THE CRIMINAL JUSTICE AND COURTS BILL

Memorandum prepared by the Ministry of Justice for the Delegated Powers and Regulatory Reform Committee

INTRODUCTION

1. This Memorandum identifies the provisions of the Criminal Justice and Courts Bill which confer powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected. It has been prepared by the Ministry of Justice to assist the Delegated Powers and Regulatory Reform Committee in its consideration of the Bill.

SUMMARY OF THE BILL

2. The Bill is in 5 Parts and contains 8 Schedules:

- **Part 1 and Schedules 1 and 2** make provision about criminal justice including provision about sentencing and the release and recall of offenders, the electronic monitoring of offenders released on licence and about the giving of cautions. It also contains provision about the offence of possessing extreme pornography.

- **Part 2 and Schedules 3 and 4** make provision about the detention of young offenders, about giving cautions and conditional cautions to youths and about referral orders.

- **Part 3 and Schedules 5 to 8** make provision about courts and tribunals including provisions creating a new procedure for cases to be tried by a single justice on the papers, provision about the recovery of a proportion of the costs of the criminal courts from offenders, about appeals and costs in civil proceedings and about contempt of court and juries.

- **Part 4** provides for the circumstances in which the High Court and the Upper Tribunal may refuse relief in judicial review proceedings, about funding and costs in relation to such proceedings and about leave of the court for certain planning proceedings.

- **Part 5** contains power to make provision consequential and supplementary to the other provisions of the Bill and general provisions including about the commencement of the Bill and its extent.

DELEGATED POWERS

PART 1: CRIMINAL JUSTICE

Clause 5 and Schedule 1: Sentence and Parole Board release for offenders of particular concern

Power conferred on: *Secretary of State*

Power exercisable by: *order made by statutory instrument*

Parliamentary procedure: *affirmative resolution*

3. Clause 5 and Schedule 1 insert new Chapter 5A into Part 12 of the Criminal Justice Act 2003 ("the 2003 Act"). This Chapter creates a new custodial sentence for certain offenders of particular concern. Paragraph 4 of Schedule 1 inserts a new Schedule 18A into the 2003 Act, which lists the offences which are subject to the new sentence. New Chapter 5A contains provision (new section 236A(6)) which enables the Secretary of State by order to amend new Schedule 18A so as to add offences, or to vary or omit offences listed in the Schedule.

4. The elements of the new sentence are all set out in the Bill itself and will therefore have been agreed by Parliament. The power to amend the Schedule will ensure that the list of offences to which the sentence will apply can reflect any changes to the criminal law, and will provide the Secretary of State with the flexibility to amend that list of offences as and when it may be appropriate to do so for the purpose of maintaining an affordable system which optimises the rehabilitation of offenders.

5. The purpose of the introduction of this new sentence is to alter the release arrangements of those to which it applies. Whilst not an exact parallel, there is existing precedent for delegated legislation to make changes to the operation of release arrangements for offenders: see for example the power to amend release provisions in section 267 of the 2003 Act to provide that a prisoner should serve a greater or lesser proportion of their sentence in prison and the power in section 269 of the 2003 Act to amend Schedule 21 to that Act to provide that a prisoner given a life sentence should serve a longer period in prison.

6. This power is subject to the affirmative resolution procedure (as set out in section 330(5) of the 2003 Act as amended by paragraph 3 of Schedule 1). Since the power amends primary legislation and since Parliament may wish to have the opportunity to debate changes to the application of this sentence, the affirmative resolution procedure is appropriate. This also reflects the level of scrutiny to which the other order making powers mentioned above are subject.

7. Section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act") currently provides a power for the Secretary of State, by order, to change the test for release on licence of certain discretionary release prisoners including prisoners who have been sentenced to an indeterminate sentence for public protection ("an IPP sentence"). Paragraph 21 of Schedule 1 contains consequential

8. The arrangements for the recall and release of prisoners subject to the new sentence are set out in primary legislation. The new power does not change this but provides flexibility to change the detail of the release test to be applied to respond to the changing nature of the prison population and the operation of the scheme in practice in the same way as flexibility is currently provided in relation to the other tests for release to which section 128 applies. Consistent with previous practice the new power is an appropriate use of delegated legislation.

9. The power in section 128 of the 2012 Act is already subject to the affirmative resolution procedure (see subsection (5) of that section) and this is unchanged.

Clause 6: Electronic monitoring following release on licence

Power conferred on: *Secretary of State*

Power exercisable by: *order by statutory instrument*

Parliamentary procedure: *negative resolution*

10. Section 62 of the Criminal Justice and Courts Services Act 2000 ("the 2000 Act") makes provision about the imposition of electronic monitoring conditions on an offender released from prison, to monitor compliance with another condition to which offender is subject or to monitor the offender's whereabouts. Clause 6 amends section 62 and contains 2 order making powers which relate to provision about electronic monitoring.

11. Firstly clause 6(2) amends section 62 to provide that an electronic monitoring condition must include provision making a person responsible for the monitoring (new subsection (2A)). That clause also includes provision in new subsection (2B) which requires the responsible person to be of a description specified in an order made by the Secretary of State.

12. A similar power can currently be found in relation to the monitoring of conditions imposed on those released early on Home Detention Curfew in section 253(5) of the Criminal Justice Act 2003. This power is being omitted (see paragraph 5(3) of Schedule 2) and replaced with the new power in section 62, such that the requirement to include provision about responsibility for monitoring will apply to electronic monitoring conditions imposed on all those released subject to conditions and the Secretary of State's power to specify who may be such a person will apply accordingly.

13. As is the case with the power in section 253(5) of the 2003 Act it is necessary to make this provision by secondary legislation as the description specified may need to change in accordance with changing contractual arrangements.

14. Section 76(5) and (6) of the 2000 Act provides that the negative resolution procedure will be applicable to such an order. The negative resolution procedure is appropriate in this case since the framework for electronic monitoring is contained in primary legislation. This is consistent with the approach taken to the existing power relating to the monitoring of those on Home Detention Curfew.

15. Secondly clause 6(3) inserts new section 62A into the 2000 Act which contains power to enable the Secretary of State by order to provide that an electronic monitoring condition must be imposed on adult offenders on their release from custody. New 62A(2) allows for the Secretary of State to provide for electronic monitoring in different cases and to specify the duration of the compulsory condition (which may be different for different groups of offenders as provided for by section 76 of the Criminal Justice and Court Services Act 2000). New section 62A(3) allows the Secretary of State to specify which offenders will be subject to electronic monitoring by reference the identify of the person monitoring the offender; will allow for random sampling for the purposes of pilots; and make provision by reference to whether a person is satisfied of a matter. Subsection (4) of new subsection 62A sets out certain custodial sentences available for young offenders in relation to which this power cannot be exercised.

16. The power to impose an electronic monitoring condition will be contained in primary legislation and such a condition may in principle be imposed on any offender. The new power in section 62A will allow the power to be used where it will be most effective in accordance with the latest analysis and is therefore a suitable use of delegated legislation. The effectiveness of the condition in relation to different types of offenders will be monitored and reviewed and this will inform changes to the order to allow monitoring to be used to best effect. Further, changes may be needed to respond to the changing nature of the prison population, changing patterns of crime and the technology behind the condition. Such changes may well require immediate response, especially if it was established that the measure was not particularly effective for a group of prisoners.

17. The use of secondary legislation in this way is consistent with previously agreed approaches to licence conditions (see for example the power in section 250 of the 2003 Act to prescribe standard licence conditions).

18. The principles relating to the imposition of an electronic monitoring condition are set out in the primary legislation which will allow for adult offenders to be monitored for the whole of their licence. In those circumstances, and consistently with the existing power to provide for standard licence conditions referred to above, the negative resolution procedure (provided for by section 76(5) and (6) of the 2000 Act) represents a suitable level of parliamentary scrutiny.

Clause 6: Duty to issue guidance in relation to electronic monitoring

Power conferred on: *Secretary of State*

Power exercisable by: *code of practice*

Parliamentary procedure: *none*

19. New section 62B of the 2000 Act, which is also inserted into that Act by clause 6, imposes a duty on the Secretary of State to issue a code of practice relating to the processing of data gathered in the course of monitoring persons under electronic monitoring conditions imposed under section 62 of the 2000 Act. A similar duty is imposed on the Secretary of State by paragraph 17 of Part 4 of Schedule 16 to the Crime and Courts Act 2013 in relation to the processing of data gathered in the course of monitoring persons subject to a community order.

20. The processing of such data will of course be subject to the requirements in the Data Protection Act 1998 ("the 1998 Act"). As with the existing code of practice issued under the Crime and Courts Act 2013, the code of practice issued under these provisions is intended to set out the appropriate tests and safeguards for the processing of such data, in order to assist with compliance with the 1998 Act. For example, it is envisaged that the code will set out the length of time for which data may be retained and the circumstances in which it may be permissible to share data with the police to assist with crime detection. It is intended that the code will cover the storage, retention and sharing of personal data gathered under a requirement that is imposed for the purpose of monitoring compliance with another requirement and under a location monitoring requirement.

21. It is considered that a code of practice is the most appropriate vehicle to set out expectations and broad responsibilities in relation to the processing of data gathered under the new electronic monitoring requirement. Given the likely content and nature of the code, and in particular the fact that it will not define or create new legal responsibilities, it is not considered necessary to make provision for any Parliamentary procedure. This is consistent with the approach taken to the code of practice required to be produced by the Crime and Courts Act 2013.

Clause 8: Power to change test for release after recall: determinate sentences

Power conferred on: *Secretary of State*

Power exercisable by: *order by statutory instrument*

Parliamentary procedure: *affirmative resolution*

22. Clause 7 replaces the existing test in section 255A of the 2003 Act allowing the Secretary of State to determine whether a recalled offender should be subject to automatic release after 28 days or whether re-release by the Secretary of State or the Parole Board should follow an assessment of risk. Clause 7 also inserts a re-release test into sections 255B, 255C, and 256A of the 2003 Act for the Parole Board to apply when considering whether an offender recalled to custody should be released on licence. In addition it amends the current test in sections 255B and 255C of that Act which must be applied by the Secretary of State for the same purpose.

23. Clause 8 inserts new section 256AZA into the 2003 Act which will enable the Secretary of State, by order, to change those tests. As mentioned above, section 128 of the 2012 Act currently provides a power for the Secretary of State, by order, to change the test applied by the Parole Board for release on licence of certain determinate sentence prisoners subject to discretionary release and of prisoners serving an indeterminate sentence for public protection. Clause 8 makes equivalent provision in relation to the tests for recall by the Secretary of State and re-release on licence after recall by the Secretary of State or the Parole Board of determinate sentence prisoners.

24. The arrangements for the recall and release of determinate sentence prisoners on licence are set out on the face of the 2003 Act. However, as has previously been acknowledged by Parliament, it is appropriate for release tests to be changed by delegated legislation in order to respond to the changing nature of the prison population and the operation of the scheme in practice.

25. The power will enable the amendment of primary legislation and Parliament will have an interest in the terms and impact of any amended test, so the order is subject to the affirmative resolution procedure (see section 330 of the 2003 Act as amended by clause 8(2)). This reflects the existing position in relation to the power in current section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Clause 9: Initial release and release after recall: life sentences

Power conferred on: *Secretary of State*

Power exercisable by: *order by statutory instrument*

Parliamentary procedure: *affirmative resolution*

26. Section 32 of the Crime (Sentences) Act 1997 makes provision about the recall, and any subsequent re-release, of indeterminate sentence prisoners on licence. Clause 9(2) inserts the test into that section for the Parole Board to consider when deciding whether to re-release an indeterminate sentence prisoner who has been recalled to custody.

27. Consistently with the provision made by paragraph 21 of Schedule 1 and clause 8, clause 9(3) inserts subsection (3)(aa) into section 128 of the 2012 Act to provide an equivalent power to change the new test for re-release on licence after recall provided by clause 9(2). This will only apply to recalled prisoners serving an IPP sentence and not recalled life sentence prisoners, in accordance with the limits in section 128.

28. The arrangements for the recall and release of indeterminate sentence prisoners on licence are set out on the face of the Crime (Sentences) Act 1997. The new power does not change this but provides flexibility to change the detail of the release test to be applied to recalled IPP sentences to provide similar flexibility to that which is currently provided in relation to the test for initial release on licence of those sentenced to an IPP sentence. Consistent with previous practice the new power is an appropriate use of delegated legislation.

29. The power in section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is already subject to the affirmative resolution procedure and this is unchanged.

Clause 14: Restrictions on use of cautions

30. Clause 14 makes provision about the giving of a caution ("a caution") (other than a conditional caution under Part 3 of the Criminal Justice Act 2003) to persons aged 18 or over who have committed a criminal offence in England and Wales. The clause imposes certain statutory restrictions on the giving of a caution based on the seriousness of the offence and the person's previous offending history.

Clause 14(3): Specifying certain offences triable either way

Power conferred on: *Secretary of State*

Power exercisable by: *order by statutory instrument*

Parliamentary Procedure: *negative resolution*

31. Clause 14(3) permits the Secretary of State to specify by order those either way offences which may not be dealt with by way of a caution unless there are exceptional circumstances. Such offences, for example, may be serious either way offences that would not normally be considered appropriate to be dealt with by way of a caution because, if prosecuted and found guilty by a court, the person would usually receive a high level community order or an immediate custodial sentence.

32. Clause 14(3) sets out the principles which will apply to the giving of cautions in the case of specified either way offences. However it is considered appropriate for the particular either way offences to be specified in secondary legislation in order to ensure that the list reflects up-to-date patterns of criminality and legislative change.

Clause 14(5): Specifying the minimum rank of constable to make certain decisions

Power conferred on: *Secretary of State*

Power exercisable by: *order by statutory instrument*

Parliamentary Procedure: *none*

33. The new restrictions on giving cautions provided by clause 14 may require a constable to be satisfied, before giving a caution in a case to which the restrictions apply, that there are exceptional circumstances. In the case of a summary or non-specified either way offence the restrictions will only apply where the person has been convicted or cautioned for a similar offence in the last two years.

34. Clause 14(5) provides that the determination of whether there are such exceptional circumstances or whether a previous offence is a similar offence must be made by a police officer not below the rank specified by the Secretary of State, in an order made by statutory instrument.

35. It is anticipated that the order will specify a different minimum rank of police officer depending on the seriousness of the offence. This is permitted by clause 15(1) which provides that an order made under clause 14 may make different provision for different purposes.

36. It is possible that, once the clause is in force, the minimum rank of constable may need to be adjusted if it is found that a particular decision is better made by a different minimum rank of constable. For example it may be found that certain ranks of constable have more relevant operational experience and are therefore better able to make a well informed decision. It is therefore considered appropriate to specify the rank of police officer in secondary legislation in order to enable such experience to be reflected. As this is a wholly operational matter it is considered appropriate that no parliamentary procedure should apply to the making of the order.

Clause 14(6): Guidance issued by the Secretary of State

Power conferred on: *Secretary of State*

Power exercisable by: *guidance*

Parliamentary Procedure: *none*

37. Clause 14(6) provides that a police officer who makes a decision about exceptional circumstances or makes a decision about whether a previous offence is similar (for summary and non-specified either way offences) must do so in accordance with guidance issued by the Secretary of State. No parliamentary scrutiny is provided for in relation to the guidance.

38. The guidance will set out a list of factors that the police officer must take into account when considering whether exceptional circumstances exist. It would not be appropriate to set these matters out in primary legislation since these are questions of operational detail. In particular it will be important to be able to reflect operational experience of the new arrangements in guidance as this develops.

39. It is appropriate to make this provision by guidance which is not subject to parliamentary scrutiny since it deals only with the conduct of operational matters.

Clause 14(7): Amending the period between the current offence and a previous similar offence

Power conferred on:	*Secretary of State*
Power exercisable by:	*order by statutory instrument*
Parliamentary Procedure:	*affirmative resolution procedure*

40. Clause 14 provides that a constable may not (unless there are exceptional circumstances) give a caution for a summary or a non-specified either way offence where the person has been convicted of, or cautioned for, a similar offence in the last two years. Clause 14(7) permits the Secretary of State to amend that period by order. Clause 15(4) provides that an order which amends the period must be made by the affirmative resolution procedure and clause 15(1) provides that an order made under clause 14 may make different provision for different purposes.

41. It is necessary to maintain a degree of flexibility in relation to this provision because, once the clause comes into force, operational experience may indicate that the period between the previous and the current offence should be amended. For example it may become apparent that where an offender commits a second similar offence the period of two years, after which he may be offered a caution, may be too short or too long and that a different period may be more appropriate.

42. The power will be amending primary legislation and so the affirmative resolution procedure is appropriate.

PART 2: YOUNG OFFENDERS

Clause 17: Secure colleges and other places for detention of young offenders etc

Power conferred on: *Secretary of State*

Power exercisable by: *rules by statutory instrument*

Parliamentary procedure: *negative resolution*

43. Clause 17(1) substitutes section 43 of the Prison Act 1952 ("the 1952 Act"). To a large extent new section 43 replicates current section 43. However, it is relevant for the purposes of this memorandum that new section 43 gives the Secretary of State a power to provide, in England, secure colleges as places of detention for young offenders, and makes related provision.

44. The 1952 Act principally relates to prisons. Current section 43 empowers the Secretary of State to provide young offender institutions ("YOIs"), remand centres and secure training centres ("STCs") as places of detention for young offenders and applies certain other provisions of that Act to those institutions as they apply to prisons. It also gives the Secretary of State power by rules to modify specified provisions of the 1952 Act.

45. New section 43 replaces the existing application and modification provisions with new subsections (3) to (8) which provide, among other things, that sections 1 to 42A of, and Schedule A1 to, the 1952 Act ('the prisons provisions') apply in relation to YOIs, STCs and secure colleges. This is subject to certain exceptions (see new subsection (4)). (Remand centres are no longer in use and will, by virtue of the Bill, be removed from the 1952 Act.)

46. New subsection (6) provides that, subject to the exceptions set out in new subsection (7), the prisons provisions apply to YOIs, STCs and secure colleges subject to modifications specified in rules made by the Secretary of State.

47. The purpose of the modification power (which already exists in relation to YOIs and STCs but is new in relation to secure colleges) is to allow the 1952 Act to apply to YOIs, STCs and secure colleges in a modified fashion where appropriate. For example, it may be appropriate to make specific different provision in relation to various matters governed by the 1952 Act (e.g. chaplaincy services; drug or alcohol testing) in a secure college.

48. Clause 17(2) inserts provision into section 52 of the Prison Act 1952 to provide that the power to make rules under new section 43 (unlike the existing power which is not subject to any parliamentary procedure) will be subject to the negative resolution procedure as parliamentary oversight of the exercise of such a power seems appropriate.

Schedule 3, paragraph 3: Rules for management of secure colleges

Power conferred on: *Secretary of State*

Power exercisable by: *rules by statutory instrument*

Parliamentary procedure: *negative resolution*

49. Paragraph 3 of Schedule 3 amends existing powers in section 47 of the 1952 Act. Section 47 as currently drafted gives the Secretary of State power to make rules in relation to prisons, remand centres, YOIs and STCs. Paragraph 3 amends section 47 so as to give the Secretary of State power, in addition, to make rules about secure colleges.

50. The purpose of this power (which already exists in relation to prisons, YOIs and STCs) is to allow the Secretary of State to set out detailed provisions about the administration of such institutions (including for example their operation, and management). The use of the existing power can be seen in the Secure Training Centre Rules 1998, the Prison Rules 1999 and the Young Offender Institution Rules 2000, all made under the existing power. These sets of Rules make provision about various aspects of the management and day-to-day operation of the institutions to which they relate, including education, religious observance, visits, restraint and internal discipline. It is appropriate that the Secretary of State should have the same powers in relation to secure colleges.

51. The rule-making power is subject to the negative resolution procedure as are existing powers under section 47 (see section 66 of the Criminal Justice Act 1967). This represents a suitable degree of oversight of such detailed operational matters.

52. It should be noted that, by virtue of paragraph 6 of Schedule 3, provisions in section 23(2) of the Criminal Justice Act 1961 are extended so that secure college rules may be made authorising the withholding and /or disposal of money and other articles sent to prisoners by post (as is already the case in relation to YOI and STC rules).

53. It should also be noted that, by virtue of certain provisions of Schedule 4 to the Bill, secure college rules may make provision in a number of specifically listed respects, which largely reflect the position in relation to STCs:
    - to confer functions on the principal of a contracted-out secure college (paragraph 4(2)(b));
    - in relation to a contracted out secure college, to confer functions on the monitor (see paragraph 5(4));
    - to make provision in relation to searching of a person detained in a secure college by a secure college custody officer performing custodial duties as a contracted-out secure college (see paragraph 9);
    - to make provision in relation to the use of force by a secure college custody officer performing custodial duties as a contracted-out secure college (see paragraph 10).

Schedule 4, paragraph 18: Regulations about suspension of officer's certificate

Power conferred on: *Secretary of State*

Power exercisable by: *regulations by statutory instrument*

Parliamentary Procedure *negative resolution*

54. Paragraph 7 of Schedule 4 requires every officer of a contracted-out secure college who performs custodial duties to be a secure college custody officer certified in accordance with Part 2 of Schedule 4.

55. Paragraph 18 of Schedule 4 gives the Secretary of State a power by regulations to prescribe the circumstances in which a secure college custody officer's certificate may be suspended pending a decision whether or not to revoke that certificate. It will be appropriate in some (but not all) cases to suspend the certificate while it is being decided by the Secretary of State whether it should be revoked, depending, for instance, on the nature of any alleged behaviour or the effect of the officer continuing to perform custodial duties. This provision mirrors equivalent provision in relation to custody officers of contracted out prisons and young offender institutions, and contracted out secure training centres.

56. It is considered appropriate that regulations made under this power should be subject to the negative resolution procedure. That gives Parliament an appropriate level of scrutiny, while preserving the need for flexibility to ensure that the criteria for suspension remain appropriate in the light of experience.

Clause 21: Referral orders: alternatives to revocation for breach

Power conferred on: *Secretary of State*

Power exercisable by: *order by statutory instrument*

Parliamentary Procedure: *affirmative resolution*

57. Clause 21 amends Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act") (which makes provision about the referral back to courts of referral orders made under Part 3 of that Act) by inserting new paragraph 6A. This provision provides a court dealing with such a referral back, in certain circumstances, with power to impose a penalty on an offender if it is satisfied that the offender has failed, without reasonable excuse, to comply with the terms of a youth offender contract (see section 23 of the 2000 Act). New paragraph 6A(2) provides that the penalty may consist of an order extending the period of the contract or of a fine not exceeding £2,500.

58. New paragraph 6A(7) contains a power for the Secretary of State to amend that sum by order. This will ensure that the sum specified as a maximum remains set at the appropriate amount. Subsection (4) of clause 21, amends the list of powers subject to the affirmative procedure contained in section 160(3) of the 2000 Act so that this new power will be subject to the affirmative procedure as it amends a provision of primary legislation.

PART 3: COURTS AND TRIBUNALS

Clause 24: Instituting proceedings by written charge
Clause 25: Instituting proceedings: further provision

Power conferred on:	*Criminal Procedure Rules Committee (see section 69 of the Courts Act 2003) and Lord Chancellor (see section 72(3) of that Act)*
Power exercisable by:	*rules of court by statutory instrument*
Parliamentary Procedure:	*negative resolution*

59. Section 29 of the Criminal Justice Act 2003 ("the 2003 Act") contains a method for instituting criminal proceedings against a person by issuing a written charge and requisition. Clause 24 contains amendments to that provision which will allow specified prosecutors to initiate proceedings against a person aged over 18 by way of a written charge and single justice notice procedure. This will only be available where the defendant is charged with a summary only offence not punishable by imprisonment. Clause 25 makes amendments to section 30 of the 2003 Act which are consequential on the changes made by clause 24. Clause 26(3) inserts new section 16A into the Magistrates' Courts Act 1980 to provide that proceedings initiated under the new procedure may be tried by a single justice on the papers.

60. Clause 24(5) introduces a new subsection (3A) into section 29 of the 2003 Act to provide that service of a single justice procedure notice must be served with such documents as may be prescribed in Criminal Procedure Rules. Such documents might include, for example, an explanation of the options available to the defendant, and further information about the procedure. These procedural matters are appropriately left to rules of court, and will allow the Criminal Procedure Rule Committee to give full consideration to what information should be provided to a defendant when the single justice notice procedure is used.

61. Clause 25(2) makes amendments to section 30(1) of the 2003 Act to provide that Criminal Procedure Rules may make the same provision about single justice procedure notices as they can currently make for requisitions. This extension of the existing power will allow provision to be made for procedural matters relating to the new procedure in the same way as it can be made for the existing procedure. In

62. Rules made under these provisions must be made in accordance with the established procedure for making Criminal Procedure Rules set out in section 72 of the Courts Act 2003 which provides that they are subject to the negative resolution procedure.

Clause 24(9): Amendment to power to specify person authorised to institute proceedings

Power conferred on:	*Secretary of State*
Power exercisable by:	*order by statutory instrument*
Parliamentary Procedure:	*negative resolution*

63. Section 29(5) of the 2003 Act contains a list of those who may institute proceedings by issuing a written charge and requisition. Subsection (5)(h) currently contains a power for the Secretary of State to specify by order additional persons who may institute proceedings in that way. This power is subject to the negative resolution procedure (see section 330 of the 2003 Act).

64. Clause 24(9) inserts new subsection (5A) into section 29 which will require an order made under the power in subsection (5)(h) to specify whether the person is authorised in relation to both procedures or only in relation to the single justice procedure. This ensures that designating a prosecutor and allowing them to issue a single justice procedure notice does not necessarily allow them to issue requisitions. Clause 24(10) provides that a person who would already be permitted to bring proceedings under an order made under section 29(5)(h) before the new provisions come into force is to be treated as being permitted to bring proceedings under both procedures once those provisions are in force.

65. Consistently with the exercise of the existing power it is appropriate for the Secretary of State to have power to ensure that the list of those to whom the procedures are available remains suitable over time. The procedure which applies to the power is unchanged by the amendment.

Clause 29: Criminal Courts Charge

66. Clause 29 inserts new Part 2A into the Prosecution of Offences Act 1985 ("the 1985 Act"). New Part 2A contains provision which will enable the recovery from offenders of a proportion of the costs involved in operating the criminal courts in England and Wales. The provisions require a court to impose a charge on a defendant when convicted of a criminal offence, when dealing with an offender who is in breach of a

New section 21A(3): Power to prescribe excluded cases or classes of case

Power conferred on: *Lord Chancellor*

Power exercisable by: *regulations by statutory instrument*

Parliamentary procedure: *negative resolution*

67. New section 21A(3) of the 1985 Act allows the Lord Chancellor to prescribe by regulations cases or classes of case in relation to which the criminal courts charge should not be imposed. The only offenders who the Bill exempts from the criminal courts charge are those offenders who were under 18 at the time of committing the offence. The power in new section 21A(3) will be available where the Lord Chancellor concludes that there are policy reasons for excepting additional categories of case from the criminal courts charge. In particular, it is envisaged that additional categories may only be identified after the provisions have been brought into operation. This power enables additional categories to be prescribed without further primary legislation.

68. The negative procedure, provided by section 29(1A) of the 1985 Act, is appropriate in this case, in particular since the power is only exercisable in a way that would benefit individuals being dealt with in particular cases.

New section 21C(1): Power to prescribe amount in respect of relevant court costs

Power conferred on: *Lord Chancellor*

Power exercisable by: *regulations by statutory instrument*

Parliamentary procedure: *affirmative resolution*

69. New section 21C of the 1985 Act gives the Lord Chancellor power to specify the amount of a charge ordered to be paid under new section 21A (criminal courts charge). Subsection (2) of new section 21C provides that the amount specified in respect of a class of case does not exceed the relevant court costs reasonably attributable to that class of case. “Relevant court costs” is defined in new section 21A(5)). The effect of these provisions is that it would not be possible to exercise this power to charge more than would achieve full cost recovery.

70. The levels of cost recovery would be determined in accordance with the principles in chapter 6 of *Managing Public Money*[1]. The expectation is that the Lord Chancellor would prescribe different amounts depending on the type of proceedings concerned, for example, whether the case was heard in a magistrates' court or the Crown Court and whether the proceedings involved a guilty plea or a not guilty plea. For each category of case, the prescribed amount would not exceed a reasonable reflection of the costs of those cases.

71. Because the amounts prescribed will not exceed full cost recovery, it is necessary for these amounts to be set out in secondary legislation to enable the amounts prescribed to be changed to reflect changes in the costs of criminal cases. In this way, the arrangements are similar to the arrangements which exist for prescribing fees to be taken in the courts (see in particular section 92 of the Courts Act 2003) where such amounts are set by secondary legislation. It would be entirely impracticable for the amounts to be set out in primary legislation.

72. As provided by section 29(1A) of the 1985 Act, the power is subject to the negative resolution procedure which is used for the prescribing fees and charges (and is the case for section 92 of the Courts Act 2003). As explained above it will not be possible for charges prescribed to exceed full cost recovery, which provides an additional safeguard in relation to the use of this power.

New section 21D: Interest on criminal courts charge

Power conferred on:	*Lord Chancellor*
Power exercisable by:	*regulations by statutory instrument*
Parliamentary procedure:	*negative resolution*

73. New section 21D, inserted by clause 29 into the 1985 Act, provides a power which would enable the Lord Chancellor to make regulations providing that a person who is ordered to pay a charge under new section 21A(1) is to pay interest on it if it remains unpaid. Subsection (2) of this new section provides that the regulations may make provision about the rate of interest and when it is and is not payable. It also provides that the regulations may make reference to an external measure of interest or an external document as amended from time to time (so that, for example, the regulations could provide that interest is payable in accordance with a particular measure of inflation the amount of which may change from time to time, for example, the Consumer Price Index). Subsection (3) provides that the rate of interest must not exceed the rate which the Lord Chancellor considers would maintain the value in real terms of amounts that remain unpaid.

[1] https://www.gov.uk/government/publications/managing-public-money

74. The need to make such provision arises from the possibility that the charge will be collected over a longer time period than other amounts collected and enforced as sums payable on conviction. In particular, the expectation is that the criminal courts charge will not be collected until other amounts (such as compensation orders, the Victim Surcharge, prosecution costs and fines) have been collected. Offenders will also continue to be liable after serving a sentence of imprisonment. Requiring offenders to pay interest to maintain the value of unpaid amounts in real terms would mean that offenders who take longer to pay than those who pay immediately would not be paying less in real terms.

75. A power is taken because the detail of the mechanism is more appropriately left to secondary legislation. For example, it will enable the Lord Chancellor to specify the appropriate index and to change the index if needed. The negative procedure, provided by section 29(1A) of the 1985 Act, is an appropriate level of scrutiny because the primary legislation circumscribes the power and its limits. In particular, the power is only exercisable to maintain the value of unpaid amounts in real terms.

New section 21E: Power to remit criminal courts charge

Power conferred on:	*Lord Chancellor*
Power exercisable by:	*regulations by statutory instrument*
Parliamentary procedure:	*negative resolution*

76. The criminal courts charge will be collected and enforced as a sum adjudged by a magistrates' court to be paid on conviction. This means that the sum will be treated for collection and enforcement purposes in a similar way to a fine and it will be possible for the courts or those enforcing the sums to permit offenders to pay the amount in instalments over time. New section 21E, also inserted into the Prosecution of Offences Act 1985 by clause 29, includes a power for the courts to remit the criminal courts charge in part or in full where a specified period of time has elapsed since the later of the day on which an order under new section 21A was made against the person, the person was last convicted of an offence or the person was last released from prison. The court must also be satisfied that the person has taken all reasonable steps to pay the amount or that it is otherwise impracticable to enforce the debt.

77. Subsections (4) and (7) of new section 21E allow the Lord Chancellor by regulations to specify the period of time. The expectation is that the Lord Chancellor will exercise this power with the aim of ensuring that a substantial measure of compliance with the requirement to pay the charge is achieved, while ensuring that relief from the charge is available, provided offenders have not re-offended and have done their best to comply with the order. The precise time period that best achieves this policy is something that may well change over time. In particular, it will depend in part on the amounts of the charge which will themselves be subject to change in secondary

78. This power is subject to the negative procedure (see section 29(1A) of the 1985 Act). This is an acceptable level of parliamentary scrutiny given that most of the arrangements for legal cancellation of the charge will be set out on the face of the primary legislation.

Clause 30: Duty to review criminal courts charge

Power conferred on:	*Lord Chancellor*
Power exercisable by:	*regulations by statutory instrument*
Parliamentary procedure:	*affirmative resolution*

79. Clause 30(1) and (2) require the Lord Chancellor to carry out a review of the operation of new Part 2A of the Prosecution of Offences Act 1985 after 3 years from that Part coming into force. Subsection (3) of that clause further provides that the Lord Chancellor must, if he considers it appropriate having regard to the conclusions of such a review, make regulations repealing that Part.

80. The policy implemented by new Part 2A of the 1985 Act will ensure that offenders make a contribution to the costs of running the criminal courts rather than the entirety of these costs continuing to be met by tax payers. Analytical work by the Government suggests that these arrangements will achieve value for money. It is accepted however that this policy involves a significant change to the way in which the criminal courts are funded. This means that it is important to review how this policy operates in practice.

81. It is possible that the review may recommend that the provisions be repealed. This provision caters for this possibility by requiring the repeal of the provisions by secondary legislation if the Lord Chancellor considers it appropriate having regard to the conclusions of the review. This will enable that repeal to occur without the need for further primary legislation and ensure that charges do not continue to be imposed where the policy is not deemed to be effective.

82. Subsection (6) of clause 30 provides that the level of parliamentary scrutiny is the affirmative procedure. The affirmative procedure is thought appropriate here because of the scope of the power. It will be important to ensure that each House of Parliament is able to consider whether it agrees with the conclusion that the provisions be repealed.

Clause 37: Strict liability: limitations and defences in England and Wales

Power conferred on: *Secretary of State*

Power exercisable by: *regulations by statutory instrument*

Parliamentary procedure: *negative resolution*

83. Clause 37 amends the Contempt of Court Act 1981 ("the 1981 Act") to make provision to clarify the liability for contempt of court of material which is available continuously for a period. Publishers of material that was first made available before the proceedings in question were active will have a defence to proceedings for contempt of court. This defence is contained in clause 37(5), which inserts new section 4A into the 1981 Act.

84. Subsection (3) of new section 4A provides that this defence will not apply if the Attorney General has given the person a notice in respect of the publication and the proceedings. Subsection (4) of that new section provides that the Secretary of State may, by regulations, make provision about the giving of such a notice, including about what information is to be included in the notice. This will enable the Secretary of State to set out the minimum requirements as to the content of the notice to be given under these provisions, and the procedure.

85. The matters to which the regulations will be directed are ancillary matters to the defence itself, the terms of which are set out in the primary legislation. Making provision about the content of the notice by secondary legislation will ensure that the regulations can be adapted if necessary, for example to reflect changing technologies. In light of both those factors it is appropriate for these matters to be dealt with in secondary legislation.

86. The provision which may be made through this enabling power is ancillary to the new defence and represents procedural detail. In those circumstances the negative resolution procedure, provided for by subsection (6) of new section 4A, is appropriate.

Clause 41: Jurors and electronic communications devices: powers of search etc
Schedule 7, paragraph 2: Jurors and communication devices

Power conferred on: *Lord Chancellor*

Power exercisable by: *regulations by statutory instrument*

Parliamentary procedure *negative resolution*

87. Clause 40 inserts new section 15A into the Juries Act 1974 to permit a judge to order members of a jury trying a matter to surrender electronic devices whilst they are carrying out their functions as jurors if the court believes that it is necessary and expedient in the interests of justice and is proportionate to those interests. Paragraph 1 of Schedule 7 inserts new section 9A into the Coroners and Justice Act 2009 ("the 2009 Act") which makes equivalent provision in relation to coroners and coroners' juries.

88. Clause 41(2) inserts new section 54A into the Courts Act 2003 to empower court security officers to search for and seize electronic communications devices which have not been surrendered in accordance with the order of a judge or coroner. New Section 9B of the 2009 Act (also inserted by paragraph 1 of Schedule 7) gives equivalent powers to coroners' officers.

89. The Lord Chancellor has an existing power in section 56 of the 2003 Act to make regulations about the retention of articles surrendered or seized under existing powers in that Act. Those regulations may, for example, make provision about the provision of written information about the extent of officers' powers, about the keeping of records and about the keeping and disposal of unclaimed articles. Such regulations are subject to the negative resolution procedure (see section 108 of the 2003 Act).

90. Clause 41(4) amends section 56 of the 2003 Act so that this regulation making power also applies to a search or seizure under new section 54A. This is an appropriate extension of the existing power to make delegated legislation to ensure that equivalent provision applies irrespective of the power under which a search or seizure takes place. The applicable parliamentary procedure is unchanged as there is no change to the nature of the regulations which may be made.

91. Coroners' officers have not previously had equivalent powers to those created by new section 9B of the 2009 Act. The 2009 Act therefore contains no equivalent provision to that contained in section 56 of the 2003 Act. However the changes made to the 2009 Act by the introduction of new section 9B make it appropriate to create a similar regulation making power, which is contained in new section 9B(8). This will also be subject to the negative resolution procedure (see section 176 of the 2009 Act).

Clause 45: Disclosing jury's deliberations
Schedule 7, paragraph 6: Offence relating to jury deliberations
Schedule 8: Disclosing information about members' deliberations

Power conferred on:	*Lord Chancellor in consultation with the Lord Chief Justice*
Power exercisable by:	*regulations by statutory instrument*
Parliamentary Procedure:	*negative resolution*

92. Clause 45 inserts new section 20D into the Juries Act 1974 which creates an offence of disclosing information relating to jury deliberations. It also inserts new sections 20E and 20F into that Act which set out exceptions to the offence. Those exceptions allow for the judge dealing with the proceedings, a judge of the Court of Appeal or the registrar of criminal appeals to disclose information relating to jury deliberations for the purposes of relevant investigations by a "relevant investigator". "Relevant investigator" is defined in sections 20E(7) and 20F(9) which each include a power for the Lord Chancellor, by regulations, to add to the list of relevant investigators, with the consent of the Lord Chief Justice (see subsection 20E(8) and 20F(10)). Subsections (9) and (11) of those sections respectively provide that the power is subject to the negative resolution procedure.

93. Paragraph 6 of Schedule 7 inserts new paragraph 5D into Schedule 6 to the Coroners and Justice Act 2009 which creates an equivalent offence of disclosing information relating to jury deliberations subject to the same exceptions, as set out in new paragraphs 5E and 5F. An equivalent regulation making power is included in sub-paragraphs 5E(7) and 5F(8) and the consent of the Lord Chief Justice is required by sub-paragraphs (8) and (9), respectively, of each paragraph. Section 176(4) of that Act provides that the negative resolution procedure applies to such regulations.

94. Paragraph 3 of Schedule 8 inserts a new Schedule 2A into the Armed Forces Act 2006 creating offences relating to members of the Court Martial. Paragraph 5 of the new Schedule contains an offence of disclosing information about such members' deliberations subject to equivalent exceptions as apply in relation to juries, which are set out in paragraphs 6 and 7 of the new Schedule. Paragraphs 6(7) and 7(9) contain an equivalent regulation making power to amend the definition of "relevant investigator" whilst the consent of the Lord Chief Justice is required by sub-paragraphs 6(8) and 7(10) respectively. By virtue of section 373 of the Armed Forces Act 2006 as amended by paragraph 7 of Schedule 8 the negative resolution procedure applies to such regulations.

95. The purpose of these powers is to allow changes to the definition to be made if practice suggests that this is necessary in order that the disclosure permitted by the defences is sufficient to ensure that trial irregularities or alleged offences can properly be investigated or dealt with.

96. Use of the negative resolution procedure is appropriate here as the principle elements of the exceptions are set out on the face of the legislation. The fact that the consent of the Lord Chief Justice is required will ensure that the views of the judiciary are considered before any amendment is made.

PART 5: JUDICIAL REVIEW

Clause 51: Provision of information about financial resources

Clause 52: Use of information about financial resources
Clause 53: Interveners and costs
Clause 54: Capping of costs

Power conferred on:	*Civil Procedure Rules Committee and the Lord Chancellor (see section 2 of the Civil Procedure Act 1997)* *Tribunal Procedure Committee and the Lord Chancellor (see section 22 of and Schedule 5 to the Tribunal, Courts and Enforcement Act 2007)*
Power exercisable by:	*rules by statutory instrument*
Parliamentary procedure:	*negative resolution*

97. Clause 51 inserts provision into section 31(3) of the Senior Courts Act 1981 ("the 1981 Act") and section 16(3) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") requiring applicants for leave to apply for judicial review to provide the court with financial information. Clause 52 makes provision about the use to which such information, and supplemental information provided in accordance with rules of court must be put. Clause 53 contains provisions which restrict the ability of courts to order other parties to pay the costs of an intervener in judicial review proceedings unless there are exceptional circumstances making it appropriate to do so. It also provides for the payment to another party, by the intervener, of costs incurred by that party as a result of the intervention except in exceptional circumstances. Clause 54 makes provision restricting the making of costs capping orders in judicial review proceedings.

98. Rules of Court made under section 1 of the Civil Procedure Act 1997 may already make provision about the practice and procedure of the courts. Tribunal Procedure Rules made under section 22 of the 2007 Act contain similar provision about the making of rules about the practice and procedure of tribunals. Provisions in these clauses rely on that jurisdiction. In particular:
    - clause 51(2) inserts new subsection (3A) into section 31 of the 1981 Act which sets out the kind of provision that may, in particular, be made in rules as regards the new requirement to provide information about the financing of an application for Judicial Review under section 31 of the 1981 Act (including information about the source, nature and extent of financial resource available or likely to be available, to the applicant (or where appropriate its members) to meet liabilities arising in connection with the application). Clause 51(4) inserts new subsection (3A) into section 16 of the 2007 Act to the same effect;
    - clause 52(2)(b) provides that a court or tribunal determining costs matters in judicial review proceedings must have regard to certain information provided in accordance with rules of court or Tribunal Procedure Rules;

- clause 53(6) provides that decisions about whether there are exceptional circumstances under that clause must be determined having regard to the criteria set out in rules of court;
- clause 54(5) provides that rules of court may, in particular, specify the information which must be contained in an application for a costs capping order similar to that which may in particular be specified under new section 31(3A) of the 1981 Act referred to above.

99. These procedural matters are all suitable for inclusion in procedural rules as they make provision about the practice and procedure in courts and tribunals. As with other civil and tribunal procedure rules the negative resolution procedure applies.

Clause 54: Capping of costs
Clause 55: Capping of costs: orders and their terms

Power conferred on:	*Lord Chancellor*
Power exercisable by:	*regulations by statutory instrument*
Parliamentary procedure:	*affirmative resolution*

100. Clause 54, together with clause 55 and clause 56, makes provision to govern the availability and making of costs capping orders in judicial review proceedings. Principles governing the making of such orders, generally referred to as "protective costs orders", have been developed in case law, in particular the "Corner House" case in the Court of Appeal (*R.(Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600). Clauses 54 and 55 replace the case law with codified provision, subject to clause 56.

101. Subsection (6) of clause 54 provides that a costs capping order in judicial review proceedings may only be made if the court is satisfied that the proceedings are "public interest proceedings", that the applicant for judicial would withdraw the proceedings or cease to participate in them if no order were made, and that it would be reasonable for the applicant to do so. Subsection (7) explains that proceedings are "public interest proceedings" only if an issue which is the subject of the proceedings is of general public importance, the public interest requires that issue to be resolved and the proceedings are likely to provide an appropriate means of resolving it. Subsection (8) contains a non-exhaustive list of matters to which the court must have regard when determining whether proceedings are "public interest proceedings". Subsection (9) of clause 54 contains a power for the Lord Chancellor to make regulations amending subsection (8) by adding to, omitting or amending the matters listed in it.

102. Clause 55 makes provision for the way in which the court, if it has determined that the it can in principle make a costs capping order, is to approach the question of

103. The approach of these provisions ensures that, whilst the primary legislation contains a list of those matters to which it is currently considered the court must have particular regard, it will be possible for the non-exhaustive lists to be amended should experience of the operation of the codified regime in the courts suggest that it would be appropriate to modify the current list, for example because a factor not included in the list emerges as of sufficient importance to be highlighted by inclusion.

104. Clause 54(11) and clause 55(5) provide that each power will be subject to the affirmative resolution procedure. This is thought appropriate here because the powers permit the amendment of primary legislation and because of the importance of the lists of matters in clauses 54(8) and 55(1) to the court's decision.

Clause 56: Capping of costs: environmental cases

Power conferred on: *Lord Chancellor*

Power exercisable by: *regulations by statutory instrument*

Parliamentary procedure: *negative resolution*

105. Clause 56 makes provision to enable the exclusion of environmental cases from the codified regime for costs capping orders created by the Bill by providing, in subsection (1), a power for the Lord Chancellor to provide for clauses 54 and 55 not to apply to judicial review proceedings prescribed in the regulations. For cases so excluded, the principles for environmental proceedings developed since the *Corner House* case, and any provision made for such cases in rules of court, will instead be applicable.

106. The scope of the power in subsection (1) is restricted to prescribing proceedings which in the Lord Chancellor's opinion have as their subject an issue relating entirely or party to the environment; but it is by virtue of subsection (2) a flexible power which may be used to make provision generally or in relation to particular proceedings and to include transitional, transitory or saving provision. This will allow, for example, for cases covered by certain provisions of the Aarhus Convention[2] to be excluded from the codified regime. It is considered important that the exclusion should be neither too narrowly nor too widely drawn, and that there

[2] Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998

should be flexibility to review its boundaries and application in the light of its operation in practice, for example should it emerge that the exclusion has been more widely drawn than necessary so that cases for which the codified regime is appropriate are being excluded from it. For that reason it is considered appropriate to prescribe the exclusion by secondary legislation rather than doing so in the clause.

107. The level of parliamentary scrutiny is the negative procedure (see subsection (4)). This is thought appropriate here since, unlike the powers in clauses 54 and 55, there is no power to amend primary legislation, and the power is limited to prescribing the detail of an exclusion the general nature of which is made clear by the clause.

PART 6: FINAL PROVISIONS

Clause 58: Power to make consequential and supplementary provisions etc

Power conferred on:	*Lord Chancellor; Secretary of State*
Power exercisable by:	*regulations made by statutory instrument*
Parliamentary procedure:	*negative resolution (if it does not amend primary legislation), otherwise affirmative resolution.*

108. Clause 58(1) contains power for the Lord Chancellor or Secretary of State to make regulations containing consequential, supplementary, incidental, transitional, transitory or saving provision in relation to any provision of the Bill. Subsection (2) of this clause provides that such regulations may include provision amending, repealing or revoking legislation ("legislation" is defined in subsection (6)).

109. It is considered necessary to have such a power to make consequential and other provision after the Bill has been enacted in order to ensure the effective implementation of the Bill. For example it may be necessary to make such provision to ensure that the new sentencing and release arrangements introduced by the Bill can operate effectively in a complex area of law. The power may also be used in order to adjust secondary legislation that requires amendment as a result of the changes introduced by the Bill. There are various precedents for including such provision in a Bill; see for example section 148 of the Criminal Justice and Immigration Act 2008 and section 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

110. Subsections (4) and (5) of clause 58 provide that regulations made under this provision will be subject to the negative resolution procedure unless they amend or repeal a provision of an Act ("Act" is defined in subsection (6)). It is appropriate that additional parliamentary scrutiny is provided where primary legislation is amended; otherwise the negative resolution procedure is appropriate to such a power. This approach is consistent with the approach previously taken to similar powers.

Clause 60: Commencement

Power conferred on: *Lord Chancellor; Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary Procedure: *None*

111. Subsections (1), (3) and (4) of clause 60 contain a standard power for the Lord Chancellor or the Secretary of State to bring provisions of the Bill into force by commencement order and to make appropriate transitional, transitory or saving provision when doing so. As is usual, orders made under this commencement power are not subject to parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them and the power enables those provisions to be brought into force at a convenient time and in an orderly manner.

Ministry of Justice
5th February 2014