These notes refer to the Criminal Justice and Courts Act 2015 (c.2) which received Royal Assent on 12 February 2015

CRIMINAL JUSTICE AND COURTS ACT 2015

EXPLANATORY NOTES

SUMMARY AND BACKGROUND

Part 1 – Criminal Justice

9. In the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the Government implemented a number of sentencing reforms following the consultation paper entitled "Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders"[1].

10. Adding certain offences, including those of weapons training for terrorist purposes and causing gunpowder or other explosive substances to explode with intent, to the enhanced dangerous offenders sentencing scheme - The current enhanced dangerous offenders sentencing scheme, introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, was commenced in December 2012 and already covers some serious terrorism offences. The effect of these provisions is that offenders will qualify for an automatic life sentence where they have previously been convicted of an offence included in the scheme (and had a sentence of at least 10 years imposed on both occasions)[2]; offenders with previous convictions for these offences will satisfy one of the conditions for getting an Extended Determinate Sentence. Where these offences do not already carry a life sentence, these provisions also increase the relevant maximum penalties to life.

11. Amending the release arrangements for offenders who receive an Extended Determinate Sentence so that, in all cases, they will not be entitled to automatic release at the two thirds point and will only get early release if the Parole Board directs release - At present offenders convicted of sexual and/or violent offences listed in Schedule 15 to the Criminal Justice Act 2003, who the courts believe are dangerous, can receive an Extended Determinate Sentence under which they must serve at least two-thirds of their custodial term before they are released into the community on licence. Currently, some of these offenders receive automatic release after two-thirds of their custodial term, whilst in more serious cases release is subject to the discretion of the Parole Board from that point to the end of the custodial term. Section 4 of this Act amends the law so that every offender who receives an Extended Determinate Sentence will only be released into the community on licence, before the end of their custodial term, if the Parole Board directs their release rather than being automatically released.

12. Creation of a new custodial sentence for certain terrorism-related and sexual offences (including rape or attempted rape of a child) whereby adult offenders sentenced for these offences will not be entitled to automatic release half way through their sentence and will only get early release if the Parole Board directs release – At present offenders convicted of these terrorism-related and/or sexual offences who receive a standard determinate sentence are automatically released half way through their prison sentence.

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1 http://webarchive.nationalarchives.gov.uk/20120119200607/http:/www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf

2 Unless the court is of the opinion that there are particular circumstances which relate to the offence, the previous offence or to the offender which would make it unjust to do so in all the circumstances (s.224A(2) of the Criminal Justice Act 2003).

These provisions amend the law so that offenders would apply to the Parole Board for early release at that point and, if no decision to release was taken (at that point or on any subsequent Parole Board consideration), they would remain in prison until the end of their custodial term. This change is intended to ensure that persons convicted of serious terrorism-related offences and sexual offenders are not released early without any consideration of their risk. The new sentence will be made up of a custodial term and a mandatory year of licence to be served subsequently, to ensure that those who end up serving their whole custodial terms are not released without supervision. Section 6 and Schedule 1 implement these changes.

13. **Introducing powers to enable offenders serving custodial sentences to be tracked on licence as a mandatory condition** – Currently offenders released on licence can be electronically monitored on a discretionary basis on release from prison under section 62 of the Criminal Justice and Court Services Act 2000. These provisions allow for the electronic monitoring of compliance with another licence condition or the electronic monitoring of the offender's whereabouts as a licence condition in its own right. In practice, the available technology has only allowed for the electronic monitoring of a curfew condition. However, technological advances mean that it will be possible to effectively track offenders using GPS and other location tracking technology and the Government intends to enable the use of electronic monitoring more widely. On 9 May 2013 the Justice Secretary announced that the Government would be introducing GPS satellite tracking of offenders to monitor them more closely in the community.

14. Section 7 and Schedule 2 enable the Secretary of State to extend the use of electronic monitoring to provide for offenders to be subject to electronic monitoring, including monitoring of the offender's whereabouts, as a compulsory licence condition on release from prison.

15. Power for the Secretary of State to appoint "recall adjudicators" to review the detention of recalled determinate sentence prisoners – Offenders serving determinate sentences who are recalled to prison for breaching their licence conditions are entitled, under the Criminal Justice Act 2003, to have their cases referred to the Parole Board to review their detention. Section 8 and Schedule 3 remove the statutory requirements in the 2003 Act for the Secretary of State to refer determinate sentence recalled prisoners to the Parole Board and replaces references to the Board in that context with references to a "recall adjudicator". The Secretary of State is able to appoint the Parole Board or any other person to be a recall adjudicator.

16. Like the Board, recall adjudicators will have the power to direct the release of recalled prisoners, to decide not to release or to refer the case for an oral hearing. Provision is also made for the Secretary of State to issue procedural rules for recall adjudicators, to make payments to adjudicators, and to appoint a chief recall adjudicator to oversee recall adjudicators and issue guidance.

17. Introducing a new statutory test for the re-release of recalled determinate sentence offenders to ensure that prolific and repeat offenders who are persistently non-compliant can be given a standard recall rather than repeated fixed term recalls - The Criminal Justice Act 2003 provides that prisoners released on licence can, if they breach their conditions, be recalled to prison either:

    a) for a fixed period of 28 days at the end of which they are released automatically (a *fixed term recall*); or

    b) for the remainder of their sentence, subject to discretionary release by a recall adjudicator or the Secretary of State (a *standard recall*).

18. The Act amends the Criminal Justice Act 2003 to provide that an offender is not suitable for a fixed term recall if it is considered that they would be highly likely to breach their licence again if released and for that reason fixed term recall seems inappropriate. The Act also provides a new statutory release test for recall adjudicators and the Secretary of

State to apply when considering the release of recalled determinate sentence prisoners. This requires the recall adjudicators/ Secretary of State to have regard not only to whether the offender needs to continue to be detained for public protection reasons - which will remain the overriding test - but also to consider whether, if the person were to be released, they would be highly likely to breach their licence. This provision is intended to prevent offenders from repeatedly being recalled to prison on a fixed term recall and then being released only to breach and be recalled again. Sections 9 and 10 (which also give the Secretary of State a power to change the test) implement these changes. It further provides that for recalled determinate sentence prisoners serving more than one sentence, the requirement to conduct annual reviews need not take place until after they have reached the earliest release point on the other concurrent or consecutive sentences.

19. For prisoners serving indeterminate sentences, the Act amends the point at which a prisoner may require the Secretary of State to refer their case to the Parole Board where they are serving a combination of a life or Imprisonment for Public Protection (IPP) sentence together with a determinate sentence. Under previous legislation, an offender's case could only be referred to the Board once they have completed *half* of the determinate sentence, but this did not take account of new types of determinate sentence where the custodial part of the sentence may not end at the half-way point – Extended Determinate Sentences (EDS), in particular, where offenders must serve at least two-thirds of the custodial term. The Act therefore amends the provisions so that the point of referral to the Board is on completion of the *requisite custodial periods* on all the sentences being served. This takes into account all types of determinate sentences which may have different requisite custodial periods.

20. The Act also provides that, where an indeterminate sentence prisoner has been released on licence and recalled to prison, the Parole Board must apply the public protection release test when considering release, and a power for the Secretary of State to amend that test by order, but only in respect of its application to recalled IPP (not life) sentence prisoners. Section 11 implements these changes.

21. Creating a new criminal offence of being unlawfully at large after recall from licence or after recall from home detention curfew – In the previous legal framework, there was no separate offence for absconding after being recalled whilst on licence. An offender could only be required to serve the remainder of their original sentence in these circumstances, though it is possible for them to be released earlier. However, it is an offence to escape from custody, to fail to surrender to custody whilst on bail or to fail to return from temporary release. The Government has addressed this by providing in the Act that offenders unlawfully at large, after recall while on licence, without reasonable excuse will also be guilty of an offence. The Act amends the Criminal Justice Act 2003 and the Crime (Sentences) Act 1997 by creating a new offence of remaining unlawfully at large following a recall to custody for determinate and indeterminate sentence prisoners respectively. Section 12 implements these changes.

22. **Increasing the maximum penalty for the offence of remaining unlawfully at large after temporary release -** Currently failure to return while released on temporary licence (ROTL), contrary to section 1 of the Prisoners (Return to Custody) Act 1995, is a summary-only offence with a punishment of up to 6 months imprisonment and/or a level 5 fine. The Government has increased the maximum sentence available for this offence to two years to harmonise sentencing powers for all offenders who are released and then either abscond following recall or fail to return from release on temporary licence. Section 13 implements this change.

23. **Drugs for which prisoners etc may be tested** – Under the existing mandatory drug testing ("MDT") programme operated by the National Offender Management

Service[3] ("NOMS") prisoners can only be tested for drugs that are controlled under the Misuse of Drugs Act 1971. NOMS is aware of a steep rise in the misuse of certain prescription drugs such as Gabapentin and Pregabalin by prisoners for whom they have not been prescribed. HM Inspectorate of Prisons for England and Wales explained in its Annual Report[4] for 2011-12 that it had previously highlighted the diversion of prescription drugs in high security and vulnerable prison populations and now "this trend is spreading to mainstream populations and it has become a major concern."[5] In addition there are clear government commitments to reduce the availability and use of drugs in prisons which are set out in the Breaking the Cycle Green Paper[6] and the cross government drug strategy[7]. Therefore, section 16 enables the Secretary of State to specify in prison rules and rules for other places of detention non-controlled drugs which can then be tested for under the existing MDT programme. The provisions of this section were originally presented to Parliament in the Prisons (Drug Testing) Bill, a private member's Bill which was introduced in June 2013 and which the Government supported.

24. **Restricting the use of simple cautions** – The Justice Secretary, together with the Home Secretary and the Attorney General, on 3 April 2013 launched a review of simple cautions. The review examined the way in which simple cautions are currently used, and considered the need for any changes to policy or practice to ensure that there is transparency, accountability and public confidence in the use of simple cautions as a disposal. On 19 November 2013, the Minister for Policing, Criminal Justice and Victims announced by written ministerial statement that the Government intended to accept the recommendations of the review to restrict the use of simple cautions for indictable only offences and certain specified either way offences, as well as restricting the repeated use of cautions for persistent offenders. Sections 17 and 18 implement the changes announced.

25. **Alternatives to prosecution: rehabilitation of offenders in Scotland** - Following on from the Children's Hearings (Scotland) Act 2011, the Scottish Government would like to legislate to specify occasions when the normal rules relating to the disclosure of spent alternatives to prosecution from a children's hearing should not apply. To achieve this, the Scottish Ministers need to exercise powers in Schedule 3 to the Rehabilitation of Offenders Act 1974 ("the 1974 Act") to specify the types of employment and proceedings that are excluded from the protection of the 1974 Act and therefore where a person may need to disclose a spent alternative to prosecution. These powers can be found in paragraph 6 of Schedule 3 to the 1974 Act and section 7(4) as applied by paragraph 8 of that Schedule.

26. The Scottish Ministers already have the power to make provisions in respect of exceptions and exclusions relating to spent convictions in reserved areas[8] and now desire to be able to make similar provision in respect of exceptions and exclusions relating to spent alternatives to prosecution in reserved areas. However, because paragraph 6 and paragraph 8 of Schedule 3 were inserted into the 1974 Act by an Act of the Scottish Parliament, the powers cannot be exercised to make exclusions, modifications or exceptions in relation to reserved matters. Therefore, section 19 inserts a new paragraph into Schedule 3 to the 1974 Act which will state that Scottish Ministers can exercise the powers in relation to spent alternatives to prosecution in paragraph 6 and section 7(4) as applied by paragraph 8 without being subject to the restrictions in section 29 of the Scotland Act 1998. This will allow the Scottish Ministers to set

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3 NOMS is an executive agency of the Ministry of Justice. It commissions and provides offender services in the community and in custody in England and Wales. The role of NOMS is to reduce re-offending by delivering the punishment and orders of the courts and supporting rehabilitation by helping offenders to change their lives.

4 http://www.justice.gov.uk/publications/corporate-reports/hmi-prisons

5 See pages 6 and 36 of the 2011-12 Annual Report: http://www.justice.gov.uk/publications/corporate-reports/hmi-prisons

6 http://webarchive.nationalarchives.gov.uk/20120119200607/http:/www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf (see pages 27 to 32)

7 www.gov.uk/government/publications/drug-strategy-2010--2

8 The power do so having been transferred to the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2003

out exclusions, modifications and exceptions in relation to alternatives to prosecution which are given by children's hearings in Scotland in the desired way.

27. Creating new criminal offences covering care workers who ill-treat or wilfully neglect someone they are caring for and care providers, when the ill-treatment or wilful neglect is committed by someone who is part of care arrangements made by them – Following the Public Inquiry into the events at Mid Staffordshire NHS Foundation Trust, the Prime Minister established a further independent review into the safety of patients led by Professor Don Berwick. This review identified a small but significant gap in existing legislation. There are existing offences of wilfully ill-treating or neglecting children in certain circumstances and of ill-treating or wilfully neglecting individuals who lack capacity under the provisions of the Mental Capacity Act 2005 or who are subject to the Mental Health Act 1983. However, there is no equivalent specific offence in relation to those with full capacity. Professor Berwick recommended the creation of a new criminal offence to fill that gap, which would apply to both individuals and organisations and be analogous to the offence set out in section 44 of the Mental Capacity Act 2005.

28. On 19 November 2013 the Government announced its intention to accept this recommendation as part of its full response to the Mid Staffordshire NHS Foundation Trust Public Inquiry. Since then, work has been ongoing to develop the detailed formulation of the offence, including a public consultation on proposals during March 2014[9], which, among other things proposed that there should be two offences, one for individual care workers and one, formulated slightly differently, for care provider organisations. The Government published its response to the consultation[10] on 11 June 2014, setting out the final articulation of the offences. Sections 20 to 25 and Schedule 4 implement the new offences as described in the consultation response.

29. Creating a new criminal offence for a police officer and certain other persons to exercise the powers and privileges of a constable in a way which is corrupt or otherwise improper - – Following the findings of the Stephen Lawrence Independent Review by Mark Ellison QC and the Government's response to it, the Home Secretary announced on 6 March 2014 the introduction of this new offence. Section 26 makes it an offence for a police officer to exercise the powers and privileges of a constable in a way which is corrupt or otherwise improper. It supplements the existing common law offence of misconduct in public office. It covers police officers of the 43 territorial forces in England and Wales, the British Transport Police, the Ministry of Defence Police and the Civil Nuclear Constabulary, as well as officers of the National Crime Agency designated as constables. The offence is triable solely on indictment and carries a maximum sentence of 14 years' imprisonment.

30. **Amending the starting point for murder of a police or prison officer** – At present the starting point for sentencers to consider for murder of a police or prison officer in the course of duty is a minimum term of 30 years. The Home Secretary announced on 15 May 2013 that this would be changed to a starting point of a whole life order to recognise the unique and dangerous job that police and prison officers do on a daily basis. Schedule 21 to the Criminal Justice Act 2003 sets out the principles which a sentencing court must have regard to when assessing the seriousness of all cases of murder in order to determine the appropriate minimum term to be imposed in relation to mandatory life sentences. Section 27 therefore moves this category of case from paragraph 5 of Schedule 21 to the Criminal Justice Act 2003 to paragraph 4 to reflect the different starting point.

31. **Introducing a minimum custodial sentence for second (or further) conviction for possession of a knife or offensive weapon** - Section 28 and Schedule 5 introduce a minimum custodial sentence for a second (or further) conviction for possession of

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9 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285426/20140226_WN_consultation_doc_-_For_publication.pdf

10 https://www.gov.uk/government/consultations/ill-treatment-or-wilful-neglect-in-health-and-social-care

a knife or offensive weapon. A previous conviction for threatening with a knife or offensive weapon also counts as a 'first strike'.

32. **Offences committed by disqualified drivers** - Section 29 and Schedule 6 make the offence of causing death by driving while disqualified an indictable only offence and increase the maximum penalty for such conduct to 10 years' imprisonment. It also creates an offence of causing serious injury by driving while disqualified. This is an either way offence with a maximum penalty of 4 years' imprisonment.

33. **Extension of disqualification from driving where custodial sentence also imposed** – Section 30 amends section 35A of the Road Traffic Offenders Act 1988 and section 147A of the Powers of Criminal Courts (Sentencing) Act 2000 which require a court, when sentencing an offender to immediate custody and imposing a driving ban, to extend the driving ban to take account of the period the offender will spend in custody. These changes will correct an inconsistency in the provisions inserted by Coroners and Justice Act 2009, as they apply to England and Wales, and allow for the commencement of the provisions which are designed to avoid a driving ban expiring, or being significantly diminished, during the period the offender is in custody

34. Making changes to allow the mutual recognition of driving disqualifications between the UK and Republic of Ireland to be re-commenced under a bilateral treaty - Between 28 January 2010 and 1 December 2014 driving disqualifications imposed on UK and Republic of Ireland (RoI) residents were mutually recognised under the European Convention on Driving Disqualifications 1998 (the Convention). The Convention ensured that residents of the UK and RoI who were disqualified from driving in the state in which they were not resident had their disqualification recognised in their home state. The UK and the Republic of Ireland were the only signatories to the Convention, which was incorporated into UK law in the Crime (International Co-operation) Act 2003. Following the UK's opt-out of Article 10(4) of Protocol 36 to the Treaties, acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which had been adopted before the entry into force of the Treaty of Lisbon ceased to apply to the UK on 1st December 2014. The Convention is one of these acts so mutual recognition of driving disqualifications with the RoI ceased to apply from 1 December 2014, until another mechanism is in place.

35. The changes in section 31 and Schedule 7 will implement the proposed new bilateral treaty being negotiated. Once the treaty is ratified the new arrangements will be very similar to those under the Convention. However, the changes will close the loophole in the Convention which allows those falsely claiming residence in the state in which the offence was committed to avoid having their disqualification recognised in their home state.

36. **Increasing the maximum penalty for the offence at section 1 of the Malicious Communications Act 1988** – Section 1 of the Malicious Communications Act 1988 makes it an offence if a person, with the intention of causing distress or anxiety, sends certain items to another person which convey an indecent or grossly offensive message or are themselves of an indecent or grossly offensive nature, or which convey a threat or information which is false and known or believed to be false by the sender. The offence is currently a summary-only offence punishable by a maximum term of imprisonment of 6 months or a fine not exceeding level 5 on the standard scale, or both. Section 32 of the Act will make the offence an either-way offence and increase the maximum penalty for committing it to 2 years imprisonment or a fine or both.

37. **Disclosing private sexual photographs and films with intent to cause distress** –The issue of revenge porn, which is commonly thought of as the malicious disclosure of private sexual photographs and films without the consent of the person featured, was the subject of a number of amendments tabled during Committee stage of the Bill in the House of Lords. Following investigation into the scale and nature of this problem and the best way in which it could be tackled, the Government brought forward amendments to create a new criminal offence. Sections 33 to 35 and Schedule 8 will create the new

offence which will criminalise the malicious disclosure of photographs or films. The disclosure must take place without the consent of at least one of those featured in the picture disclosed and with the intention of causing that person distress. The offence will be an either way offence with a two year maximum custodial penalty.

38. **Meeting a child following sexual grooming etc** – The cross-party inquiry, led by children's charity Barnardo's, into the effectiveness of legislation for tackling child sexual exploitation and the trafficking of children within the UK recommended that the "grooming" offence at section 15 of the Sexual Offences Act 2003 be amended to reduce the number of occasions on which the defendant must initially meet or communicate with a child, so that a single meeting or communication will suffice.

39. In the inquiry's report the police expressed support for this reform. They said that offending involving physical contact between a victim and offender can occur quickly following just one communication or meeting. As amended, the offence could allow investigators to intervene earlier. It would also bring the offence in England and Wales in closer line with the equivalent offence in Scotland. Section 36 implements this change.

40. Extending the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 to cover the possession of extreme images that depict rape and non-consensual sexual penetration - Rape Crisis South London (the "RASASC") wrote an open letter to the Prime Minister on 7 June 2013 highlighting what they believed to be a loophole in the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008. The extreme pornography offences form part of a framework of offences covering the distribution and possession of a broad range of indecent images, including indecent images depicting the abuse of children. See in particular the Obscene Publications Act 1959 and the offences of making an indecent photograph of a child at section 1 of the Protection of Children Act 1978, possessing an indecent photograph of a child at section 160 of the Criminal Justice Act 1988 and possessing a prohibited image of a child at section 62 of the Coroners and Justice Act 2009.

41. The section 63 extreme pornography offence currently covers pornographic images - images which can reasonably be assumed to have been "produced solely or principally for the purpose of sexual arousal" – which are grossly offensive, disgusting or otherwise obscene and which realistically depict necrophilia, bestiality or violence that is life-threatening or results, or is likely to result, in serious injury to the anus, breasts or genitals, but does not explicitly include depictions of non-consensual penetration (save to the extent that the depicted penetration threatens a person's life or results, or is likely to result, in serious injury to the anus, breasts or genitals of the person penetrated).

42. Section 37 will extend the extreme pornography offence to cover depictions of rape and other non-consensual sexual penetration.