These notes refer to the Crime and Courts Act 2013 (c.22) which received Royal Assent on 25 April 2013

CRIME AND COURTS ACT 2013

EXPLANATORY NOTES

BACKGROUND

Part 1: the National Crime Agency

The National Crime Agency

12. In July 2010 the Home Office set out the Government's plans for policing reform in *Policing in the 21st Century*[1], including proposals for a new National Crime Agency ("NCA") to lead the fight against serious and organised crime and strengthen border security. Further details of the Government's proposals for the creation of the NCA were announced by the Home Secretary on 8 June 2011 (House of Commons, Official Report, columns 232 to 234). The accompanying *The National Crime Agency: A plan for the creation of a national crime-fighting capability* (Cm 8097[2]) set out the proposed structure of the NCA comprising:

- Organised Crime Command;
- Border Policing Command;
- Economic Crime Command;
- Child Exploitation and Online Protection Command ("CEOP").

13. The four commands would be underpinned by an intelligence hub, tasking and co-ordination arrangements and a National Cyber Crime Unit.

14. The NCA will build on the work of the Serious Organised Crime Agency ("SOCA") which was established by Part 1 of the Serious Organised Crime and Police Act 2005.

15. The establishment of the NCA is part of the Government's wider organised crime strategy, *Local to global: reducing the risk from organised crime*[3], published on 28 July 2011. Part 1 of the Act provides for the establishment of the NCA and the abolition of SOCA and the National Policing Improvement Agency ("NPIA").

Abolition of National Policing Improvement Agency

16. The NPIA was established by section 1 of the Police and Justice Act 2006. The Agency was formed in April 2007.

17. The Home Office's plans for policing reform set out in *Policing in the 21st Century* included proposals for streamlining the national policing landscape by, amongst other things, phasing out of the NPIA. On 4 July 2011, the Home Secretary announced plans to set up a police information and communications technology company[4] which would

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1 https://www.gov.uk/government/publications/policing-in-the-21st-century-reconnecting-police-and-the-people-consultation
2 https://www.gov.uk/government/publications/national-crime-agency-a-plan-for-the-creation-of-a-national-crime-fighting-capability
3 https://www.gov.uk/government/publications/organised-crime-strategy
4 https://www.gov.uk/government/speeches/police-reform-home-secretarys-speech-to-acpo-summer-conference

take on certain functions of the NPIA. In written statements on 15 December 2011 (House of Commons, Official Report, columns 125WS to 127WS), 26 March 2012 (House of Commons, Official Report, columns 94WS to 95WS) and 16 July 2012 (House of Commons, Official Report, columns 105WS to 107WS), the Home Secretary set out further proposals. Section 15(2) of the Act provides for the abolition of the NPIA. The statutory duty conferred on the NPIA by section 3 of the Proceeds of Crime Act 2002 to provide a system for the training, monitoring, accreditation and withdrawal of accreditation of financial investigators will move to the NCA as provided for in paragraph 111 of Schedule 8.

Part 2: Courts and Justice

Section 17: Civil and family proceedings in England and Wales

Single County Court for England and Wales

18. County courts are constituted under the County Courts Act 1984. There are approximately 170 county courts in England and Wales, prescribed by article 6 of, and Schedule 3 to, the Civil Courts Order 1983[5], as amended. Each county court has a separate legal identity and serves a defined geographical area. Certain civil matters, for example in respect of proceedings in contract and tort or actions for the recovery of land, can be dealt with by all county courts, whereas other civil cases, for example family proceedings, certain contested probate actions and bankruptcy claims, are handled by designated county courts.

19. In January 2008, the Judicial Executive Board commissioned Sir Henry Brooke to conduct an inquiry into the question of civil court unification. He published his report[6], entitled *Should the Civil Courts be Unified?*, in August 2008. In the report, Sir Henry recommended that consideration should be given to whether the county courts should become a single national court.

20. In March 2011, the Ministry of Justice subsequently published a consultation document (Consultation Paper CP6/2011) entitled *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*[7]. The consultation paper, which was aimed at reforming the civil justice system in England and Wales, sought views on whether a single county court should be established. On 9 February 2012, accompanied by a written ministerial statement (House of Commons, Official Report, column 53WS), the Government published its response to the consultation (CM 8274)[8], announcing its intention to implement its proposals for the establishment of a single county court. Section 17(1) of the Act implements those proposals.

Single family court for England and Wales

21. Family proceedings are currently heard at first instance in the magistrates' courts (family proceedings courts), the county courts and the High Court. While the Family Procedure Rules 2010[9] largely govern the practices and procedures of all courts dealing with family proceedings, each court's family jurisdiction is constituted and governed by a variety of different statues. For example, section 33(1) of the Matrimonial and Family Proceedings Act 1984 allows the Lord Chancellor to designate certain county courts as "divorce county courts", which have jurisdiction to hear and determine any matrimonial matters.

22. In March 2010, the Family Justice Review Panel, chaired by David Norgrove and commissioned by the Ministry of Justice, the Department for Education, and the Welsh

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5 S.I. 1983/713
6 http://www.judiciary.gov.uk/publications-and-reports/reports/civil/civil-courts-unification
7 http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf
8 https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf
9 S.I. 2010/2955

Government, began their review of the family justice system in England and Wales. In November 2011 the Family Justice Review Panel published their final report, *Family Justice Review – Final Report,*[10] in which they recommended that a single family court, with a single point of entry, should replace the current three tiers of court. Prior to publication of the Panel's final report the Government consulted on the Panel's interim report and recommendation *Family Justice Review – Interim Report*[11]. An analysis of consultation responses was integrated into the Panel's final report; however, in summary the majority of respondents to the consultation (75%) agreed that a single family court should be created.

23. A written ministerial statement on 6 February 2012 (House of Commons, Official Report, column WS3) announced the publication of the Government's response to that Panel's final report (CM 8273)[12]. The response noted "*we* [the Government] *will establish a single Family Court for England and Wales, with a single point of entry, as the Review recommended*". Section 17(3) of the Act gives effect to this.

Section 18: Youth courts to have jurisdiction to grant gang-related injunctions

24. Gang-related injunctions were introduced by the Policing and Crime Act 2009, which made provision for civil injunctions to be granted by the county court (or High Court) on application by the police or local authority in order to prevent gang related violence. This was amended by the Crime and Security Act 2010 to enable gang-related injunctions to be taken out against those aged between 14 and 17 by creating two new penalties for breach.

25. Section 18, which also introduces Schedule 12, makes amendments to provide for applications for gang-related injunctions for 14 to 17 year olds to be heard in the youth court, sitting in a civil capacity, rather than in the county court (or High Court). The effect of this measure will be to allow the courts with the most appropriate facilities and expertise in dealing with young people to consider these matters.

Section 19: Varying designation of authorities responsible for remanded young persons

26. Section 102(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("2012 Act") requires the court to designate a local authority as the designated authority for a child remanded to youth detention accommodation. A designation has various consequences. One consequence is to make the designated authority liable for the costs of the remand to youth detention accommodation. Regulations made under section 103(2) of the 2012 Act provide for the recovery of a proportion of these costs by the Youth Justice Board for England and Wales ("the YJB") from the designated authority. The youth remand provisions of the 2012 Act, and regulations under section 103(2) of that Act, came into force on 3rd December 2012. In addition, new regulations providing for the recovery from the designated authority of the full costs of the remand to youth detention accommodation were brought into force on 1st April 2013.

27. Section 102(7) of the 2012 Act provides for the court to designate any authority which is already looking after the child. If there is no such authority, the court is to designate either the authority in which the child habitually resides ("the home authority") or that in whose area the offence was committed. Section 19 provides that, where the child is not looked after, the court is ordinarily to designate the home authority. However, in some cases the court may not be able to correctly establish the identity of the home authority at the initial remand hearing. It will in those cases designate a different authority. A designation may be changed at a later remand hearing, but any change only has effect from the point at which the change is made. As such the YJB may only recover costs

10 http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf
11 http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-interim-rep.pdf
12 https://www.education.gov.uk/publications/eOrderingDownload/CM-8273.pdf

of the remand to youth detention accommodation from the newly designated authority which relate to the period after the change has been made (but not costs which relate to the period *before* the change was made – for which the initially designated authority remains liable).

28. Section 19 amends section 102 of the 2012 Act to allow a court to make a 'replacement designation.' A replacement designation has the effect that the newly designated authority is – for the purpose of liability for the costs of remand to youth detention accommodation – designated during the period before the replacement designation was made. This therefore allows regulations to provide for the YJB to recover from this designated authority the costs of remand to youth detention accommodation in relation to that period of remand.

Section 20: Judicial appointments

29. The Constitutional Reform Act 2005 ("the CRA") made a number of substantial changes to the process for selecting and appointing various judicial office holders within the United Kingdom. Part 4 of the CRA, which established the Judicial Appointments Commission, governs the selection process for appointing judicial office holders to the courts in England and Wales, together with appointments to specified tribunals in the United Kingdom. The Supreme Court of the United Kingdom was also established by section 23 of the CRA. A separate process for selecting and appointing the President, Deputy President and judges of the UK Supreme Court is governed by Part 3 of the CRA.

30. In November 2011, the Ministry of Justice published a consultation document entitled *Appointments and Diversity: A Judiciary for the 21st Century* (CP19/2011)[13]. The consultation sought views on legislative changes to achieve the proper balance between executive, judicial and independent responsibilities and to improve clarity, transparency and openness in the judicial appointments process. In addition the consultation also sought views on creating a more diverse judiciary that is reflective of society. The Government published its response to the consultation on 11 May 2012[14]. Section 20 of, and Schedule 13 to, the Act give effect to the aims outlined above.

Section 21: Deployment of the judiciary

31. The deployment of the judiciary is a function referred to in the CRA and the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Section 7 of the CRA includes in the list of the Lord Chief Justice's responsibilities as President of the Courts of England and Wales, the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales. Part 2 of Schedule 4 to the 2007 Act provides that the Senior President of Tribunals has the function of assigning judges and other members to the chambers of the First-tier Tribunal and Upper Tribunal.

32. The establishment of Her Majesty's Courts and Tribunals Service ("HMCTS") on 1 April 2011 was designed to provide the Ministry of Justice with the opportunity to manage its resources more flexibly according to changing pressures and demands. However, the Lord Chief Justice and Senior President of Tribunals lack the ability to share judicial resource in order to respond to changes in demands. Section 21 introduces Schedule 14 which makes amendments that will enable the Lord Chief Justice to deploy judges more flexibly across different courts and tribunals of equivalent or lower status.

Section 22: Transfer of immigration or nationality judicial review applications

33. Section 22 removes a restriction in existing legislation so as to allow for the transfer, from the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland to the Upper Tribunal, of applications for judicial review

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13 http://www.justice.gov.uk/downloads/consultations/judicial-appointments-consultation-1911.pdf
14 https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011

or permission to apply for judicial review. This restriction applies to most types of immigration, asylum and nationality applications, and its removal would allow these to be transferred by a direction from the Lord Chief Justice (or, in the case of the Court of Session, by a procedural rule known as an act of sederunt), with the consent of the Lord Chancellor.

Section 23: Permission to appeal from Upper Tribunal to Court of Session

34. Section 23 allows for a rule of court in Scotland to reintroduce the "second-tier appeals test" for applications for permission to appeal from the Upper Tribunal to the Court of Session. This test requires that an application should demonstrate that the appeal would raise an "important point of principle or practice", or "some other compelling reason for the court to hear the appeal". The test applies in England and Wales and in Northern Ireland and was in place in Scotland before it was recently found to be *ultra vires* in a decision of the Court of Session.

Section 24: Appeals relating to regulation of the Bar

35. Judges have long exercised an appellate jurisdiction in relation to the regulation of barristers. Since 1873 judges of the High Court have been exercising this function as part of their "extraordinary functions" under what is now section 44(1) of the Senior Courts Act 1981. The current regulatory arrangements of the Bar Council (as set out in Bar Training Regulations made by the Bar Standards Board and the Hearing before the Visitors Rules 2010) provide for disciplinary decisions of the Council of the Inns of Court and decisions taken by the Bar Council's qualifications committee and its panels to be appealed to the Visitors. This includes decisions about professional misconduct, satisfaction of requirements for a person to be admitted to an Inn or called to the Bar, the conduct of students, the registration of pupillages and the approval of pupil supervisors. The historical jurisdiction of the Visitors is quite wide, however, and includes all decisions relating to the conduct of an Inn's affairs, such as the letting of chambers or payment of dues.

36. In December 2009 the Ministry of Justice consulted on a draft Civil Law Reform Bill[15] which included proposals to transfer the jurisdiction of the Visitors of the Inns of Court to the High Court; that draft Bill was not taken forward. Baroness Deech, Chair of the Bar Standards Board, tabled what is now section 24 of the Act at Report stage in the House of Lords (Official Report, 4 December 2012, columns 605 to 607) to abolish the jurisdiction of judges to sit as Visitors under section 44(1) of the Senior Courts Act 1981 and enable appeal to the High Court.

Section 25: Enforcement by taking control of goods

37. In February 2012 the Ministry of Justice set out its proposals for transforming the enforcement industry and providing more protection against aggressive bailiffs in the consultation paper, *Transforming Bailiff Action.*[16] The Government's response to *Transforming Bailiff Action* was published in January 2013[17] and sets out a series of proposals to strengthen protections from rogue bailiffs who use unsound, unsafe or unfair methods, while at the same time making sure that debts can still be collected fairly. These measures included the implementation of Part 3 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act").

38. Part 3 of the 2007 Act makes a number of reforms to bailiff law. The changes would help debtors, creditors and bailiffs understand what their rights and responsibilities are when debts are enforced. The provisions would also codify the existing law and introduce a comprehensive code governing amongst other things: when and how a bailiff can enter

15 http://www.justice.gov.uk/downloads/legislation/bills-acts/draft-civil-law-reform-bill.pdf
16 https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action
17 https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action

somebody's premises; what goods they can and cannot seize and sell; and what costs they can charge.

39. Section 25 makes amendments of Part 3 of the 2007 Act relating to the use of force by bailiffs to enter commercial and domestic premises and the definition of abandonment.

Section 26: Payment of fines and other sums

40. In England and Wales the Lord Chancellor by virtue of section 36 of the Courts Act 2003 ("the 2003 Act") may appoint fines officers for the purpose of managing the collection and enforcement of court fines. Fines officers play a crucial role in the operation of the fine collection scheme detailed in Schedule 5 to the 2003 Act. For example, the role of a fines officer includes chasing payment via texts or letters, and issuing notification to the Department for Work and Pensions for benefit deductions in the event of non-payment of a court fine in certain cases.

41. In 2008 HMCTS launched the Criminal Compliance and Enforcement Blueprint. The fundamental principle of this strategy was to ensure criminal financial penalties imposed by the court were complied with earlier and reduce the use of costly enforcement actions such as issuing a warrant of distress. The costs of collection incurred by HMCTS while attempting the recovery of financial penalties are currently funded via the public purse.

42. To support the implementation of the above strategy and increase the incentive for early compliance, section 26 of the Act will enable the imposition and recovery of a charge imposed on offenders for the costs of collecting or pursuing financial penalties and clarifies the role of the fines officer.

Section: 27 Disclosure of information to facilitate collection of fines and other sums

43. The current data sharing gateway in Schedule 5 to the 2003 Act is amended by section 27 to bring the relevant paragraphs of that Schedule within a new Part 3A of that Schedule. New Part 3A enables the Secretary of State (in practice the Department for Work and Pensions) and a Northern Ireland Department and Her Majesty's Revenue and Customs to share "social security information" and "finances information" with HMCTS for the purpose of the enforcement of unpaid financial penalties.

Section 28: Disclosure of information for calculating fees of courts, tribunals etc

44. In line with chapter 6 'Fees, Charges and Levies' of HM Treasury's *Managing Public Money*[18], HMCTS, the UK Supreme Court and the Public Guardian charge fees for the services they provide. To help individuals of limited financial means to gain access to these services, HMCTS, the UK Supreme Court and the Public Guardian operate fee remission systems for their users. For example, the Civil Proceedings Fees Order 2008[19] sets out the fees payable in civil proceedings (Schedule 1) and the accompanying remission system for those fees (Schedule 2).

45. Currently, to qualify for certain fee remissions an individual must supply HMCTS, the UK Supreme Court or the Public Guardian with a completed application form and up-to-date hard copy proof of state benefit entitlement, issued by either the Department for Work and Pensions ("DWP") or Her Majesty's Revenue and Customs ("HMRC") confirming which benefit they receive. Failure to provide evidence can result in the application being refused.

46. To streamline the fee remission process, section 28 allows HMCTS, the UK Supreme Court and the Public Guardian to obtain certain information from the DWP, HMRC or a Northern Ireland Department in order to determine whether an individual qualifies for

18 http://www.hm-treasury.gov.uk/psr_managingpublicmoney_publication.htm
19 S.I. 2008/1053

a fee remission. The Government intends that ultimately the information will, in most cases, be disclosed via a shared IT database. This data gateway therefore removes the need for an individual to supply a hard copy of their benefit entitlement notice in order to satisfy their entitlement for certain fee remissions.

Section 29: Supreme Court chief executive, officers and staff

47. Section 48 of the CRA prescribes that the Lord Chancellor must appoint the chief executive for the UK Supreme Court, after consulting the President of the Court. Similarly, section 49 of the CRA requires the Lord Chancellor to agree the numbers of officers and staff of the UK Supreme Court, and the terms on which these officers and staff are to be appointed.

48. Section 29 removes the Lord Chancellor from both of these processes, leaving the President of the UK Supreme Court solely responsible for appointing the chief executive and the chief executive responsible for determining the number of staff and officers of the Court.

Section 30: Supreme Court Security Officers

49. The Lord Chancellor, in accordance with the Courts Act 2003, appoints and designates security officers for all courts in England and Wales, other than the UK Supreme Court. Security officers are required to comply with training requirements prescribed by secondary legislation. Once the Lord Chancellor designates an individual as a court security officer they have specific powers that they may exercise in court buildings, for example, the power of search, seizure of weapons and other prohibited articles and of restraint and/or removal from a court. Section 30 inserts into the CRA provisions that confer on the President of the Court the power to appoint and designate Supreme Court security officers who will exercise powers identical to those of other court security officers across England and Wales.

Section 31: Making, and use, of recordings of Supreme Court proceedings

50. Upon the creation of the UK Supreme Court, section 47 of the CRA lifted the prohibition against photography and filming in court contained in section 41 Criminal Justice Act 1925 in respect of photography and filming in the UK Supreme Court. Section 9 of the Contempt of Court Act 1981, which prohibits sound recording in court and the broadcast of any such recording, was not amended. There is no suggestion that the practices of the UK Supreme Court or its predecessor are a form of contempt. However, in order to avoid any doubt when comparing section 47 of the CRA to section 32 of the Crime and Court Act 2013, which enables broadcasting in courts below the UK Supreme Court where permitted by Order, section 31 of the Act enables the UK Supreme Court to disapply section 9 of the Contempt of Court Act 1981.

Section 32: Enabling the making, and use, of films and other recordings of proceedings

51. In England and Wales, the recording and broadcasting of the proceedings of a court or tribunal is prohibited by section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981. It is an offence to breach section 41 of the Criminal Justice Act 1925 and it is a contempt of court to breach section 9 of the Contempt of Court Act 1981. By virtue of section 47 of the CRA, the Supreme Court of the United Kingdom is exempt from the prohibition in the Criminal Justice Act 1925 and proceedings are routinely recorded and broadcast.

52. The Lord Chancellor and Secretary of State for Justice made a written ministerial statement (House of Commons, Official Report, column 17WS and 18WS) on 6 September 2011 stating his intention to allow, in limited circumstances and with certain safeguards, the recording and broadcasting of certain aspects of court proceedings. Further details were set out in a policy paper, *Proposals to allow the broadcasting,*

filming, and recording of selected court proceedings, published on 10 May 2012[20]. Section 32 provides the Lord Chancellor with powers to bring forward secondary legislation, with the consent of the Lord Chief Justice, to give effect to this.

Section 33: Abolition of scandalising the judiciary as a form of contempt of court

53. Scandalising the Judiciary (also referred to as scandalising the court or scandalising judges) is defined by Halsbury's Laws of England as 'any act done or writing published which is calculated to bring a court or a judge into contempt or lower his authority'.

54. The call to abolish the offence arose when, in March 2012, the Attorney General of Northern Ireland obtained leave to prosecute the Rt Hon Peter Hain MP following comments made in his autobiography about a High Court judge. Although the proceedings were withdrawn, the proposed use of the offence caused considerable disquiet in Parliament and more widely. They were perceived by many as a serious attack on free speech.

55. An amendment tabled by Lord Lester of Herne Hill, to abolish the offence in England and Wales and in Northern Ireland was debated at Lords Committee (Official Report, 2 July 2012, columns 555 to 566) but was withdrawn. The Law Commission subsequently published a consultation paper in August 2012 provisionally concluding that the offence should be abolished without replacement. In November 2012 the Law Commission published a summary of its conclusions, namely that they consider that the retention of the offence serves no practical purpose and accordingly they support its abolition.[21] Their final report in December 2012 confirmed this recommendation.[22] A further amendment on this issue was tabled at Lords Report stage by Lord Pannick and was agreed by the House (Official Report, 10 December 2012, columns 871 to 876) and now forms section 33 of the Act. In February 2013 the Northern Ireland Assembly considered and accepted an amendment to the Northern Ireland Criminal Justice Bill that would also abolish scandalising in Northern Ireland and that has been enacted as section 12 of the Criminal Justice Act (Northern Ireland) 2013.

Sections 34 to 42: Publishers of news-related material: damages and costs

56. On 29th November 2012 *the Report of An Inquiry into the Culture, Practices and Ethics of the Press* was presented to Parliament (HC 780) ("the Leveson Report")[23]. In the report, the Rt. Hon. Lord Justice Leveson makes a range of recommendations to reform the regulatory framework for the press, creating a new framework for press regulation, with the principle of industry self-regulation at its heart. The new framework proposed is for a system of voluntary self-regulation, overseen by a recognition body established by Royal Charter and strengthened by a series of incentives for members of the press in the application of costs and exemplary damages, encouraging them to join a recognised regulator. Sections 34 to 42 and Schedule 15 set out the new system for exemplary damages and costs, as well as defining those who meet the definition of a 'relevant publisher' to whom the new system of exemplary damages will apply.

Section 43: Use of force in self-defence at place of residence

57. Section 43 amends section 76 of the Criminal Justice and Immigration Act 2008 so that the use of disproportionate force can be regarded as reasonable in the circumstances as the accused believed them to be when householders are acting to protect themselves or others from trespassers in their homes. The use of grossly disproportionate force would still not be permitted. The provisions also extend to people who live and work in the same premises and armed forces personnel who may live and work in buildings such as barracks for periods of time. The provisions will not cover other scenarios where

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20 http://www.justice.gov.uk/publications/policy/moj/proposals-for-broadcasting-selected-court-proceedings
21 http://lawcommission.justice.gov.uk/consultations/scandalising.htm
22 http://lawcommission.justice.gov.uk/areas/contempt.htm
23 http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp

the use of force might be required, for example when people are defending themselves from attack on the street, preventing crime or protecting property, but the current law on the use of reasonable force will continue to apply in these situations.

Section 44: Dealing non-custodially with offenders

58. In March 2012, the Ministry of Justice published a consultation on community sentencing entitled *Punishment and Reform: Effective Community Sentences* (Cm 8334). The consultation sought views on a set of proposed reforms to the way sentences served in the community operate in England and Wales. The Government announced its response to the consultation on 23 October 2012 (House of Commons, Official Report, column 50WS to 51WS)[24]. Amongst other things, the Government announced proposals to: require courts to include a punitive requirement in every community order; make greater use of restorative justice; and introduce a new electronic monitoring requirement. Section 44 and Schedule 16 give effect to these proposals. Proposals in the Government response to *Punishment and Reform* to allow courts to access information held by Her Majesty's Revenue and Customs and the Department for Work and Pensions for the purposes of sentencing and enforcing fines are also provided for by Schedule 16 and section 27 respectively.

Section 45: Deferred prosecution agreements

59. In May 2012, the Ministry of Justice published a consultation on proposals for a new tool to deal with corporate economic crime, known as 'Deferred Prosecution Agreements'. The Government published its response to the consultation on 23 October 2012 (House of Commons, Official Report, column 50WS)[25]. Section 45 and Schedule 17 make provision for Deferred Prosecution Agreements.

Section 46: Restraint orders and legal aid, and Section 47: Restraint orders and legal aid: supplementary

60. Section 41 of the Proceeds of Crime Act 2002 ("POCA") prohibits the use of restrained assets to pay for legal expenses related to the offences upon which the restraint order is predicated, which includes making a contribution towards the cost of legal aid. A relevant legal aid payment is that which a person subject to the restraint order is obliged to make under regulations made under sections 23 or 24 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in respect of legal aid provided in connection with the offences underlying the restraint order. Sections 46 and 47 of the Act amend section 41 of the POCA so that a restraint order must be made subject to an exception enabling relevant legal aid payments.

Section 48: Civil recovery of the proceeds etc of unlawful conduct, and Section 49: Investigations

61. Civil recovery under Part 5 of the POCA enables certain enforcement authorities to bring proceedings before the High Court or the Court of Session for the recovery of property which has been obtained through unlawful conduct, or property which represents property obtained through unlawful conduct. The value of the property must not be less than £10,000. The action is taken against property rather than an individual, and so does not require a criminal conviction. A civil recovery investigation is an investigation to identify property which is, or represents, the proceeds of unlawful conduct. An investigation, however, cannot be undertaken if proceedings for a recovery order have been started in respect of the property, an interim receiving order or interim administration order applies to the property or the property is detained under section 295 of the POCA (the provisions in relation to detained cash).

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24 https://consult.justice.gov.uk/digital-communications/effective-community-services-1
25 https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements

62. The UK Supreme Court's judgment in the case of Perry v SOCA [2012] UKSC 35 effectively meant that orders made under Chapter 2 of Part 5 of the POCA did not extend to property outside the jurisdiction of the court, and that disclosure orders could not be made against persons who were not within the jurisdiction of the court. The Supreme Court also cast doubt on whether a disclosure order made under Part 8 of the POCA could go beyond property already known, although these comments were not a formal part of the judgment. The original policy intention behind the POCA was always that orders made under Chapter 2 of Part 5 of the POCA should reach beyond the jurisdiction of the court, as the proceeds of unlawful conduct are rarely held in one country and are often placed in jurisdictions where recovery is difficult. However, it was intended that the courts should only deal with cases which had some connection to the United Kingdom. Section 48 and 49, and accompanying Schedules 18, 19 and 25 seek to put this intention beyond doubt.

Section 50: Extradition

63. On 8 September 2010 the Government commissioned a review of the UK's extradition arrangements. The review was tasked to consider a number of specific issues, including whether the existing forum bar to extradition (in the Police and Justice Act 2006) should be brought into force; and the breadth of the Secretary of State's discretion in an extradition case. "A Review of the United Kingdom's Extradition Arrangements" ("the Baker review") was presented to the Home Secretary on 30 September 2011.[26]

64. In October 2012, the Government published its response to the Baker review.[27] Not only taking into account the recommendations made by the review panel, but also the concerns of Parliament and the public that enhanced protections were needed with regards to extradition, the Home Secretary announced her intention to legislate for a new forum bar that would "better balance the safeguards for defendants and delays to the extradition process which were predicted by [the Baker review]."[28] The Government also took the view that the discretion to consider final human rights representations in Part 2 extradition cases should be transferred from the Secretary of State to the courts. Section 50, and accompanying Schedule 20, gives effect to these policy objectives.

65. In the case of BH(AP) & Another v the Lord Advocate & Another (Scotland) [2012] UKSC 24, the UK Supreme Court raised concerns about the operation of certain aspects of the 2003 Act when an appeal of a devolution issue to the UK Supreme Court is made under the Scotland Act 1998. Part 3 of Schedule 20 addresses these concerns and amends the Extradition Act 2003 so that it properly takes account of appeals of devolution issues to the UK Supreme Court from the High Court of Justiciary. The High Court of Justiciary is the final court of appeal in relation to Scottish extradition proceedings except in relation to devolution issues.

Part 3: Miscellaneous and General

Section 51: Immigration cases: appeal rights; and facilitating combined appeals

66. Section 47 of the Immigration, Asylum and Nationality Act 2006 provides for the Secretary of State to make a decision that a person may be removed from the United Kingdom whilst the person has their leave extended so that they can bring an appeal against a decision on the variation, curtailment or revocation of their leave. Making both decisions and serving them simultaneously enables the two appeals to be considered at the same time. However, the Upper Tribunal concluded in the cases of both *Ahmadi*[29] and *Adamally and Jaferi*[30] that secondary legislation prevents the simultaneous service of these two decisions because the removal decision cannot be made until written notice

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26 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf
27 http://www.official-documents.gov.uk/document/cm84/8458/8458.pdf
28 Ibid
29 http://www.bailii.org/uk/cases/UKUT/IAC/2012/00147_ukat_iac_2012_ja_afghanistan.html
30 http://www.bailii.org/uk/cases/UKUT/IAC/2012/00414_ukut_iac_2012_ma_sj_srilanka.html

of the decision to refuse to vary a person's leave to remain has been given to that person. To ensure section 47 of the 2006 Act remains effective, section 51 clarifies when the decision to remove can be made, so that written notice of this decision and the decision to refuse to vary, or to curtail or revoke, leave may be given in the same document or at the same time.

Section 52: Appeals against refusal of entry clearance to visit the UK

67. Section 4 of the Immigration Asylum and Nationality Act 2006 substituted a new version of section 88A for sections 88A, 90 and 91 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). Under section 88A(1)(a), which was commenced on 9 July 2012, a person may not appeal against a refusal of an application for entry clearance as a visitor unless the application was made for the purpose of visiting a person of a class or description prescribed in regulations. The Immigration Appeals (Family Visitor) Regulations 2012[31] prescribes the class or description of family members and includes, for example, where the applicant is the spouse, civil partner, father, mother, son or daughter of the person in the UK being visited. In July 2011, the Home Office published a consultation document entitled "Family Migration: A Consultation"[32]. The consultation sought views on a wide range of family migration proposals, including whether the full right of appeal for family visitors should be retained. The response to the consultation was published on 13 June 2012[33]. In regards to full appeal rights for family visitors it was decided first to restrict (by narrowing the description of the person to be visited and introducing a sponsor status requirement) and then to remove the full right of appeal altogether. Applicants continue to be able to appeal on European Convention on Human Rights ("ECHR") and race discrimination grounds. The first stage was implemented through regulations made under section 88A of the 2002 Act[34], which was further commenced for this purpose[35]; section 52 of the Act gives effect to the second stage of these proposals.

Section 53: Restriction on right of appeal from within the United Kingdom

68. The power to exclude a foreign national from the UK is a prerogative power and the decision to do so must be made personally by the Secretary of State (normally the Home Secretary). The Secretary of State will take such a decision if information presented to her leads her to conclude that the exclusion of a person from the UK would be conducive to the public good. The exclusion decision itself is a direction, provided to officials, requiring a mandatory refusal of all applications for entry clearance or entry to the UK courtesy of paragraph 320(6) of the Immigration Rules[36].

69. In March 2011 the Court of Appeal in the case of *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333 upheld the decision of Mr Justice Collins in the High Court that, despite being subject to an exclusion decision, the claimant had an in country right of appeal against the order of the Secretary of State to cancel his leave to enter under article 13(7)(a) of the Immigration (Leave to Enter and Remain) Order 2000[37]. The claimant had originally been granted refugee status and indefinite leave to enter the UK in 2001. The claimant had no right of appeal against the exclusion decision itself, but he did have a right of appeal under section 82(2)(e) of the 2002 Act, which gives a statutory right of appeal against a variation of a person's leave to enter or remain in the UK if, when the variation takes effect, the person has no leave to enter or remain. Under section 92(2) of the 2002 Act, this was an in country right of appeal, and under section 3D of the Immigration Act 1971 ("the 1971 Act"), a person

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31 S.I. 2012/1532
32 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary
33 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/cons-fam-mig.pdf
34 The Immigration Appeals (Family Visitor) Regulations 2012 (S.I. 2012/1532)
35 The Immigration, Asylum and Nationality Act 2006 (Commencement No. 8 and Transitional and Saving Provisions) (Amendment) Order 2012 (S.I. 2012/1531)
36 http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/
37 S.I. 2000/1161

has continuing leave while an appeal could be brought under section 82(1) of the 2002 Act. The Court of Appeal found that section 3D of the 1971 Act did not provide a power to exclude a person from entering the UK to exercise an in country right of appeal, and that the claimant had a right to return to the UK from abroad to exercise that right.

70. To ensure exclusion decisions remain effective, section 53 provides a certification power for the Secretary of State to remove the in country right of appeal against the decision of a Secretary of State to cancel an individual's leave to enter or remain in the UK on the grounds that the individual's presence in the UK would not be conducive to the public good.

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54: Deportation on national security grounds: appeals

71. The framework for appeals against a decision to make a deportation order, and other immigration decisions, is set out for most cases in Part 5 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Section 82(1) of the 2002 Act provides that where an 'immigration decision' is made in respect of a person he may appeal to the Tribunal. Section 82(2) defines 'immigration decision' for the purposes of section 82(1). A decision to make a deportation order is an immigration decision by virtue of section 82(2)(j). Section 82(3A), however, provides that section 82(2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007 ("the 2007 Act"); but a decision that section 32(5) applies is itself an immigration decision and therefore appealable. Section 32 of the 2007 Act requires the Secretary of State to make a deportation order in respect of 'foreign criminals' as defined in section 32(1), provided none of the exceptions set out in section 33 of the 2007 Act applies. Deportation orders made under section 32(5) of the 2007 Act are known as 'automatic deportation orders'.

72. Several sections in Part 5 of the 2002 Act qualify or restrict the right of appeal set out in section 82. In particular, section 92 makes provision for certain appeals to be in-country and therefore suspensive of removal, and for other appeals to be out of country and therefore non-suspensive of removal. Section 92(2) provides that an appeal under section 82(2)(j) against a decision to make a deportation order will be in-country, but an appeal against a refusal to revoke a deportation order need not be. An appeal against a decision that section 32(5) of the 2007 Act applies will not be in-country unless it is made in the circumstances described in section 92(4). Section 92(4)(a) provides that an appeal against any immigration decision will be in-country, if the appellant has made an asylum claim, or a human rights claim, while in the UK.

73. If an appeal falls to be in-country by virtue of section 92(4)(a), section 94(2) provides that the Secretary of State may nevertheless certify that the appellant's asylum or human rights claim is 'clearly unfounded'. The effect of a certificate under section 94(2) is that the appeal in question will not be in-country or suspensive of removal as a result of section 92(4)(a). A certificate under section 94(2) may not be appealed, but is amenable to challenge by way of judicial review.

74. An appeal against a deportation order which states that it is made in accordance with section 32(5) of the 2007 Act may therefore be rendered non-suspensive by a certificate under section 94 of the 2002 Act, and such a certificate could be subject to challenge by way of judicial review.

75. Section 97 of the 2002 Act provides for the Secretary of State to certify that an immigration decision was taken wholly or partly in the interests of national security or of the relationship between the UK and another country, or that an immigration decision was taken wholly or partly in reliance on information which should not be made public in the interests of national security, the relationship between the UK and another country, or otherwise in the public interest. Section 97A of the 2002 Act provides for the Secretary of State to certify that a person's deportation would be in the interests of national security. Certificates made under section 97 or section 97A have,

among other consequences, the effect that appeals may not be brought or continued under Part 5 of the 2002 Act.

76. Section 2(1) of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") provides an alternative right of appeal when appeals under Part 5 of the 2002 Act are prevented or discontinued by virtue of certificates under section 97 or 97A of the 2002 Act. Section 2(2) of the 1997 Act then provides that certain provisions in the 2002 Act shall apply, with any necessary modifications, in relation to an appeal against an immigration decision under that section as they apply in relation to an appeal under section 82(1) of the 2002 Act. Section 2(2)(c) of the 1997 Act lists sections 78 and 79 of the 2002 Act. This means that when an immigration decision, including a decision to make or not to revoke a deportation order, is subject to a certificate under section 97 of the 2002 Act, the subject of the decision cannot be removed (section 78), and, where relevant, no deportation order can be made against him (section 79). Section 78(4) restricts the prohibition on removal so that it only applies if the appeal is in-country as a result of section 92 and is still pending, as per the definition in section 104 of the 2002 Act. Section 2(5) of the 1997 Act confirms that an appeal may only be brought under that section in-country if it could be brought or continued in-country under section 82(1) of the 2002 Act. This means that, in respect of most national security immigration decisions, including refusals to revoke a deportation order, it is possible to render appeals out of country using section 94 of the 2002 Act.

77. Section 97A of the 2002 Act is subject to amendment by section 54 of this Act. Prior to amendment, section 97A(2)(c) made alternative provision about the circumstances in which an appeal against a decision to make a deportation order in national security cases certified under section 97A(1) ("a certified decision") would be in-country. Section 97A(2)(a) provided that section 79 will not apply to a certified decision. This means the Secretary of State could make a deportation order while an appeal is still pending. This would have the effect of cancelling the person's leave to enter or remain. Section 97A is the only mechanism that would allow a deportation order to be made, and therefore a person to be deported, while their appeal is pending in a national security case.

78. Even in cases certified under section 97A in its original form, section 78 may have continued to prevent removal in relation to appeals which must be in-country as a result of section 92. But section 97A(2)(c)(i) provided that section 92 of the 2002 Act would not apply to a certified decision by virtue of section 92(2) to 92(3D) of the 2002 Act. This meant that an appeal against a certified decision was not automatically appealable in-country. Section 97A(2)(c)(ii) of the 1997 Act provided that section 92 of the 2002 Act would not apply to a certified decision by virtue of section 92(4)(a) of the 2002 Act in respect of an asylum claim. Section 97A(2)(c)(iii), however, provided that section 92(4)(a) of the 2002 Act was capable of applying to an appeal against a certified decision by reference to a human rights claim, unless the Secretary of State further certified that the removal of the person from the UK would not breach the UK's obligations under the ECHR. Such certification was subject to an in-country appeal as a result of section 97A(3). The effect of these provisions was that there would be a suspensive substantive appeal on the human rights challenge to a deportation order, but the challenge to the national security case would be out of country.

79. There have therefore been three broadly distinct sets of arrangements for making and challenging deportation orders: first, ordinary deportation orders, which are subject to an appeal with automatic suspensive effect; second, deportation orders made under section 32(5) of the 2007 Act, in which appeals may be non-suspensive if any asylum or human rights claim is certified as clearly unfounded; and, third, national security deportation orders, which may be certified under section 97A(2)(c)(iii) of the 2002 Act. Section 54, explained in detail below, amends the third of these sets of arrangements.

Section 56: Drugs and Driving

80. The Misuse of Drugs Act 1971 ("MD Act") prohibits the production, import, export, possession and supply of "controlled drugs" (subject to regulations made under the MD Act). The definition of the term controlled drugs is set out in section 2 of the MD Act. However, it is not an offence under the MD Act to have a controlled drug in your body. Also in relation to drugs, section 4 of the Road Traffic Act 1988 ("the 1988 Act") makes it a criminal offence to drive, or be in charge of, a mechanically propelled vehicle when under the influence of drink or drugs. The difficulties involved in proving impairment due to drugs means that section 4 of the 1988 Act is not often used in drug driving cases. While section 5 of the 1988 Act makes it a separate offence to drive or be in charge of a motor vehicle with an alcohol concentration above the prescribed limit, no similar offence exists for drugs.

81. In December 2009, Sir Peter North CBE QC was appointed, by the then Secretary of State for Transport, to conduct an independent review of the law on drink driving and drug driving. Sir Peter North's *Report of the Review of Drink and Drug Driving Law* was published in June 2010 and made a variety of recommendations in regards to drink and drug driving, including that further consideration should be given to introducing 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. Following Sir Peter North's report the Transport Select Committee published, in December 2010, a report on drink and drug driving law (HC 460). The Committee favoured the adoption of a "zero-tolerance" offence for illegal drugs which are known to impair driving.

82. The Secretary of State for Transport made a written ministerial statement on 21 March 2011 (House of Commons, Official Report, column 44WS to 46WS) which announced the publication of the Government's response to the reports by Sir Peter North and the Transport Select Committee on Drink and Drug Driving (CM 8050). The response endorsed Sir Peter North's recommendation that the case for a new offence relating to drug driving should be examined further. Section 56 of the Act provides for such an offence.

Section 57: Public Order Offences

83. It is an offence under section 5 of the Public Order Act 1986 to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, within the sight or hearing of a person likely to be caused harassment, alarm or distress. It is also an offence under section 5 to display any writing or other visible representation which is threatening, abusive or insulting and likely to cause harassment, alarm or distress.

84. Section 57, which was inserted by a non-Government amendment passed during Lords Report stage, removes the word 'insulting' from section 5, thereby decriminalising insulting words, behaviour etc in the hearing or sight of someone likely to be caused harassment, alarm or distress.