. However, in most cases the "directing mind" difficulties outlined above will present a significant hurdle to a successful prosecution. In complex cases there will also be significant time and financial costs to the Crown Prosecution Service and the Serious Fraud Office. However, if the defendant pleads guilty (or indicates that it intends to do so), then prosecutors may try to mitigate these costs by entering into plea negotiations with the entity. Such negotiations should be conducted in accordance with the *Attorney General's guidelines on plea discussions in cases of serious or*

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313 There are certain exceptions to this rule of thumb. For example, a company cannot be prosecuted for murder, as the mandatory sentence is life imprisonment (which cannot be imposed on a company), nor can it be prosecuted as the principal offender in offences such as rape or bigamy (as it cannot commit the necessary physical actions involved in such crimes).

314 *Blackstone's Criminal Practice*, 2012 edition, para A6.2

complex fraud (March 2009) and section IV.45 of the *Consolidated Criminal Practice Direction*. Paragraph A5 of the guidelines states:

> The purpose of plea discussions is to narrow the issues in the case with a view to reaching a just outcome at the earliest possible time, including the possibility of reaching an agreement about acceptable pleas of guilty and preparing a joint submission as to sentence.

The guidelines emphasise that it remains entirely a matter for the court to sentence the defendant on conviction, regardless of the terms of any plea agreement that may have been reached between the defendant and the prosecutor.[315]

The second option available to prosecutors is to seek a civil recovery order against the entity under Part 5 of the *Proceeds of Crime Act 2002*. This enables the recovery of property which is (or represents) property obtained through unlawful conduct. Applications for civil recovery orders are dealt with by the High Court, and there is no need for a criminal conviction before a civil recovery order can be made.

6.2 The Government's proposals

In May 2012, the Ministry of Justice published a consultation on proposals to introduce DPAs in England and Wales.[316] It began by setting out a number of perceived weaknesses with the existing criminal and civil options available to prosecutors dealing with corporate economic crime:

- existing options involve lengthy investigation and protracted court proceedings;
- the "directing mind" principle poses problems for bringing a criminal prosecution for many corporate economic offences, particularly in relation to large and sophisticated organisations;
- criminal prosecutions can effectively punish the organisation but may have unintended and detrimental side effects such as share price movements and corporate failures, which can in turn impact on employees, customers, pensioners, suppliers and investors;
- a criminal conviction can mean the organisation is unable to bid for EU and US public procurement tenders; and
- property recovered under a civil recovery order goes to the state rather than to victims, and the organisation is not ultimately penalised for its wrongdoing.

The Government had therefore reached the conclusion that there was a need for a more flexible approach to tackling corporate economic crime, and that DPAs were the best option for achieving this. The consultation paper set out the basic premise of a DPA in the following terms:

> 15. Under a DPA, the prosecutor would lay, but would not immediately proceed with, criminal charges pending successful compliance with agreed terms and conditions stated in the DPA. The terms and conditions might include:
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> - payment of a financial penalty;

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315 For a recent judicial reiteration of this principle, see Thomas LJ in *R v Innospec Ltd* [2010] EW Misc 7 (EWCC) (18 March 2010)

316 Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements*, Cm 8348, May 2012

- restitution for victims;
- disgorgement of the profits of wrongdoing; and
- measures to prevent future offending (a monitoring or reporting requirement).

16. These would be discussed and agreed between the parties and then placed before a judge for consideration and approval. Time limits would be attached to the terms and conditions so that compliance can be managed and it will be clear when the agreement should cease.[317]

The consultation proposed that where an organisation breached a DPA, the DPA could either be terminated and the original substantive prosecution revived, or formal breach proceedings could be brought against the organisation. It considered that the latter option would be relatively uncommon but might be more appropriate in cases where it would not be cost effective to pursue the original prosecution (for example where the organisation had substantially satisfied any financial penalty or restitution to victims due under the DPA).

The response to the consultation was published in October 2012.[318] This indicated that 86 per cent of respondents had agreed that DPAs "have the potential to improve the way in which corporate economic crime is dealt with and would enable prosecutors to bring more cases to justice".[319] However, 13 per cent disagreed with this statement. Some expressed concern at the "risk of injustice posed by DPAs for the public and for the organisation involved", while others queried whether DPAs would offer "a sufficient incentive for commercial organisations to consider entering into a DPA, particularly given the difficulty in obtaining convictions for serious economic crime".[320]

6.3 The Bill

The Bill as introduced did not include any provision on DPAs. **Clause 32** and **Schedule 16** were instead added to the Bill by way of Government amendments in Committee.

The parties to a DPA

A DPA would be entered into between a "designated prosecutor" and a person whom the prosecutor was considering prosecuting for one of the specified offences listed in Part 2 of Schedule 16. Designated prosecutors would be the Director of Public Prosecutions, the Director of the Serious Fraud Office, or any prosecutor designated as such by order of the Secretary of State. The person under investigation would have to be a body corporate, a partnership or an unincorporated association; individuals would not therefore be able to enter into a DPA.

The list of offences set out in Part 2 of Schedule 16 is limited to certain common law and statutory offences involving financial or economic wrongdoing, for example: conspiracy to defraud; cheating the public revenue; theft; false accounting; fraudulent evasion of VAT; fraud; and bribery. The Secretary of State would have the power to amend this list by order, either by adding an offence of financial or economic crime or by removing an offence. He would not have the power to add any other type of offence to the list.

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317 Ibid, paras 15-16

318 Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations*, Cm 8463, October 2012

319 Ibid, para 18

320 Ibid, para 37

The effect of a DPA

Under a DPA, the person under investigation ("P") would agree to comply with the requirements imposed on him by the agreement. Criminal proceedings would be commenced against P but would then be automatically suspended. The prosecution would only be able to lift the suspension by applying to the Crown Court, but it would be unable to make such an application while the DPA was in force. No other person (e.g. a private prosecutor) would be able to prosecute P for these offences while the proceedings were suspended.

If the DPA remained in force until its expiry date, then (following its expiry) the criminal proceedings instituted against P would be discontinued by the prosecutor giving notice to the Crown Court that he did not want the proceedings to continue. If proceedings were to be discontinued in this way, it would not be possible to institute fresh criminal proceedings against P for the alleged offence. However, this would not apply if (following the DPA's expiry) the prosecutor discovered that P had provided inaccurate, misleading or incomplete information to him during the course of negotiations for the DPA.

The content of a DPA

A DPA would have to include the following mandatory terms:

- a statement of facts relating to the alleged offence, which might include admissions made by P; and
- an expiry date on which the DPA would cease to have effect (if it had not already been terminated for breach).

The DPA would also set out various requirements that P would have to comply with. Paragraph 5(3) of Schedule 16 sets out a non-exhaustive list of suggested requirements:

> (a) to pay the prosecutor a financial penalty;
>
> (b) to compensate victims of the alleged offence;
>
> (c) to donate money to a charity or other third party;
>
> (d) to disgorge any profits made by P from the alleged offence;
>
> (e) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;
>
> (f) to co-operate in any investigation relating to the alleged offence;
>
> (g) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

In the event that the DPA included a financial penalty, this would have to be "broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea".

A Code for prosecutors

Under paragraph 6 of Schedule 16, the Director of Public Prosecutions and the Director of the Serious Fraud Office would be required to issue a joint Code for prosecutors setting out guidance on:

> (a) the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case;

(b) the disclosure of information by a prosecutor to P in the course of negotiations for a DPA and after a DPA has been agreed.

Court approval of a DPA

Once DPA negotiations between the prosecutor and P had commenced, but before terms had been agreed, the prosecutor would be required to apply to the Crown Court for a preliminary declaration that entering into a DPA with P was likely to be in the interests of justice and that the DPA's proposed terms were fair, reasonable and proportionate. This hearing would be held in private, and any declaration made by the court would also be private.

Once the prosecutor and P had agreed the terms of the DPA, the prosecutor would then have to apply to the Crown Court for a final declaration that the DPA was in the interests of justice and its terms were fair, reasonable and proportionate. The DPA would only come into force once such a declaration had been made. The hearing itself would be held in private, but if the court decided to make a declaration approving the DPA it would be required to do so in open court and to give its reasons. Upon approval of the DPA, the prosecutor would be required to publish the DPA, the declaration made by the court at the preliminary hearing and the court's declaration at the final hearing.

Breach of a DPA

While the DPA was in force, if the prosecutor believed that P had failed to comply with any of its terms he would have the discretion to make an application to the Crown Court. The court would then decide (on the balance of probabilities) whether P had breached the DPA. If it found that he had, it could either invite the prosecutor and P to agree proposals to remedy the breach, or it could terminate the agreement. The outcome of any such application would have to be published by the prosecutor.

If the prosecutor believed that P had breached the DPA but decided not to apply to the Crown Court, he would have to publish details relating to that decision, including his reasons for the belief that P had failed to comply and his reasons for not making an application to the court.

6.4 Lords debate

Many speakers were broadly supportive of the proposed introduction of DPAs, with some calling for their use to extend beyond corporate economic crime to other types of crime and to individuals. Lord Phillips of Sudbury, however, took the view that DPAs would "compromise the basic principle of equality before the law" and would place "huge, powerful, sophisticated companies engaged in premeditated and long-term fraud in a different position from that of a man or woman had up before the local magistrates for shoplifting".[321] Lord Beecham cautioned that the public would need to be convinced that DPAs would not create "a privileged class of potential defendants without achieving a significant benefit, not only in cash terms but also in terms of corporate behaviour".[322]

The Government amendments were added to the Bill without amendment or division. Some of the key areas of debate are outlined below.

Review of DPAs

Lord Beecham spoke to an amendment that would have added a sunset clause to Schedule 16, providing that the Schedule would cease to have effect five years after its commencement. The amendment would also have created a statutory duty for the Secretary

[321] HL Deb 30 October 2012 cc580-1
[322] HL Deb 30 October 2012 c572

of State to provide for a review the operation of Schedule 16 (in consultation with the Director of Public Prosecutions and the Director of the Serious Fraud Office) and to lay the results of this review before Parliament.[323]

Lord Beecham said that the amendment was designed to reassure the public that the introduction of DPAs was not being undertaken lightly, and that it would be subject to "very careful review".

In response, Lord Ahmad said that the amendment was unnecessary as the Government had already undertaken to review the scheme as part of its general commitment to review all new primary legislation within five years of Royal Assent.[324]

Lord Beecham returned to his amendment on Report, with Lord Ahmad again describing it as unnecessary.[325] The amendment was withdrawn.

Extension of DPAs beyond corporate financial crime

Lord Marks spoke to a group of amendments that sought to extend the application of DPAs to other types of crime and to individuals. He suggested that the appropriate question to consider "is not whether an offender is an organisation or an individual but whether the nature of the offence is suitable for a DPA".[326] He also suggested that environmental or health and safety offences might be good candidates to be dealt with by way of DPA.

Lord Goldsmith said that he had seen DPAs being used in the United States to change the behaviour of individuals who were drug offenders by requiring them to comply with particular conditions (e.g. taking regular drug tests and meeting probation officers). If they complied, they would not be convicted or imprisoned.[327] He challenged the idea that the use of DPAs in relation to individuals was an entirely novel concept, drawing parallels with existing measures such as deferred sentencing, suspended sentences and conditional cautions.

In response, Lord Ahmad said that the Government's view was that a "narrow, targeted approach is the best course of action to begin with".[328] The difficulties in prosecuting corporations – particularly in relation to the "directing mind" test" – were not present to the same extent in relation to prosecuting individuals. He was also not persuaded that a DPA would be the appropriate response where direct physical harm had been caused to an individual by an organisation, as might be the case in an environmental or health and safety case. He did, however, indicate that he would keep the points raised under review, and that the scope of DPAs could be widened by future primary legislation if thought appropriate.

The lead amendment was withdrawn. Similar amendments were tabled at on Report, but Lord Ahmad reiterated the Government's position on restricting DPAs to corporate financial crime and the amendments made no further progress.[329]

Level of financial penalty

Lord Goldsmith spoke to an amendment regarding the level of any financial penalty imposed as part of a DPA. The amendment would have replaced the requirement for such a penalty to be "broadly comparable to" the fine that a court would have imposed on conviction

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323 HL Deb 13 November 2012 c1484
324 HL Deb 13 November 2012 c1488
325 HL Deb 10 December 2012 c958
326 HL Deb 13 November 2012 c1480
327 HL Deb 13 November 2012 c1482
328 HL Deb 13 November 2012 c1487
329 HL Deb 10 December 2012 cc959-962

following a guilty plea with a requirement that the penalty "shall not exceed" such an amount.[330]

He said that the requirement as drafted effectively set a minimum amount for a financial penalty, and argued that this might make DPAs unattractive and therefore little used. He also said that the cost of any compliance programme imposed as part of a DPA could be sufficiently high that it justified not imposing the same financial penalty as a court would have imposed. A further concern was that setting a minimum financial penalty might limit the amount of money available to the organisation to pay compensation to victims, which ran contrary to the general criminal sentencing principle that compensation should take priority over fines.

He returned to the amendment on Report, describing the Government's provision as "wrong" and saying that it would lead to an "absurd situation":

> In the discussions that are taking place, the company will say, "We don't want to pay the full fine that we would have paid. We are prepared to accept our guilt even though we think that we could fight this in court and get off, but we do not want to pay the full penalty". Then the prosecutor is faced with saying, "Well, either that means no penalty at all, because then I can escape the straitjacket of subsection (4), or you have to pay the full penalty, so there is no deal. So we will be forced to go into court; we may lose the case; it will cost the public a great deal".[331]

In response, Lord Ahmad set out the Government's view that DPAs were not a "soft option" and that the level of financial penalty should therefore bear close relation to the financial penalty that would have been imposed by a court on conviction following a guilty plea.[332] His view was that the primary incentive for a company to enter into a DPA was to avoid prosecution and conviction (and the associated reputational damage), rather than to avoid a financial penalty.

In any event, he considered that sufficient incentive was provided by the fact that any financial penalty under a DPA would be discounted by up to one third to reflect the position the company would have been in had it pleaded guilty in a timely way before a court. He indicated that the Sentencing Council would be producing new sentencing guidelines for many of the offences listed in Schedule 16 and covering corporate offending, which would be in place in time for the implementation of DPAs. The parties to a DPA and the Crown Court would be able to refer to these guidelines when negotiating the level of financial penalty.

Lord Goldsmith withdrew the amendment but returned to it again at third reading. He asked the minister to clarify whether the maximum available discount for any financial penalty would be limited to one third, or whether the parties to a DPA would be able to negotiate a greater discount. Lord Ahmad confirmed that the maximum available discount would not be limited to one third, and that greater discounts might be appropriate in certain cases. Parties to a DPA should be guided by sentencing practice and pre-existing case law on this matter.[333]

On that basis, the amendment was withdrawn.

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330 HL Deb 13 November 2012 c1489
331 HL Deb 10 December 2012 c964
332 HL Deb 10 December 2012 c968
333 HL Deb 18 December 2012 cc1524-1526

Principles of corporate criminal liability

On Report, Lord Beecham spoke to a probing amendment that would have introduced a new concept of corporate criminal liability based on wording set out in the *United States Attorneys' Manual*.[334] The amendment would have provided:

> A corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents where the act is committed during the performance of duties which are intended, at least in part, to benefit the corporation.

He said:

> The US law on corporate criminal liability enhances the prospects of successful prosecutions for fraud because corporations are deemed to be vicariously liable for offences committed by their employees during the course of their duties. Here, by contrast, the prosecution must prove that, to quote the legal phrase, the "directing mind and will" of the company was guilty of the offence, and the concept of the directing mind would imply that a board member or senior manager was involved in the illegality.[335]

He queried whether there would actually be any incentive at all for companies in this country to enter into a DPA, given the difficulties the "directing mind" principle created in bringing successful criminal prosecutions against them. He acknowledged that it was too late for the minister to make a considered response to this point before the Bill left the Lords, but hoped that the Government might review it further during proceedings in the Commons.

Lord Ahmad said that the amendment would introduce a "new and very broad basis for corporate criminal liability" to replace the existing common law approach.[336] He acknowledged the difficulties in bringing criminal prosecutions against corporations, but said that reliance was instead often placed on prosecutions of individuals for economic or financial wrongdoing.

Lord Beecham expressed disappointment that the minister had not addressed the question of incentivising the DPA process, which his amendment was intended to achieve. However, he withdrew the amendment.

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[334] HL Deb 12 December 2012 c1081
[335] Ibid
[336] HL Deb 12 December 2012 c1083

7 Border Control

7.1 Immigration cases: appeal rights; and facilitating combined appeals

Clause 33 proposes various technical amendments to immigration appeals legislation.[337] Firstly, it reinstates a ground of appeal on race discrimination grounds against an immigration decision. This had been unintentionally removed when the *Equality Act 2010* repealed the *Race Relations Act 1976*. Secondly, it confirms that certifying an immigration decision under section 96 of the *Nationality, Immigration and Asylum Act 2002* does not cause a pending appeal to lapse. Finally, it clarifies that notice of a decision to remove a person from the UK can be given at the same time as the decision to refuse to vary, or to revoke their immigration leave. Section 47 of the *Immigration, Asylum and Nationality Act 2006* was already intended to allow for this, but the Upper Tribunal has recently found that the legislation requires clarification.[338]

7.2 Appeals against refusal of entry clearance to visit the UK

Background

Family visitors are currently the only category of visitor visa applicant to have a full right of appeal against a visa refusal decision. Their appeal rights were abolished in 1993, but reinstated by the Labour government in 2000.[339]

All entry clearance ('visa') refusal decisions attract 'residual' (also known as 'limited') rights of appeal on race discrimination and human rights grounds. Visa sections are not required to inform applicants of how they may exercise these limited appeal rights.[340] The Chief Inspector of Borders and Immigration has a statutory duty to monitor and report to the Home Secretary on the quality of decision-making in visa categories which do not attract a full right of appeal.[341]

The success rate for family visitor visa appeals for 2010/11 and 2011/12 was 38 per cent and 32 per cent respectively.[342]

In summer 2011 the UK Border Agency (UKBA) publicly consulted on limiting the right of appeal against refusal of family visitor visas to race discrimination and human rights grounds.[343] According to the Home Office's analysis of responses, 39 per cent of respondents supported restricting family visitors' rights of appeal; 28 per cent did not agree with the proposal; and 33 per cent did not comment.[344]

The Government's rationale for abolishing family visitors' full rights of appeal is based on the following considerations:[345]

- *The volume of family visitor visa appeals, and associated costs to the taxpayer, which are considered disproportionate to the benefits sought* - significantly more family

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337 *Nationality, Immigration and Asylum Act 2002* and *Immigration, Asylum and Nationality Act 2006*
338 [2012] UKUT 147 (IAC) and [2012] UKUT 414 (IAC)
339 See Library standard note SN06363 *Immigration: Family visitor visa appeal rights* for further background information relevant to this section.
340 UKBA, *Entry Clearance Guidance*, APL4.1 (accessed on 19 December 2012)
341 s23, *Immigration and Asylum Act 1999* (as amended by section 4(2) of the *Immigration, Asylum and Nationality Act 2006)*
342 Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13, paragraph 79
343 UKBA, *Family Migration: A consultation*, July 2011
344 Home Office, *Family Migration: Response to consultation*, June 2012, p.23
345 HL Deb 4 July 2012 cc697-8

visitor visa appeals are now submitted than originally anticipated, and the system is no longer quick or self-financing, as had been intended.

- *That further evidence is often submitted at appeal stage which should have been submitted with the original application* - the Government has suggested that this is a 'misuse' of the system since such appeals become, in effect, 'second decisions' based on new evidence.

- *That refused applicants would obtain a faster and cheaper resolution by submitting a new application* - a visit visa application currently costs £78, whereas an appeal costs £80/£140 (depending on the type of hearing). Decisions on visa applications are made within weeks, whereas appeals can take many months to process.

- *That removing the right of appeal would allow the UKBA and HM Courts Service to prioritise other types of case* - the Government says that the UKBA would be able to devote more time to improving its service to applicants, and that greater priority could be given to other categories of appeal that have more far-reaching impacts, such as asylum and deportation cases.

Government analysis of a sample of 363 allowed family visitor visa appeals identified that 63 per cent succeeded purely on the basis of additional evidence which had not been available to the initial decision-maker.[346] Critics of the proposed changes have argued that there are often valid reasons why applicants submit additional evidence at appeal stage, such as if an application was refused for failure to provide evidence which was not referred to in applicants' supporting guidance.[347]

The Joint Committee on Human Rights has called on the Government to provide Parliament, as a matter of urgency, with information about the proportion of appeals which succeed due to additional evidence which the applicant should have provided with the initial application, rather than evidence which was required due to UKBA errors. The Committee has stated that whilst the success rate of family visitor visa appeals remains so high, it cannot support the Government's proposals to remove the right of appeal.[348]

The Bill

Clause 34 seeks to amend the current complex legislative provisions on immigration appeal rights in order to remove family visitors from the categories of applicant who have a full right of appeal, and to remove the provisions under which the existing family visitor visa appeals regulations were made, thereby removing the full right of appeal in these cases.

Subject to the Bill's passage through Parliament, the Government intends to implement these changes by January 2014. Its best estimate is that abolishing family visitors' full appeal rights will generate a net benefit of around £107 million over 10 years.[349]

The main issues covered during the course of the debates on the clause in the Lords were whether the UKBA could do more to improve the quality of visa decision-making and information given to applicants, and the importance of giving refused applicants an

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[346] UKBA, *Family Migration: A consultation*, July 2011 paragraph 7.7
[347] ILPA, *Briefing on House of Lords Committee Stage Crime and Courts Bill Clause 24*, 8 June 2012
[348] Joint Committee on Human Rights, *Human Rights Legislative Scrutiny: Crime and Courts Bill*, 26 November 2012, HL Paper 67/HC 771 2012-13, paragraph 83
[349] Home Office, *Impact Assessment* HO0070 Restricting the Right of Appeal for Family Visitors to the UK, 29 March 2012, pp.2-3

opportunity to 'clear their name' so that future applications are not prejudiced by a previous refusal decision.[350]

In response, Ministers emphasised that the UKBA has been making efforts to make the visa application process user-friendly, but argued that ultimately it is applicants' responsibility to ensure that they properly prepare their application before it is submitted.[351] They also emphasised that each application is treated on its own merits and is not prejudiced by a previous refusal decision. Even if a previous application was refused under a 'general ground for refusal' (such as deception, which can result in any future application being refused for up to ten years), it is open to the applicant to re-apply and explain why the previous refusal was not justified.

7.3 Restriction on right of appeal from within the United Kingdom

Background

The Home Secretary has non-statutory powers to direct that an individual's exclusion from the UK would be "conducive to the public good". A person who is the subject of such an 'exclusion order' must be refused permission to enter the UK.[352] In order to give effect to the exclusion order, it may also be necessary to give a direction to cancel the person's existing immigration status. The decision to exclude an individual cannot be appealed, but there is a right of appeal against a decision to cancel leave.[353]

In 2011, in the case of *Secretary of State for the Home Department v MK (Tunisia)*,[354] the Court of Appeal found that current immigration legislation allows for individuals whose leave was cancelled for 'public good' reasons whilst they were outside the UK to have an in-country right of appeal (if they return to the UK within the 10-day time limit for lodging an in-country appeal), and for their immigration leave to continue whilst the appeal is outstanding.[355]

The Home Office is concerned that this judgement "potentially undermines the operational effect of the Secretary of State's exclusion decision."[356]

The Bill

Clause 35 seeks to reverse the effect of the Court of Appeal's judgement. It provides that if the Home Secretary certifies that a decision to cancel a person's leave to remain has been taken wholly or partly on "conducive to the public good" grounds, and the person is outside the UK at the time when the decision is taken, the person will only have a right of appeal which is exercisable from outside the UK.

The clause would only affect non-EEA nationals.[357] Provisions for the exclusion of EEA nationals are set out in separate legislation, and there is no scope to exclude UK nationals.[358]

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350 HL Deb 4 July 2012 cc690-704
351 HL Deb 12 December 2012 cc1093-5GC
352 Immigration Rules (HC 395 of 1993-4 as amended), paragraph 320(6)
353 Often referred to as 'variation appeals', since they relate to a decision to vary leave, made under section 82(2)(e) of the *Nationality, Immigration and Asylum Act 2002.*
354 *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333
355 Under s82(2)(e) and s92(2) of the *Nationality, Immigration and Asylum Act 2002,* and section 3D of the *Immigration Act 1971.*
356 Home Office *Impact Assessment*, Crime and Courts Bill: Parts 1 and 3, IA no: HO0070 p.6
357 EEA - European Economic Area (comprised of EU Member States plus Iceland, Norway and Liechtenstein)
358 SI 2006/1003 as amended by *The Immigration (European Economic Area) (Amendment) Regulations 2009,* SI 2009/1117

The Immigration Law Practitioner's Association (ILPA) has criticised the clause for being "unjust and oppressive".[359] One of its concerns is that it is unfair that one party to litigation can control whether or not the other party has an in-country right of appeal, by using information about the other party's whereabouts to determine the timing of a decision to cancel leave.

Similar concerns were raised during debate in the Lords, particularly at Report and Third Reading stages.[360] Lord Avebury contended that "it happens frequently and not by accident" that the Home Secretary waits until after an individual has left the UK to issue notice of her decision.[361] Lord Pannick and Lord Lester considered that it was arbitrary, unjust and irrational for appellants to have different appeal rights, depending on whether or not they were in the UK at the time of the Home Secretary's decision to cancel their leave.

Lord Taylor, Home Office Parliamentary Under-Secretary of State, refuted the suggestion that it is Home Office policy to "lie in wait" until a person is outside the UK before taking action against them, but pointed out that relevant evidence might only come to light after a person has left the country.[362] He emphasised that the power to exclude an individual from the UK is not used lightly, and is reserved for the "highest-harm individuals". He argued that it would be "a highly risky strategy" to allow individuals back into the country in order to pursue an appeal against their exclusion, and did not agree with those Peers who suggested that appellants would be put at a disadvantage if they had an out-of-country appeal right.

Concerns have also been raised, including by the office of the UN High Commissioner for Refugees (UNHCR), that the clause would have particularly serious potential implications for recognised refugees and stateless persons.[363] Stateless persons deprived of a right to return to the UK may not have an entitlement to reside in any other country. Refugees may only have a right to return to their country of origin, but returning them there would contravene the principle in international refugee law of *non-refoulement* (prohibition on returning a person to a place where they are at risk of persecution). The UNHCR has pointed out that the *1951 Geneva Convention Relating to the Status of Refugees* and its *1967 Protocol* already list the circumstances in which a refugee can be excluded from refugee status or have their status or protection from *non-refoulement* ceased, and that these do not include "conducive to the public good" grounds. It considers that, in light of the serious consequences of such decisions, "any such measures should be applied restrictively, and that the affected person should be able to challenge any such decision from within the country which granted them international protection, with procedural safeguards, including a hearing and an interview."

Lord Avebury tabled a series of amendments during the Bill's passage through the Lords which sought to preserve an in-country right of appeal for persons who had already been recognised as stateless or qualifying to stay in the UK on asylum or human rights grounds, or who raise an asylum or human rights claim in their grounds of appeal. Government Ministers argued that this "could seriously undermine the Government's ability to secure our borders against individuals who pose a threat to the United Kingdom."[364] Although they attracted some support from other Peers, none of the amendments went to a vote.

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359 ILPA, *House of Lords Committee Stage Crime and Courts Bill (HL Bill 4) Clause 25*, 22 June 2012
360 HL Deb 12 December 2012 cc1096-1104GC; HL Deb 18 December 2012 cc1468-1474GC
361 HL Deb 12 December 2012 c1096
362 HL Deb 18 December 2012 cc1472-3GC
363 UNHCR, *Crime and Courts Bill House of Lords Committee Stage Proposed amendments to clause 25*, June 2012
364 HL Deb 12 December 2012 c1101GC

7.4 Powers of immigration officers

Background

The UKBA has responsibilities for investigating the smuggling of drugs, firearms and weapons into the UK and for investigating serious and/or organised immigration crime. This work is conducted by the UKBA's Criminal and Financial Investigation teams.[365] There are around 700 staff in these teams, of whom "roughly half" are designated customs officials. The remainder are immigration officers and police officers on attachment to the UKBA.

Currently, immigration officers and customs and police staff within these teams have different powers available to them, and are subject to certain restrictions on the circumstances in which these can be used. For example, only customs officials can apply for permission to interfere with property under Part 3 of the *Police Act 1997*, and only for the investigation of customs offences. Immigration officers must rely on cooperation from other law enforcement agencies in order for such powers to be available for use in immigration investigations.[366] However, the Government anticipates that the proposed National Crime Agency will increasingly require the UKBA to lead on investigations relating to organised immigration crime in the future.[367]

The Government therefore wishes to ensure that the UKBA has sufficient powers to be able to investigate serious and organised immigration and customs crime, throughout the UK and independently of other law enforcement agencies. It has identified that immigration officers need powers equivalent to those already used by customs officials and other law enforcement officers, and that the UKBA's powers must be aligned with the Scottish criminal justice system.

The Bill

The changes that **clause 36** and **Schedule 17** of the Bill would make are summarised in a Home Office *Fact Sheet*:[368]

> (...) the Bill makes four changes to UKBA powers, these are in relation to:
>
> - The Regulation of Investigatory Powers Act 2000 (RIPA) and Part 3 of the Police Act 1997– extending powers covering the use of covert investigative techniques and property interference to cover immigration officers investigating serious and organised crime;
>
> - The Proceeds of Crime Act 2002 (POCA) – extending coverage of this legislation to include immigration criminal investigators putting them on a par with their customs colleagues in UKBA.
>
> - Criminal investigation and detention powers in Scotland – bringing the powers and legal responsibilities of UKBA immigration investigators into line with those of police and UKBA customs officials in Scotland and clarifying the legal position in respect of the detention and arrest of suspects by immigration officers.
>
> - Cross-border powers of arrest – making cross-border powers contained in the Criminal Justice and Public Order Act 1994 that already apply to police and customs officials in UKBA available to immigration officers to enable

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[365] Home Office, *Crime and Courts Bill Fact Sheet: Powers of Immigration Officers*, May 2012
[366] Home Office, *Crime and Courts Bill Fact Sheet: Powers of Immigration Officers*, May 2012
[367] Home Office, *Crime and Courts Bill Fact Sheet: Powers of Immigration Officers*, May 2012
[368] Home Office, *Crime and Courts Bill Fact Sheet: Powers of Immigration Officers*, May 2012

> them to deal independently with suspects wanted for offences in different jurisdictions across the United Kingdom.

The Bill's Explanatory Notes contain more detailed commentary on how UKBA staff currently exercise their existing powers and the nature of the proposed new powers.[369]

The UKBA intends to produce guidance "in due course" stipulating that only immigration officers in the Criminal and Financial Investigation teams will be able to apply for authorisation for intrusive surveillance under the *Police Act 1997* and *Regulation of Investigatory Powers Act 2000.*[370] At Lords Committee stage, Lord Henley rejected a call from Baroness Smith (speaking for the Opposition) to make these restrictions explicit within the Bill. He said that to do so would not achieve parity between immigration officers and customs officials, and that the *Police Act 1997* and *Regulation of Investigatory Powers Act 2000* already provide safeguards for how such requests are to be authorised.[371]

Baroness Smith had also cautioned that mechanisms for co-operation and information-sharing between the UKBA and the National Crime Agency would be needed in order to deal with the potential for a duplication of efforts or crimes being overlooked by both agencies.[372]

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[369] Bill 115-EN, paragraphs 534-558
[370] Bill 115-EN, paragraph 550
[371] HL Deb 4 July 2012 cc727-730
[372] HL Deb 4 July 2012 c728

8 Drugs and driving

8.1 Background

Information about the wider issues associated with drug driving, including roadside testing, drug screening devices and other evidential problems, can be found in HC Library note SN2884, available on the Parliament website.[373]

Driving whilst impaired by drugs is a serious criminal offence with penalties similar to those for drink driving. Under section 3A of the *Road Traffic Act 1988*, as amended by the *Road Traffic Act 1991*, the offence of 'causing death by careless driving while under the influence of drink or drugs' requires the prosecution to show that the driving:

- caused the death of another person;
- fell below the standard expected of a reasonable, prudent and competent driver in the circumstances; and
- the driver was unfit through drink or drugs or the level of alcohol is over the prescribed limit, or a failure to provide a specimen.

The charge can only be heard in the Crown Court.

The maximum penalty is an unlimited fine and/or 14 years imprisonment; an obligatory disqualification for at least two years (three years if there is a relevant previous conviction); and the obligatory endorsement of the driver's licence with 3-11 penalty points. The maximum penalty was originally five years imprisonment and/or an unlimited fine but this was doubled to ten years imprisonment from August 1993 by the *Criminal Justice Act 1993* and increased again to 14 years in February 2004 under the *Criminal Justice Act 2003.*

Under section 4 of the 1988 Act it is also an offence to drive or be in charge of a vehicle while unfit to drive through drink or drugs. The maximum penalty for driving or attempting to drive while unfit is six months in prison, a £5,000 fine and disqualification; for being in charge while unfit it is three months in prison, a £2,500 fine and a disqualification or ten points on the licence.

In January 2007 the Sentencing Advisory Panel announced a consultation on advice about the 'causing death by driving' offences.[374] In January 2008 the Panel published its new advice to the Sentencing Advisory Council[375] on causing death by driving offences. In total the Panel made 18 recommendations; these included:

- Where there is sufficient evidence of driving impairment, the consumption of alcohol or drugs prior to driving will make an offence more serious; and
- The fact that an offender may have consumed alcohol or drugs unwittingly before driving may be regarded as a mitigating factor but consideration should be given to the circumstances in which the offender decided to drive or continue to drive when driving ability was impaired.[376]

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[373] HC Library, *Driving: drugs*, SN2884, 8 June 2012
[374] SAP press notice, "Consultation paper on causing death by driving offences", 25 January 2007
[375] now the Sentencing Council
[376] SAP, *Advice to the Sentencing Guidelines Council: Driving Offences – Causing Death by Driving,* 9 January 2008, pp59-60 (Annex E)

In November 2008 the Department for Transport published a consultation document on road safety compliance and asked for views on the creation of a possible new offence for driving with drugs in one's system. The consultation paper explained:

> We could explore the viability of creating a new offence to target those who drive after taking illegal drugs – those that are controlled by the Misuse of Drugs Act 1971 – which can impair a user's ability to drive. The public rightly perceive users of these drugs who drive as a danger to road safety. As this paper has shown, it is difficult for the police to deal with these offenders. The nature of the effects of the drugs they take mean it is inappropriate to regulate the use of impairing illegal drugs using a prescribed limit based on the same principles as the limit for alcohol, even if it was acceptable to do so.
>
> Such an offence could be framed in such a way that a driver could be convicted of a new offence if an appropriate test showed such an illegal drug in their body. The effects of particular drugs on different individuals are complex, and, as set out below, there would be a lot of further work to do to develop this possibility, but our ultimate aim would be to treat in this way any illegal drug that is capable of impairing driving.
>
> [...]
>
> The penalties for drivers exceeding the prescribed limit for alcohol are the same as for those convicted of the alternative offence of driving while unfit through drink or drugs. We therefore envisage that penalties for the possible new offence should be the same as for the existing offence of driving while unfit through drugs, which is a mandatory minimum disqualification of 12 months; offenders may also be fined up to £5,000 and sent to prison for up to 6 months.[377]

The consultation closed in February 2009 and in December 2009 the Labour Government announced that it would seek further advice on the matter from Sir Peter North.[378] While Sir Peter provided initial advice to Lord Adonis before the 2010 General Election, his final report was not published until 16 June, after the Conservative-Liberal Democrat Coalition Government took power. The main recommendations of the North Review related to drug driving were that police procedures enforcing current drug driving laws should improved and that there should be early approval for saliva testing. The press notice accompanying the Review stated:

> The Review also assesses Great Britain's less well-understood drug driving problem, challenging the lack of reliable statistics, out-dated research and police emphasis on drink driving detection. 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 was keen to say:
>
> "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".

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[377] DfT, *Road safety compliance consultation*, 20 November 2008, paras 5.43-5.49
[378] HC Deb 3 December 2009, cc136-138WS

> 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.[379]

In written evidence to the Transport Select Committee, submitted in September 2010, the Department for Transport set out the Government's views on how it intended to proceed in the area of drug driving. This mostly concerned introducing preliminary testing devices to assess suspected drug driving and discussed the difficulties involved in ascertaining the prevalence of driving impaired by drugs.[380] In March 2011 the then Secretary of State for Transport, Philip Hammond, set out how the Government would proceed in these areas.[381]

8.2 The Bill

In the 2012 Queen's Speech, the Government announced its intention to introduce a new drug driving offence. **Clause 37** and **Schedule 18** of the Bill include a new specific offence of driving or being in charge of a motor vehicle with a concentration of a controlled drug above a specified limit and makes further provision for the taking of preliminary tests to determine the level of drugs in a person's blood or urine. Different specified limits may be set for different controlled drugs, including a specified limit of zero in some instances.

As set out above, it is already an offence under section 4 of the 1988 Act to drive whilst impaired by drugs (or alcohol), and the section 4 offence will remain in place alongside the new offence. Unlike the section 4 offence, the new offence will not require proof of impairment. The maximum penalty available for the new offence is 51 weeks' imprisonment and a fine of £5,000 in England and Wales; six months imprisonment and a similar fine in Scotland. Ministers may specify by regulations the controlled drugs that are covered by the offence, and the specified limit in relation to each.

The Government announced the formation of an expert advisory panel to look at the impairing levels of certain drugs in the context of the proposed offence of driving whilst under the influence of drugs in excess of prescribed concentrations, chaired by Dr Kim Wolff.[382]

8.3 Debate in the Lords

At Second Reading, Lord Henley, described the purpose of the new measure as follows:

> Finally, [the clause] introduces a new, specific offence of drug driving. Figures for 2010 identified impairment by drugs as a contributory factor in nearly 1,100 road casualties, including some 50 deaths. We also know from studies that the extent of the road casualty problem is a lot greater than these reported statistics suggest. We need to do more to tackle this scourge and to protect road users. There is already an offence of driving while being unfit through drugs, but there are few convictions because of the requirement to prove impairment. The new offence is modelled on the analogous drink-

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379 North Review press notice, "'Time to give the public what they want': North proposes crack down on drink and drug driving", 16 June 2010; the report and supporting research can be found on the North Review website

380 Transport Committee, *Drink and drug driving law* (first report of session 2010-11), HC 460, 1 December 2010, written evidence from the Department for Transport; the Coalition Agreement makes a specific commitment that the Government will "switch to more effective ways of making our roads safer, including authorising 'drugalyser' technology"

381 HC Deb 21 March 2011, cc44-46WS; for further information see ibid., *Driving: drugs*

382 DfT press notice, "Government crack down on drug driving menace", 9 May 2012

> driving offence, where it is not necessary to prove impairment but simply that the driver had a concentration of alcohol in his or her body above the prescribed limit.[383]

The spokesman for the Opposition, Baroness Smith of Basildon, said:

> This is a very important area, as the Minister indicated. It has our support in principle, but this is, as he has acknowledged, a complex and difficult area to get right. The proposal is to look at this issue in the same way as drink-driving in that a certain level of drugs would be an offence even if there were no problems detected with driving. I was struck by and interested in the comments of the noble Baroness, Lady Meacher, in a speech on the Queen's Speech just a couple of weeks ago, about the complexities of this area. Clearly we will want to debate this further and seek assurances from the Minister about how this could be put into practice in an effective way.[384]

In Committee Baroness Meacher put down a series of amendments which, taken together, would have the effect of relating the proposed offence to the risk associated with particular drugs, rather than their legality, and to ensure that people taking prescription medication were not unfairly caught be the law. She explained:

> The purpose of my amendments is to ensure that young people are not criminalised unless any drugs in their system really are causing impairment while they are driving. ... there are several reasons why a driver may have a drug in their system but be entirely safe behind the driving wheel. One of my main concerns is that a very substantial minority of young people, as we know, take herbal cannabis. That is a relatively harmless thing to do [...] The distinction between controlled and uncontrolled drugs is not evidence-based. Alcohol and tobacco, as we know, are far more dangerous than some drugs that are controlled under the Misuse of Drugs Act. Any evidence-based legislation - which I understand this is designed to be-should not reference the outdated and discredited Misuse of Drugs Act. [...]
>
> My second point is that a number of the so-called legal highs, or new psychoactive substances, are the drugs that may prove far more of a risk to drivers. Of course, these are controlled through temporary bans, but as Ministers and everybody else know, as soon as one of these drugs is controlled, the creators of these substances get back into their labs and create some new ones by changing a few molecules, and for a while those substances will be legal. There is, therefore, no rationale for limiting this legislation to controlled drugs, because drugs that are not controlled cause just as many problems, if not more.
>
> [There should also be] a good reason for police involvement, either that the police are responding to a road accident, or that the roadside evidence suggests that the driver is impaired and that this may be due to alcohol or a drug in their system [...] I am concerned that the legislation could cause the inappropriate arrest and charging of patients prescribed medications for chronic pain and other long-term conditions.[385]

Baroness Smith, for the Opposition, voiced similar concerns as to how the new offence would operate fairly.[386] In reply the Minister, Lord Hanley, admitted that the clause was a work in progress and that "this is probably just the first stage in quite a long discussion that will take place in this House and the other House so that we can get these matters absolutely right".[387] He likened the measure to the introduction of the breathalyser for alcohol but

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383 HL Deb 28 May 2012, c977
384 ibid., c982
385 HL Deb 4 July 2012, cc767-8GC
386 ibid., cc768-71GC
387 ibid., c772GC

acknowledged that it “is going to be very difficult indeed”. He emphasised the importance of the advice from the expert panel (see above), which had yet to be received but would be working “very hard to find ways of defining the appropriate drugs and the appropriate limits”.[388] Baroness Meacher withdrew her amendment and the clause was agreed without further debate.

On Report the baroness proposed a slightly different amendment to replace the word ‘controlled’ with ‘psychoactive’, in effect to achieve the same effect as her earlier amendment in Committee.[389] Baroness Smith also sought assurances, on behalf of the Opposition, that the new law would not result in action being taken against those on prescribed medication, unless it was clear that their driving was impaired.[390] The Minister, Earl Attlee, replied to the concerns as follows:

> First, I emphasise that any passengers would not be screened for drugs following a vehicle being stopped by the police and the driver being tested for drugs [...]
>
> The Government expect roadside drug test equipment to be available in 2014, when we anticipate bringing the new offence into force. We would expect breath tests to be conducted first, as they are quicker and easier. We cannot speculate on how many tests would be taken, as that is an operational matter for the police.
>
> [...] Focusing on controlled drugs limits the scope of the offence to a specific category of drugs. This category of drugs is considered to be sufficiently harmful to warrant restricting its availability under the Misuse of Drugs Act 1971. Within the category, the Government will set limits only for drugs which are known to affect road safety.
>
> [...] A police officer may only require a person to co-operate with a preliminary drugs test in certain circumstances. Preliminary testing can be required only if the officer suspects that a driver is under the influence of a drug or has a drug in his body; if the driver has committed a moving traffic offence; or if the driver has been involved in a road traffic accident.
>
> [...] As we have heard, a number of noble Lords are concerned about the impact which this legislation could have on patients taking prescription medication and have tabled Amendments 118GA, 118H, 118J, 118K and 118L to address this issue. It is to no one's benefit for drivers who are innocent of any wrongdoing to be arrested. The new offence is intended to target those who drive after taking illicit drugs or prescription drugs which are being misused and therefore give rise to road safety risks. The Government have therefore included a defence so that a person who has taken their medication in accordance with medical advice would not be guilty of an offence.
>
> The noble Baroness, Lady Smith, asked me what happens if the doctor's advice conflicts with the advice on the leaflet supplied with the drugs. Proposed new Section 5A(3)(b) says:
>
> "so far as consistent with ... directions".
>
> A doctor's instructions therefore take precedence over the patient information leaflet, so the doctor trumps the leaflet.
>
> [...] The medical defence places what is known as an "evidential" burden on a person accused of committing the offence. This means that the accused person must simply put forward enough evidence to "raise an issue" regarding the defence that is worth

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388 ibid., cc772-3
389 HL Deb 12 December 2012, c1105
390 ibid., c1112

> consideration by the court, following which it is for the prosecution to prove beyond reasonable doubt that the defence cannot be relied on [...] Another point to note is that the Code for Crown Prosecutors specifically states that prosecutors "should swiftly stop cases" ... Furthermore, the Government expect that the courts will take a sensible approach to the operation of the new offence. For example, a defendant seeking to rely on the medical defence may be afforded more or less leeway depending on the facts of a particular case, such as the nature of the medical advice provided, including the wording of any leaflet accompanying the medicine.[391]

On the report of the expert panel, he said:

> The expert panel is independent of government. It is important that it takes the time that it needs. Advising on which drugs the new offence should cover and on limits to set for driving purposes are complicated issues which require careful consideration. The expert panel has considered a wide range of drugs and has needed to reconcile the available evidence from the UK and abroad. This means that it has taken longer than we anticipated for the panel to report. The Government intend to publish a copy of the report of the expert panel on drug-driving as soon as we are able after the report is finalised. Of course, we will not proceed further with the secondary legislation until we have the expert panel's report. [392]

The amendment was withdrawn.

Baroness Hamwee moved a further amendment to require that the Secretary of State publish a report on any controlled drug proposed to be specified and the limit proposed to be specified before laying the relevant regulations before Parliament.[393] Earl Attlee replied that there would be one single set of implementing regulations preceded by a consultation on their contents, the types of drugs to be prescribed and their limits.[394] The amendment was withdrawn.

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[391] ibid., cc1112-7
[392] ibid., cc1112
[393] ibid., cc1117-8
[394] Ibid., c1119

9 Public order offences: "Insulting words or behaviour"

Clause 38 is the result of the latest of a number of attempts to amend section 5 of the *Public Order Act 1986* through various bills. On this occasion, the crossbench peer Lord Dear moved the amendment on Report.[395]

Section 5 of the *Public Order Act 1986* makes it an offence to use "threatening, abusive or insulting words or behaviour, or disorderly behaviour" or to display "any writing, sign or other visible representation which is threatening, abusive or insulting" within the hearing or sight of a person "likely to be caused harassment, alarm or distress thereby". The offence does not depend on harassment, alarm or distress actually having been caused in the particular case.

The Government has been consulting on whether to remove the word "insulting" from section 5 of the *Public Order Act 1986*. Background is given in Library Standard Note 5760, *"Insulting words or behaviour": Section 5 of the Public Order Act 1986*. Section 5 has been used to arrest and/or prosecute (for example) religious campaigners against homosexuality,[396] a British National Party member who displayed anti-Islamic posters in his window[397] and people who have sworn at the police.[398] Police charged a teenage anti-Scientology protestor,[399] although the charges were later dropped, as they were in a well publicised case of a student arrested for calling a police horse "gay".[400] Hotel owners were charged (although later acquitted) following a religious discussion with a Muslim guest.[401]

The Joint Committee on Human Rights recommended that the Government amend section 5 in their 2009 report *Demonstrating respect for rights? A human rights approach to policing protest*.[402]

The previous Government in its response said that whilst they saw the merits in the Committee's argument in the context of policing protest, it saw potentially far-reaching implications for the policing of level disorder on the street, and for the racially and religiously aggravated section 5 offences. It promised to come back to the Committee following consultation with stakeholders, but said "in the short-term, ACPO will seek to address the concerns of the Committee in its redraft of the *Keeping the Peace* manual which provides guidance on public order policing."[403]

The Government published its consultation document on 13 October 2011.[404] This sought views on three issues relating to public order. The aim of the consultation on section 5 was to "consider the value of the word 'insulting' in section 5, whether it is consistent with the right to freedom of expression and the risks of removing it from section 5."[405] The consultation closed on 13 January 2012. As yet no government response document has been published.

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395 HL Deb 12 December 2012 c1128-30
396 *Hammond v DPP*, [2004] EWHC 69 (Admin) 13 January 2004
397 *Norwood v DPP,* [2003] EWHC 1564 (Admin);
398 See for example DPP v Orum [1989] 1 WLR 88
399 "Teenager faces prosecution for calling Scientology 'cult'", *Guardian*, 20 May 2008
400 "'Gay' police horse case dropped", *BBC News*, 12 January 2006
401 Christian Institute, *Thought Crimes Briefing*, October 2010
402 JCHR, *Demonstrating respect for rights? A human rights approach to policing protest, HL 47/HC 320* 2008-09, 23 March 2009
403 *The Government Reply to the Seventh Report from the Joint Committee on Human Rights Session 2008-09 HL Paper 47, HC 320* CM 7633, May 2009
404 Home Office, *Consultation on police powers to promote and maintain public order*, October 2011
405 p7

The Conservative peer, Lord Mawhinney, moved an amendment in Committee to remove the word insulting from section 5, but withdrew it.[406] Lord Dear moved a similar amendment on Report, setting out some of the support there was for the change:

> The noble Lord, Lord Macdonald of River Glaven, until recently the Director of Public Prosecutions, has signed the amendment and written a detailed opinion that I have circulated individually to Members of your Lordships' House. It gives a brilliant resumé of the substantial legal arguments supporting this change. The noble Baroness, Lady Kennedy of The Shaws, an eminent QC and chairman of Justice, and the noble and learned Lord, Lord Mackay of Clashfern, one of the most respected Lord Chancellors of recent years, have also signed the amendment. I am very grateful to all three for their interest and support.
>
> But there is much more, and from individuals or organisations that do not always work harmoniously one with the other. The National Secular Society and the Christian Institute are often at odds, but here they stand shoulder to shoulder supporting the amendment. I should like to record my warm thanks to the staff of the Christian Institute for the administrative help that they have given me prior to this debate. There are also the Peter Tatchell Foundation; the Bow Group; the Freedom Association; the Equality and Human Rights Commission; and the Joint Committee on Human Rights, which reported as recently as 20 November, saying:
>
> "We understand the sensitivities with certain communities on this issue, but nonetheless we support an amendment to the Bill which reduces the scope of s. 5 Public Order Act ... on the basis that criminalising insulting words or behaviour constitutes a disproportionate interference with freedom of expression".
>
> Justice fully supports the amendment, writing:
>
> "It is essential for the progress of society that we do not ossify public views by censoring debate on matters of current public controversy".
>
> Liberty would scrap the whole of Section 5, not just one word; but it has pledged wholehearted support, saying:
>
> "The amendment would herald a very significant victory for freedom of expression".[407]

For the Government, Lord Taylor of Holbeach made it clear that the Government has considered the consultation responses, and does not intend to amend section 5:

> Let us make it clear: the Government are not seeking to change the law. It is this debate and this amendment that are seeking to change the law. The law has existed and has protected free speech, and incidents have been demonstrated. But we need to be properly considerate before we change the law in this area.
>
> As the noble Lord, Lord Dear, has explained, the amendment would repeal as an offence the use of insulting words or behaviour that are likely to cause "harassment, alarm or distress". As has been mentioned, the House will recall that a similar amendment was put forward by my noble friend Lord Mawhinney in Committee. At that point, he agreed to withdraw his amendment to allow the time for the Government to fully consider their response. After all, they had a public consultation, as the noble Baroness has mentioned, on possible reform of the whole of Section 5. I am grateful to my noble friend, who I do not think is in his place.

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406 HL Deb 4 July 2012 c781
407 HL Deb 12 December 2012 c121-2

> The Government have completed their consideration of the consultation responses. The consultation produced a polarisation of views - I do not think that that will surprise noble Lords - between those seeking removal of the word "insulting" and those wishing to retain it. The number of responses - there were more than 2,900 - the strength of feeling and the complex issues raised by respondents, on both sides of the debate, make this a far from straightforward decision. If it were easy, I certainly would try to make it easy.
>
> The task falling to Government on this issue is to carefully balance the right of people in a democratic society to express themselves freely with the Government's responsibilities to protect the rights of others to go about their lawful business without being caused harassment, alarm or distress. Therefore, it is important that the debate on this issue is properly informed. (…)
>
> The Government have carefully considered the legitimate concerns and strongly held views of respondents to the consultation. There are good arguments on both sides. **However, I must inform the House that the Government strongly holds the view that the word "insulting" should be retained in Section 5 of the Public Order Act.**
>
> The Government have a responsibility to protect the public so that communities and law-abiding citizens can live in peace and security. The police must have the powers they need to meet this responsibility.[408]

The amendment was agreed to on division by 150 votes to 54.

[408] HL Deb 12 December 2012 cc1128-30 emphasis added