THE CRIMINAL JUSTICE AND COURTS BILL

European Convention on Human Rights

Memorandum prepared by the Ministry of Justice

INTRODUCTION

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Criminal Justice and Courts Bill. The memorandum has been prepared by the Ministry of Justice. The Justice Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

2. Only clauses which contain substantive ECHR issues are discussed. Each section briefly sets out what the clause does in order to explore the issues to which that clause gives rise.

SUMMARY OF THE BILL

3. 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 tribunal 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.

CONSIDERATION OF THE BILL

Part 1 – Criminal Justice

Sentencing

4. The Bill contains a number of provisions concerning the length and administration of sentences for certain crimes and certain classes of person, in particular:
    - adding certain terrorism related offences to Schedules 15 and 15B (dangerous offenders scheme) to the Criminal Justice Act 2003 (CJA 2003), and increasing the maximum sentence length for some of these offences to life imprisonment (clauses 1 - 3);
    - amending the release arrangements for offenders who receive an Extended Determinate Sentence (EDS) so that all such offenders will not be entitled to automatic release at the two thirds point and will only be released early if they do not present a risk to the public; and creating a new custodial sentence for certain serious violent and sexual offenders whereby they will not be entitled to automatic release at the half way point and will only be released early if they do not present a risk to the public (clauses 4 and 5 and Schedule 1);
    - enabling, by order, for the mandatory electronic monitoring of offenders released from a sentence of imprisonment on licence (clause 6);
    - providing for a new release test for prisoners recalled from licence to (a) determine the type of release arrangements that apply and (b) require the Parole Board and the Secretary of State to have regard to the risk of further licence breaches, as well as public protection, when considering whether to release a recalled prisoner. These provisions also amend the requirement for annual Parole Board review where concurrent sentences are being served (clauses 7-9).

5. The Government's view is that these provisions collectively engage Articles 5, 7 and 14 ECHR.

Clause 1 to 3 – 1. Maximum sentence for certain offences to be life imprisonment; Clause 2. Specified offences; and 3. Schedule 15B offences

6. Clause 1 increases the maximum sentence for offences contrary to section 4 of the Explosive Substances Act 1883 (ESA 1883) (making or possession of explosives), section 54 of the Terrorism Act 2000 (weapons training), and section 6 of the Terrorism Act 2006, to life imprisonment.

7. Clause 2 adds section 4 ESA 1883 and encouraging or assisting in the commission of an offence of murder to Schedule 15 to the CJA 2003. The effect of adding an offence to Schedule 15 (and increasing the maximum sentence of imprisonment to life) is that:

- the offender may receive an automatic life sentence under sections 225 and 226 CJA 2003, if the court considers there is a significant risk to the public of serious harm from further specified violent or sexual offences; and
- (if they satisfy other criteria) the offender may receive an EDS for the offence under sections 226A or 226B CJA 2003.

8. Clause 3 adds the following offences to Schedule 15B to the CJA 2003:

- causing bodily injury by gunpowder or other explosive substance: section 28 of the Offences Against the Person Act 1861;
- causing gunpowder or other explosive substance to explode with intent: section 29 of the Offences Against the Person Act 1861;
- causing an explosion likely to endanger life or property: section 2 of the ESA 1883;
- attempt to cause an explosion or making or keeping explosives with intent to endanger life or property: section 3 ESA 1883;
- making or possession of explosive: section 4 ESA 1883;
- weapons training: section 54 of the Terrorism Act 2000;
- training for terrorism: section 6 of the Terrorism Act 2006.

9. The effect of adding these sentences to Schedule 15B is that:

- an offender can qualify for the "two strikes life" provision in section 224A CJA 2003 whereby (if they satisfy other criteria) they may receive an automatic life sentence if they have previously been convicted of an offence listed in Schedule 15B. This is subject to the proviso that the sentence need not be imposed if particular circumstances are present such that it would be unjust to impose a life sentence;
- an offender will satisfy the 'previous conviction criterion' under section 226A(2) CJA 2003 such that (if they satisfy other criteria) they may be eligible to receive an extended determinate sentence ("EDS"); and
- an offender who is given an EDS for one of these offences will be eligible for release at the Parole Board's discretion between two-thirds and the end of the custodial term under section 246 CJA 2003 (although Clause 4 will in any case provide that all EDSs, not just those imposed for a Schedule 15B offence, will be subject to discretionary release between two-thirds and the end of the custodial term).

Article 3

10. The raising of the maximum sentence to life imprisonment for these offences creates the potential that a court will be compelled to order a whole life order where the case is sufficiently serious (under section 82A Powers of Criminal Courts (Sentencing) Act 2000). The Government is considering its response to the European Court of Human Rights' (ECtHR) Judgment in *Vinter v UK (*Applications nos. 66069/09, 130/10 and 3896/10). The extent to which *Vinter* affects UK law is under consideration by the Court of Appeal in the case of *Mcloughlin and Others* in which judgment is awaited.

Article 7

11. In so far as qualification for a life sentence under sections 224A, 225 or 226 CJA 2003 is concerned, the change will only apply to offences committed after commencement so there is no question of retrospective effect or breach of Article 7.

12. In so far as eligibility for an EDS is concerned, the change will apply to all sentences imposed on or after the date of commencement (including if the offence for which an EDS may be imposed was committed prior to the date of commencement). These offenders will therefore be eligible for an extended licence period, however the imposition of such a licence period does not constitute the imposition of a penalty (*R v R* [2003] 4 All ER 882). In addition, sections 226A(9) and 226B(7) expressly provide that the extended term of imprisonment imposed (the appropriate custodial term and the extended licence period) must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence. This ensures that no greater penalty will be imposed on an offender than that which was applicable at the time (*Uttley v Secretary of State for the Home Department* [2004] UKHL 38; *M v Germany* (19359/04)).

13. In so far as release arrangements for those given an EDS are concerned, the change will apply to all sentences imposed on or after the date of commencement (including if the offence for which an EDS may be imposed was committed prior to the date of commencement). In relation to release arrangements, the ECtHR has confirmed that where the nature and purpose of a measure relate to a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7 (*Hogben v UK* (11653/85)*; Del Rio Prada v Spain* (42750/09)). Therefore there is no breach of Article 7.

Clause 4 - Parole Board release when serving extended sentences

14. This clause amends the release arrangements for offenders with an EDS so that automatic release at the two-thirds point of the sentence is no longer available; all offenders sentenced to an EDS will be released before the end of their custodial term only at the Parole Board's discretion (during a period beginning at the 'two-thirds point' and ending at the end of the custodial term). The amendment applies to all offenders sentenced to an EDS after commencement.

Article 7

15. This clause will apply to those offenders who have committed their offence before commencement, but have not yet been convicted. As such Article 7 is engaged. However it relates to the regime by which prisoners can be released or removed from prison before serving the full term of the sentence imposed, and therefore the Government does not consider that it forms part of the 'penalty' for the purposes of Article 7 (*Uttley v UK* ; *Del Rio Prada v Spain*).

16. *Welch v UK* (17740/90) established the factors which the court will take into consideration when making an assessment as to whether a measure is punitive. These are whether the measure follows conviction for an offence, the nature and purpose of the measure, its characterisation under national law, the procedures involved in making the measure, its implementation and its severity.

17. The ECtHR has also drawn a distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of a penalty. As mentioned above (paragraph 13), where the nature and purpose of a measure relate to a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7 (*Hogben v UK* (11653/85)*; Del Rio Prada v Spain* (42750/09)).

18. The ECtHR has acknowledged that the distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of a penalty will not always be clear cut (*Del Rio Prada v Spain*). For example, in *M v Germany* (19359/04) the extension of an applicant's preventative detention by virtue of a law enacted after he was sentenced was found to amount to an additional penalty imposed on him retrospectively; and in *Del Rio Prada v Spain* a postponement of the applicant's final release from prison on the basis of a new approach to the relevant sentencing legislation adopted after she had been sentenced was found to have led to a retrospective redefinition of the scope of the penalty imposed on the applicant. A change in the essential quality of or character of a sentence which make it unquestionably more severe than any sentence which might have been imposed at the time of the offence is also a relevant factor (*R (Uttley) v Home Secretary* [2004] UKHL 38).

19. There are two precedents in the ECtHR which are particularly relevant:

- In *Uttley v UK*, the applicant was sentenced to a total of 12 years imprisonment for a series of offences; this was below the maximum sentence available at the time of commission of the offences, but if sentenced at that time he would have been entitled to be released on licence at the one-third point of his sentence and to release at the two-thirds point of his sentence. However, when the applicant was sentenced, the relevant legislation provided for release on licence at the two-thirds point of his sentence with the licence remaining in force until the three-quarters point and residual liability to serve the outstanding term if convicted of a further offence. The ECtHR held that the application of the new rules on early release to the applicant was not part of the 'penalty' imposed on him and was part of the general regime applicable to prisoners.
- The case of *Hogben v UK* concerned early release on parole for a prisoner who was serving a life sentence. As a result of a change in policy in release on parole, the applicant had to serve a substantially longer time in prison. The ECtHR confirmed that although the measure could give rise to the result that the applicant's imprisonment was effectively harsher than if he had been eligible for release on parole at an earlier point, because the

20. The Government considers that the proposals at issue fall squarely on the side of 'execution' of the penalty imposed. In each case the sentence imposed by the court or to be imposed by the court remains the same, and the change is to the administration of the sentence only.

21. The same analysis applies to:

- Clause 6 - Electronic monitoring following release on licence etc;
- Clause 7 – Test for release after recall: determinate sentences;
- Clause 8 – Power to change test for release after recall: determinate sentences;
- Clause 9 - Initial release and release after recall: life sentences.

Clauses 5 and Schedule 1 – Sentence and Parole Board release for offenders of particular concern

22. Clause 5 and Schedule 1 introduce a new sentence for adult offenders convicted of certain terrorist or child sex offences, where the court considers that a custodial sentence (other than a life sentence or an EDS) is appropriate. The Secretary of State may by order add, vary or remove, the offences to which this sentence applies.

23. The sentence is made up of two parts: a custodial term; and a period of one year for which the offender is to be subject to a licence. The offender will be eligible for release at the Parole Board's discretion between half-way and the end of the custodial term (currently these offenders may receive a standard determinate sentence which involves automatic release at the half-way point of a sentence). In considering release, the Parole Board would consider whether the offender presents a risk of serious harm to the public. If an offender is released before the end of the custodial term they will serve the remaining period of that term on licence, and then go on to serve the year on licence. If an offender reaches the end of the custodial term without having been released by the Parole Board, they would be automatically released to serve the year's licence period.

24. The Government considers that the inclusion of one year licence period is necessary in light of the proposed new release arrangement; if this year was not provided, then a prisoner not considered suitable for release by the Parole Board and therefore held in prison until the end of their sentence could be released into the community without adequate supervision having not spent any time in the community on licence.

Article 5

25. Schedule 1 provides the court with the necessary discretion when imposing this sentence to ensure that the resulting deprivation of liberty is not arbitrary (*R v Offen [2001] 1 WLR*

253). The sentence imposed will always be the one which the court considers is proportionate in all the circumstances, as required by section 153(2) CJA 2003 (which is not to be disapplied in relation to this sentence).

26. The court retains the necessary discretion because they decide whether to impose a custodial sentence, and if so the length of the custodial sentence. Although the court does not have a discretion over the length of the licence period, the court does have a discretion when setting the appropriate custodial term, and the effect of new section 236A(3) (Schedule 1) provides that when setting the custodial term the court must take into account the fact of the one year licence period.

Article 7

27. Offenders who committed their offence before commencement will be affected and receive this new sentence which could not have been imposed at the time of their offence. However, the Government does not consider that this constitutes a breach of Article 7. New section 236A(4) CJA 2003 provides that the term of the sentence (the custodial term and the year's licence period) must not exceed the term that, at the time the offence was committed, was the maximum term of imprisonment permitted for the offence.

28. Accordingly, no offender will be given a sentence greater than that which was applicable at the time of the commission of the offence. It will not apply to serving prisoners such that it could be argued that this constitutes a change to a sentence already given or a redefinition of the scope of the penalty imposed (*Del Rio Prada v Spain* (42750/09)).

29. Nor is it considered that it could be argued that the make up of the sentence (with a custodial term and one year's licence period) amounts to a change in the essential quality of or character of a sentence which makes it unquestionably more severe (*R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38). In the House of Lords in *Uttley* examples were given of the reintroduction of hard labour; the conversion of a sentence of imprisonment into transportation; or the replacement for juvenile offenders of committal to the care of a local authority with a sentence of detention in a prison establishment. The court has held that the imposition of an extended licence period does not constitute the imposition of a penalty (*R v R* [2003] 4 All ER 882); similarly here the Government considers that the licence period is not punitive in effect, but preventative and imposed for rehabilitative reasons, and its operation relates to the execution of the sentence and is part of the machinery for carrying out the penalty.

30. The Secretary of State has a power by order to add offences to which the new sentence would apply (new section 236A CJA 2003). The exercise of the power would insert additional offences into new Schedule 18A of the Criminal Justice Act 2003, and the same analysis as above applies in relation to Article 7.

Clause 6 - Electronic monitoring following release on licence etc

31. Clause 6 concerns electronic monitoring in relation to release on licence. The

Government considers that Articles 7 and 8 are engaged, but not Article 5. There are a number of existing provisions permitting the electronic monitoring of offenders, and the Government does not consider that these additional provisions give rise to a breach of the Convention. All sentences of imprisonment are made up of two distinct parts: the custodial part and the part spent in the community, which (unless the sentence is less than 12 months[1]) is spent on licence. Conditions are attached to every offender's licence and an offender can be recalled to custody if they breach their licence.

32. Clause 6 provides an order making power to enable the Secretary of State to provide that an electronic monitoring condition must be imposed when an offender is released on licence. This applies to adult offenders (those 18 and over), young offenders serving public protection sentences on their initial release from custody, and would apply to both determinate and indeterminate sentence prisoners. An electronic monitoring condition is a condition requiring the monitoring of compliance with another licence condition, and/or the monitoring of the person's whereabouts. The order making power enables the Secretary of State to provide for the duration of the electronic monitoring condition (which could be of different times for different categories of offenders) if it is to be for less than the licence period; to provide for the condition to be imposed in certain cases, for example in the case of offenders convicted of a particular offence; to specify which offenders will be subject to electronic monitoring by reference to whoever is monitoring the offender; and to allow for random sampling. The order making power also allows for exceptions to be made where necessary, for example if the offender cannot be monitored for medical reasons.

33. In the majority of cases a determinate sentence prisoner's licence lasts until the end of their sentence. An indeterminate sentence prisoner's licence lasts until the death of the prisoner, unless they are serving an indeterminate sentence for public protection where there is a possibility that the licence can be revoked after 10 years if it is no longer necessary for the purposes of public protection.

34. The provisions introducing the order making power apply to anyone released on or after commencement and those already released on licence.

Article 5

35. The Government does not consider that Article 5 is engaged. In *Secretary of State for the Home Government v E* [2008] 1 AC 499 Lord Bingham stated that if the core element of confinement was "insufficiently stringent" then other conditions imposed will not convert the case into one where the person has been deprived of his liberty (see also *Secretary of State for the Home Government v JJ and* others [2007] UKHL 45). In the case of electronic monitoring there is no confinement; it does not physically restrict a persons' movement and is not imposed for the purpose of punishment.

[1] Note that the Offender Rehabilitation Bill will add a period of licence to under 12 month sentences lasting to the end of the custodial term and a period of top up supervision to take the combination of licence and supervision to 1 year.

Article 7

36. See paragraphs 16 to 20, but in summary the Government considers that licence conditions are part of the regime for early release and do not form part of the 'penalty' for the purposes of Article 7 (*Uttley v UK* (36946/03); upheld in the recent Grand Chamber judgment in *Del Rio Prada v Spain* (42750/09)).

37. In *Uttley v UK* the ECtHR held that even though licence conditions imposed on the applicant were capable of being 'onerous' in the sense that they limited his freedom of action, they did not form part of the 'penalty' but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.

Article 8 (Right to respect for private and family life)

38. Article 8 protects the private life of an individual. It has been well established by the ECtHR that the term 'private life' is a broad concept not susceptible to exhaustive definition (see for example *S and Marper,v UK* (App. Nos. 30562/04 and 30566/04) at para 66). The imposition of the electronic monitoring condition and the collection and storage of location data obtained by it are likely to amount to an interference with the offender's rights under Article 8 of the ECHR (*Leander v Sweden* (1987) 9 EHRR 433, 34 DR 78, on data collection, (*Uzun v Germany* (2011) 53 E.H.R.R. 24 on GPS monitoring).

39. The Government considers that any order made to provide for an electronic monitoring condition to be imposed will be in pursuit of a legitimate aim - ensuring compliance with other licence conditions and preventing re-offending during the part of the sentence served in the community; and/or the prevention or detection of crime.

40. The Government considers that mandatory electronic monitoring, which could include tracking of a person's whereabouts, of prescribed adult prisoners on their initial release from custody for, potentially, the duration of their licence period can be necessary in a democratic society. During a licence period the prisoner is still serving their sentence as imposed by the court, but they have benefitted from provisions as to early release. It has always been accepted that prisoners on licence should be subject to licence conditions and subject to supervision. Offenders released on licence are subject to strict conditions, which include standard conditions such as a requirement to be of good behaviour; to live and work only as approved by the supervising officer; and not travel abroad without permission. Section 250 of the Criminal Justice Act 2003 provides for the Secretary of State to impose by secondary legislation standard conditions on all determinate sentence prisoners (and these conditions are also generally adopted by the Parole Board and applied to indeterminate sentence prisoners). Such standard conditions, whilst potentially an interference with the offender's Article 8 rights, are considered necessary and proportionate. A licence may also include further conditions particular to the offender such as a requirement not to enter a certain area, not to contact a certain person, or not to use a computer. Again section 250 provides for the Secretary of State to prescribe these

types of conditions by order and a bespoke condition may be imposed on a determinate sentence prisoner by the Secretary of State (or on an indeterminate sentence prisoner, by the Parole Board) as appropriate. These underlying licence conditions must be necessary and proportionate and it is open to the offender to challenge any licence condition considered too intrusive.

41. Electronic monitoring conditions can be either for monitoring compliance with other conditions or for the tracking of whereabouts, or both. In so far as the underlying licence conditions with which compliance is monitored are compatible with Article 8, the Government considers that the electronic monitoring of an offender to monitor compliance with those conditions is justified. The offender is still serving their sentence while on licence and this forms part of the enforcement of their sentence. It is appropriate that all offenders who are in the community on licence are monitored appropriately and comply with their licence conditions – and that they are recalled to prison if they do not do so. This is not only the case for those offenders who are considered dangerous; all offenders should understand the importance of good behaviour while on licence and that this is a condition of their early release.

42. In so far as the electronic monitoring condition is applied to monitor whereabouts, this is an effective way to assist the Government in ensuring offenders comply with their licences as a whole and achieving the aims identified above. This includes the prevention of re-offending for which location monitoring can be expected to act as a deterrent.

43. Currently under section 62 of the Criminal Justice and Court Services Act 2000 electronic monitoring conditions are imposed on a discretionary basis. Although on its face the new power is broad, the Government considers that the clause is a proportionate means of achieving the aims identified above. Developments in technology have meant that such a measure can be applied with less intrusion to the person. The imposition of electronic monitoring does not restrict a persons freedom of movement, and the person is aware that he or she is subject to the licence condition.

44. The duty on the Secretary of State to act compatibly with the Convention (section 6 of the Human Rights Act 1998), is sufficient to safeguard that the power will be exercised compatibly i.e in a necessary and proportionate manner. The order making power gives the flexibility to apply the measure proportionately to different types of offender and for different times if its application in particular cases becomes disproportionate. Unlike in the case of a standard licence condition, it will be possible for the order made under this power to provide for exceptions where necessary, for example if an electronic monitoring condition could not be imposed for medical reasons. The order making powers also provide the flexibility for compulsory electronic conditions to be piloted through the use of randomised trials, should this be considered useful. 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. Changes may be needed to respond to the changing nature of the prison population and the technology

behind the condition. The power is subject to the negative resolution procedure and as such an immediate response would be possible, especially if it was established that the measure was disproportionate or not effective for a particular group of prisoners.

45. The raw data produced will be limited in that it is a record of movements (though it is acknowledged that putting the movement data together could reveal a lot about a person), and the offender will be aware of the specific use to which that data will be put. Any data processed as a result of the monitoring will be processed in compliance with the principles of the Data Protection Act 1998, and in accordance with a statutory code of practice.

Clause 7 – Test for release after recall: determinate sentences ; Clause 9 – Initial release and release after recall: life sentences

46. Clause 7 enables a determinate sentence prisoner who is recalled and is considered highly likely to breach their licence conditions in the future, but who does not pose a risk of serious harm to the public to be given a 'standard recall'; and inserts a test for the re-release of determinate sentence prisoners to take into account whether the prisoner is highly likely to breach their licence conditions in the future. It would therefore be possible for this small group of offenders to potentially be recalled for the rest of their sentence. Clause 9 inserts a re-release test for recalled indeterminate sentence prisoners, but only in relation to public protection. The changes would apply to anyone recalled to custody at or after the point of commencement.

47. Once determinate sentence prisoners are released on licence, they are liable to be recalled to custody for breach of the licence under section 254 CJA 2003. A prisoner can be given a 'fixed term recall' where, if not released earlier by the Secretary of State or the Parole Board, they must be released automatically at the end of a period of 28 days (section 255B CJA 2003); or a 'standard recall' where they are liable to be detained until the end of their sentence, unless released earlier by the Secretary of State or the Parole Board (sections 255C, 256 and 256A CJA 2003). Where the prisoner presents a risk of serious harm to the public then they should be given a standard recall, and otherwise they are given a fixed term recall. If a standard recall is given, then the prisoner is not re-released so long as they continue to present a risk of serious harm to the public.

48. However, there is a small group of offenders who have been recalled to custody on multiple occasions during the course of the same sentence, but who do not pose a risk of serious harm to the public. Currently, because they do not pose a risk of serious harm to the public they are given a 'fixed term recall' and re-released in 28 days, and within a short period breach their licence and are recalled again creating a 'revolving door' situation.

Article 5

49. A recall to prison could engage Article 5. Although the offender is still serving the original sentence once the offender reaches the point where he is entitled to be released

then any recall to custody triggers Article 5.4 as a new detention that entitles the offender to a review by an independent body. The clause amends the test to be applied, but does not change existing requirements for a review.

Article 7

50. For reasons set out above (paragraphs 16-20), although the changes will apply to an offender who is already sentenced and serving their sentence at the point of commencement, there is no breach of Article 7.

Article 14

51. The new re-release test for determinate sentence prisoners will have a public protection element and a likelihood of breach of a licence condition element whilst the re-release test for indeterminate sentence prisoners will just have the public protection element. It could therefore be argued that determinate sentence prisoners will be treated differently and arguably less favourably because of their sentence length.

52. *Clift v United Kingdom* (7205/07) held that length of sentence could be a relevant status for the purposes of Article 14; and that on the facts of that case the operation of a different early release scheme for prisoners with different lengths of sentence was not objectively justified and constituted discrimination.

53. The difference in treatment in *Clift* was not just in relation to a difference between indeterminate and determinate sentence prisoners but in relation to a small group of determinate sentence prisoners as compared to those more serious offenders with indeterminate sentences *and* to the rest of the determinate sentence prisoners with shorter sentences.

54. A difference of treatment on grounds of a protected status only requires justification under Article 14 if those between whom the relevant difference of treatment exists are in a truly analogous situation having regard to the nature of their complaint: see *R(S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196, per Lord Steyn at [42].

55. The Government considers that recalled determinate sentence prisoners are not in a truly analogous situation to recalled indeterminate sentence prisoners. Indeterminate sentence prisoners are liable on recall to be detained for the rest of their life; by its very nature a determinate sentence will end and the recalled offender will be automatically re-released. This is a clear distinction.

Clause 16 – Possession of pornographic images of rape and assault by penetration

56. Clause 16 will extend the offence at section 63 of the Criminal Justice and Immigration Act 2008 of possessing an extreme pornographic image to include images depicting non-consensual sexual penetration of a person. Similar provision has already been made in Scotland. As with the material covered by the offence as currently in force, such material is at the most extreme end of the spectrum of pornographic material which is likely to be

thought abhorrent by most people. The material at issue is expressly that which realistically depicts non-consensual penetration; the clause would cover both (a) actual non-consensual penetration (which depending on the circumstances would be either an offence of rape or assault by penetration), and (b) simulations of such acts. In respect of the former, the material covered would be a record of the commission of a criminal offence; in the latter the Government believes that banning possession is justified in order to meet the legitimate aim of protecting the individuals involved from participating in degrading activities, and to prevent the public at large from accessing and becoming desensitised to such material.

Articles 8 and 10 (Freedom of expression)

57. The Government considers this clause is compatible with Article 8 and Article 10. It is acknowledged that the offence could constitute an interference with rights under Article 8 and Article 10, but in the Government's view such interference is justified in accordance with Articles 8(2) and 10(2) respectively (prevention of crime, and protection of morals). The clause would interfere with a person's freedom to view such material (there is an express exclusion from criminal liability where a person creates an image featuring him or herself engaging in such acts, and that person is able to prove that that the conduct in question had not involved the infliction of any non-consensual harm). The provision is intended to achieve a legitimate aim and is in the Government's view necessary to meet that aim.

58. The clause covers a narrow range of images. The new offence is therefore considered to be a proportionate measure with the further legitimate aim of breaking the demand and supply cycle of this material. Access to such material may desensitise the viewer to acts of sexual violence, and the Government considers there is a need to reinforce the message that such behaviour is unacceptable. The restrictions on this material also achieve the aim of protecting others, particularly children and vulnerable adults, from inadvertently coming into possession of this material, which is available on the internet. In any event, the Government considers that the provision can be justified on the grounds that, in relation to extreme images of this kind, the public interest outweighs any private right to possess such material.

Part 3 – Courts and Tribunals

Clauses 24 – 28 - Trial by single justice on the papers

59. Clauses 24 to 28 enable summary-only, non-imprisonable cases to be dealt with other than in a traditional court room setting. Instead, these cases will be dealt with on the papers by a magistrate, sitting alone outside of open court (perhaps in an office). This will only be available where the accused person pleads guilty or does not respond to the charge. Where the accused pleads not guilty or requests an oral hearing, the proceedings will take place in open court with a magistrates' court constituted as it would be at present for a hearing, i.e. generally three magistrates sitting to hear the case. There will always be a full right of appeal to the Crown Court against the decision of a single magistrate.

Article 6 (Right to a fair trial)

60. Clearly Article 6 is engaged. Article 6 requires a "fair and public hearing", and that the accused has the chance to "defend themselves" and "examine witnesses". However, the requirements of Article 6 are not absolute. Member States are given "considerable freedom" in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The question in ECHR terms is whether the proceedings *as a whole* were fair (see, for example, para 84 of *Taxquet v Belgium*). The ECtHR will not find a violation of the right to a fair trial unless satisfied that the applicant has been deprived *overall* of that right (*CG v United Kingdom* (2002) 34 EHRR 31).

61. The Government considers that the safeguards inherent in the provisions ensure compatibility with Article 6. The defendant will waive certain of his Article 6 rights; hearings in private will only be available where the accused person pleads guilty and has elected for trial by a single justice on the papers, or does not respond to the charge. There is also the further safeguard of the availability of a full re-hearing of the case in the Crown Court and the possibility of the judgment being set aside by statutory declaration in circumstances where the defendant can show he or she was not aware of proceedings. These have the effect of rendering the proceedings *as a whole* fair for the purposes of Article 6.

62. The Government does not consider the waiving of certain rights by the defendant to be problematic in terms of Article 6. Where the defendant has 'engaged' in the process the position is clear: if they have been informed of their rights and have not opted for trial in an open court (ie in this instance pleaded guilty), there is clear case law that they are entitled to waive their right to a public hearing in this way (see for example *Albert and Le Compte v Belgium* (7299/75), para 35).

63. The ECtHR has also been prepared to accept that an implied waiver is possible. The Court has stated that: "*Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial*." (*Sejdovic v Italy* at para 86).

64. Such a tacit waiver must be made in an unequivocal manner, must be attended by minimum safeguards commensurate with its importance and must not run counter to any important public interest (*Hakansson and Sturesson v Sweden*, para 66 and *Poitrimol v France*, para 31). These cases, established in the context of civil cases, have been applied in the criminal context by the ECtHR (see *Hermi v Italy* (18114/02), paras 72-73).

65. The written charge and notice will clearly set out the options open to the defendant and the consequences of each. The consequences will be clear to the defendant. The ECtHR has said that "before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he

could reasonably have foreseen what the consequences of his conduct would be", (see *Jones v United Kingdom* (30900/02). This addresses any issue as to whether a waiver can be both implicit and unequivocal. In relation to these clauses, a waiver can be taken to apply where the defendant has not responded to the written charge by the specified date.

66. Before proceeding to decide the case a magistrate will be required to satisfy themselves that papers have been served on the defendant (new section 16A(2) of the Magistrates Court Act 1980). Therefore, so long as the single magistrate satisfies himself that the defendant has been informed of the options available and that the defendant could reasonably foresee the consequences of his conduct, then this is sufficient to allow the magistrate to rely on a tacit waiver by the defendant of his Article 6 rights. The availability of a statutory declaration to set aside a determination for those defendants who can prove they were unaware of proceedings is a further safeguard.

67. The ECtHR has held that "proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact" (*Poitrimol v France,* para 31). Therefore, in providing for a full right of appeal to the Crown Court as would be the case if the matter has been heard by a conventionally constituted magistrates' court, any Article 6 incompatibility can be cured that arises in the initial decision-making process.

Costs of Criminal Courts

Clause 29 - Criminal courts charge

68. This clause concerns the recovery from offenders of a proportion of the costs involved in operating the criminal courts in England and Wales. In summary, the provisions require a court to order a person convicted of a criminal offence to pay an amount prescribed by the Lord Chancellor for relevant court costs. The court is obliged to make an order when dealing with an offender, for unsuccessful appeals and concerning certain post-conviction hearings. The amounts prescribed by the Lord Chancellor will be amounts fixed according to the type of case concerned. The provision requires that in setting the charge, the amounts are not to exceed the relevant court costs reasonably attributable to that type of case (see new section 21C(2) of the Prosecution of Offences Act 1985). Enforcement of the charge would be as a sum adjudged to be paid on conviction by a magistrates' court, which means that it is enforced in a similar way to other such sums (which include compensation orders, the Victim Surcharge, prosecution costs and fines). The courts will have a power to remit the whole or part of a criminal courts charge in certain circumstances.

Article 6 (right to a fair trial)

69. The provisions engage Article 6. There are the following key issues: (a) whether the charge involves the determination of a civil right or obligation or a criminal charge; (b) the nature of the tribunal and the fixed rate of the charge; (c) whether the charge is an impermissible interference in the right of access to the courts; and (d) the compatibility of

the enforcement powers.

Determination of a criminal charge

70. The Government accepts that the likelihood is that, if the charge is not the determination of a criminal charge (discussed below), then it would involve the determination of civil rights or obligations. This is because the imposition of the criminal courts charge would result in offenders being liable to make payments. Such payments would appear to be in the nature of a civil right. Whether something is instead criminal for the purposes of Article 6 is a matter of applying the *Engel* criteria. This involves looking at: (a) the domestic classification; (b) the nature of the offence; and (c) the severity of the penalty (*Engel v Netherlands* (1976) 1 EHRR 647). Applying this criteria, the Government considers that the charge is not the determination of a criminal charge, but rather a contribution by the offender towards the costs of the proceedings. Dealing with the *Engel* criteria in turn:

- Although the charge is imposed during criminal proceedings, this does not mean that the domestic classification is necessarily criminal. It is instead a non-criminal aspect of the criminal proceedings. See for example the Commission decision in *B v United Kingdom* Application No. 10615/83 (proceedings for wasted costs order against a solicitor neither the determination of a criminal charge nor civil rights).
- The charge is related solely to the costs of criminal proceedings. It is not designed to penalise the offender. The severity of the offence will not be directly relevant to the amount of the charge. Although the expectation is that, for example, Crown Court proceedings will attract a higher charge, this would be on account of those proceedings being more costly than the severity of the offence.
- The charge is only determined by reference to the costs involved in dealing with the offender. The costs are therefore in proportion to the costs of the case. They will be quite low for the simplest criminal proceedings (see the relevant Impact Assessment).

Nature of the tribunal and fixed rate of the charge

71. Whether the charge is the determination of a civil right or obligation or criminal charge, the Government considers that these provisions are compatible with the Convention rights. This is because the charge would be imposed by an independent and impartial tribunal: the court. The court will be obliged to impose the charge and the court's power over the amount of the charge will be limited to choosing the correct type of charge (as prescribed by the Lord Chancellor) that applies to that case. But there is nothing incompatible with this. The case law on the need for "exceptional circumstances" safeguards in the imposition of mandatory minimum custodial sentences is not relevant because the disposal is non-custodial (see *R v Offen* [2001] 1 CrAppR 372 (restrictions on deprivation of liberty under Article 5(1) where done in an arbitrary fashion). Proportionality will be achieved by the charge being set by the Lord Chancellor and by the existence of powers to enable offenders to repay on terms they can afford. This power

will be capable of being exercised compatibly, for example, by putting in place a sliding scale of charges to be imposed depending on the proceedings concerned.

Access to the courts

72. Courts recognise that Article 6 contains an implicit right of access to the courts. It may be argued that the charge operates as a barrier on defendants from accessing both trial and appeal courts. However, the provisions in no way impede a defendant's ability to access court. In relation both to the trial stage and appeal stage of proceedings, the charge is imposed at the end of the stage and so payment is not a condition of being able to access the courts or continue with the case. In addition, in relation to the trial stage, the initiation of criminal proceedings is with the prosecution and so the imposition of the charge on the offender will not affect whether that person appears or is brought before the courts.

73. We have considered whether there are "access to court" issues arising from arguments that the way defendants behave in criminal proceedings will be changed by the knowledge that a charge may be imposed. Depending on how the charge structure is devised, it may be argued that there is a financial incentive on the offender to plead guilty in those proceedings or to consent to summary trial over Crown Court trial. It may also be argued that there is a financial incentive not to appeal. One issue is that the charge is imposed regardless of an offender's means to pay. There is case law in the civil context to the effect that fees must be assessed in the light of the circumstances of a case, including the applicant's ability to pay them, *Kreuz v Poland* (App No 28249/95). See also the pre-HRA case, *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (fees order in the absence of specific statutory provision to authorise denial of access to poor fell foul of the "constitutional right" of access at common law).

74. The Government's view is that these issues are not properly "access to court" issues. These incentives do not hinder access to the courts. There is nothing in the Strasbourg case law which prohibits incentives of these kinds. Even were the Strasbourg court to extend the "access to court" principles to determine the acceptable scope of any potential incentives, the likely test to be applied, drawing on the access to court case law in the civil context, is that incentives are permissible where proportionate (Application 4451/70: *Golder v United Kingdom* (1975) 1 EHRR 524, ECtHR, at para 38 (civil)). The scheme of charges would be proportionate by being a sliding scale of charges, and for each class of case not exceed the relevant court costs reasonably attributable to that class. While there is no means test on imposition of the charge, an offender's means can be taken into account for the purposes of enforcement.

Enforcement powers

75. The criminal courts charge is to be collected and enforced as a sum adjudged to be paid on conviction. These enforcement powers include powers of courts and fines officers to collect sums through payments by installment and to issue warrants of distress. The courts may also, in tightly controlled circumstances, commit an offender to custody in default. There is case law indicating that these existing powers are compatible with Article 6. See

in particular *R (Minshall) v Marylebone Magistrates' Court* [2008] EWHC 2800 (Admin) (enforcement proceedings are regarded as criminal proceedings for the purposes of Article 6). Providing that these powers are exercisable to enforce the criminal courts charge is therefore also compatible with Article 6.

76. The Bill is also making changes to the collection and enforcement powers for fines officers in Schedule 5 to the Courts Act in **clause 31**. These amendments would apply to all sums adjudged, including the criminal courts charge. The amendments extend the powers of fines officers over variation of payment terms (and related terms) both as to the time when variation may occur and to permit the terms to be varied less favourably to the offender. These changes do not alter the Article 6 compatibility of fines officers' powers. In particular, fines officer decisions will continue to be appealable to magistrates' courts. Variations which are less favourable to an offender can only occur with that offender's consent.

Article 1P1 (protection of property)

77. These provisions also engage Article 1P1. The requirement to pay money is an interference with the peaceful enjoyment of possessions. The Government considers that the public interest justifies such interference: individuals who give rise to the need for criminal proceedings in the first place ought to contribute to the costs of those proceedings. In any event, the clause sets out a power to prescribe the level of the court charge. It would not set out the amount of the charge. This power is capable of being exercised compatibly.

Article 14 (prohibition of discrimination)

78. Article 14 may also be engaged, in combination with Article 6 and Article 1P1. There is one element of the policy which may involve direct discrimination, namely, age. The charge is only to apply to adult offenders. However, the Government considers that imposing the charge on adult offenders only is justifiable. The policy is about providing that individuals are responsible for the financial consequences of their behaviour. It is appropriate to expect more in this respect from adults than children and young people.

Contempt of court

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

79. This clause amends the Contempt of Court Act 1981 to introduce a new defence to the strict liability rule under the Contempt of Court Act 1981, and to clarify the time at which the rule will apply to publications. At present, the Act says that the strict liability rule only applies where proceedings are active "at the time of publication". This is considered to be insufficiently precise. The phrase "time of publication" will be replaced with a provision making clear that the strict liability applies to a publication only if proceedings are active *at a time when the publication is available to the public*. This clarification will mean that any material available during active proceedings may be held in contempt, whether it is published for the first time or accessed online.

80. To reduce the burden on media organisations with online archives to monitor continually the content of these archives, provision will be made whereby a publisher or distributor will have a complete defence to liability for contempt in relation to an article or other material first published prior to proceedings becoming active (i.e. the accused being arrested or charged) unless the person or organisation is placed on formal notice by the Attorney General. This formal notice will inform the publisher that proceedings have become active, and of the fact that they have material online that is potentially contemptuous. The media organisation will then have to decide whether to remove the material.

81. The law under the Contempt of Court Act 1981 will continue to operate as it does at present in relation to material published for the first time during active proceedings.

Article 10

82. Article 10 is engaged. The clause, as with the current law, limits what media organisations and others may publish or make available during active proceedings.

83. The restriction on the Article 10 rights of media organisations in this way is justifiable under Article 10(2). There is an evident need to ensure that jurors are protected from external influences when deciding cases. This will help to ensure that they do not stumble across prejudicial information if they are on the internet for completely separate and legitimate purposes. It will only operate to allow the Attorney-General to give notice where he feels that there is a "substantial risk of serious prejudice" arising as a result of the publication. This is a high threshold, and a proportionate response to the pressing social need of ensuring that jurors are not subject to external influences and prejudices when deciding cases.

84. The availability of the new defence strengthens the protection afforded to media organisations in this regard as the current situation requires them to monitor their archives to ensure that there is no contemptuous material online in relation to active proceedings. The defence will remove that burden.

85. The ECtHR has held that in relation to archives, the margin of appreciation afforded to states in striking the balance between competing rights is likely to be greater where news archives of past events, rather than news reporting of current events, are concerned (*Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* (3002/03) para 45). It is worth noting that in their response to the Law Commission consultation on this issue, the Equality and Human Rights Commission confirmed their view that the policy would be Article 10 compliant (see para 2.82 of the Law Commission report on Contempt of Court (Law Com No. 340), published on 9 December 2013).

Juries and members of the Court Martial

86. These clauses create new offences in areas currently covered by the common law on contempt of Court and the Contempt of Court Act 1981. The offences cover:

- Research by jurors;
- Sharing research with other jurors;
- Jurors engaging in other prohibited conduct; and
- Disclosing jury's deliberations.

87. There are also provisions covering the use of electronic communications devices by jurors. Collectively these provisions engage Articles 8, 10 and may engage Article 1 of Protocol 1. The Government considers that the extent to which such rights are interfered with is compatible with Convention, being a proportionate interference for the legitimate purpose of maintaining the authority and impartiality of the judiciary' (which includes the jury) and 'the protection of the reputation or rights of others' (which includes the defendant's Article 6 rights). The analysis below applies equally to provisions in relation to juries at inquests and members of the Court Martial.

Clause 40 - Juries and electronic communications devices

88. This clause provides that judges should have a discretion to remove electronic communications devices from jurors during a trial. This will only be exercisable when to do so is necessary in the interests of justice and proportionate to that aim. A person in breach of judicial order regarding such a device will be in contempt of court. This clause engages Articles 8, 10, and may engage Article 1P1.

Articles 8 and 10.

89. Articles 8 and 10 are both qualified rights. Limiting access to communications devices at relevant times could be seen as an interference with these rights. However, interference is permissible under Articles 8(2) and 10(2) so long as it is in accordance with the law, necessary in democratic society, and either for the protection of others (Article 8(2)) or the protection of the reputation or rights of others or maintaining the authority and impartiality of the judiciary (Article 10(2).

90. The aim of the policy is clearly to ensure that jurors do not access the internet when doing so would be inappropriate to their role of jurors. Judges would only order removal of devices when doing so would be necessary in the interests of justice and removal would be a proportionate means of safeguarding those interests. It would only be temporary removal, and would not extend beyond the juror being in the court building or on court business.

91. Such interference is clearly justified in protecting the rights of defendants to a fair trial, and the protection of the reputation of the judiciary (which, according to ECtHR case law, includes the jury - see paragraph 32 of *Attorney General v MGN Ltd and another* [2011] EWHC 2074 (Admin)).

Article 1 of Protocol 1

92. Article 1P1 entitles people to peaceful enjoyment of their possessions. However, the Government considers that any such interference is justified in the public interest and in

accordance with the law.

93. The ECtHR often draws little distinction between the different kinds of interference when determining whether they were justified. However, the Government considers that this policy will not result in either a deprivation of property (it is well-established that for something to be a deprivation it must be a deprivation of ownership, rather than a restriction or temporary deprivation of use or enjoyment of the property see for example *Handyside v UK* (5493/72)*, para 62* and *Erknew and Hofauer v Austria* (9616/81)*, para 74)*) or a control of use (which generally relates to provision restricting property use, such as rent control legislation, or the imposition of reforestation obligations).

94. Therefore, if Article 1P1 is engaged, then it is only in so far as the clause interferes with the peaceful enjoyment of possessions as a juror may, perhaps in some lengthy cases, have to temporarily surrender their device(s) on a daily basis, albeit for fairly insignificant amounts of time.

95. Any interference will be in accordance with the law. It is in the public interest to ensure that, in the interests of justice, jurors can not seek extraneous information through a smart phone or similar device whilst deliberating, and where necessary ensure that they cannot seek extraneous information at other times when there is a perceived risk that they might do so. The clause provides the power for a judge to remove devices when necessary and proportionate, which will necessarily be for a limited time. The power will only be available when the juror is engaged in their role as a juror. Therefore, the clauses provide that any interference other than the automatic application of the rule to the jury room will also be justified.

Clause 41 – Jurors and electronic communications devices: powers of search etc

96. Clause 41 provides a power of search and seizure of electronic communications devices. It is at least arguable that this engages Article 8 (see, for example, *Gillan and Quinton v UK*, application no. 4158/05, paragraph 61 and 62). If Article 8 is engaged, then the power clearly meets the criteria set out in Article 8(2) and is therefore a justifiable restriction on Article 8 rights. Most pertinently, the power is a proportionate means of meeting a legitimate aim.

97. The power is proportionate to the aim of ensuring the protection of the rights of others. That right is the right of a defendant to a fair trial. The power to search and seize is only available if the judge or senior coroner has ordered it, and is only permitted for the purposes of looking for or seizing an electronic communications device that is being held by a juror contrary to a judicial order. By keeping an electronic communications device against the order of a judge, it is likely that the juror doing so either intends or would be seen as having the intention to research the case in the deliberating room or elsewhere. The power to search and seize ensures a sufficient and proportionate safeguard against that danger. In either case, there is obvious potential that the fair trial of the defendant could be undermined, and so the limited power to search for and seize such devices

allows for a necessary and proportionate restriction on the Article 8 rights of a juror.

Clause 42 - Research by jurors

98. This clause will make it an offence for jurors to 'intentionally seek information' relevant to the case that they are trying. This is intended primarily to cover internet research, but will also cover things like visits to the crime scene. It engages Article 10.

99. Article 10(2) provides for a justification of an interference with the rights provided under Article 10(1). The interference proposed by this clause is a proportionate restriction on right to receive information. The restrictions meet the legitimate aims of 'maintaining the authority and impartiality of the judiciary' and 'the protection of the reputation or rights of others' (which includes the defendant's Article 6 rights).

100. In terms of the proportionality of the restriction, the offence will only restrict a very particular type of conduct, i.e. intentionally seeking information that he or she believes is relevant to the case. It also only applies for the time a person is sworn in as a juror. It will not, therefore, prevent jurors using the internet generally. The Government considers this to be clearly proportionate to the pressing social need of maintaining the reputation of the jury system by ensuring that they are, and are seen to be, trying cases only on the evidence presented in court.

Clause 43 - Sharing research with other jurors

101. Clause 43 will make it an offence for jurors to disclose information that they have gained in contravention of clause 44 to another member of the jury during a trial, where that information has not been presented in court. The offence will restrict the ability of jurors to communicate certain things to other jurors, and so clearly interferes with rights under Article 10.

102. This interference can be justified for the same reasons set out above. The restrictions meet the legitimate aims of 'maintaining the authority and impartiality of the judiciary' (which includes the jury) and 'the protection of the reputation or rights of others' (which includes the defendant's Article 6 rights).

103. In terms of the proportionality of the restriction, the offences will only restrict a very particular type of conduct, i.e. disclosing information to another juror that has been illegally gained. It will not, therefore, prevent jurors discussing anything other than that very narrow category of information. That is clearly proportionate to the pressing social need of maintaining the reputation of the jury system by ensuring that they are seen to be trying cases only on the evidence presented in court.

Clause 44 - Jurors engaging in other prohibited conduct

104. This clause will make it an offence to demonstrate an intention to decide a case other than on the evidence presented in court. This is intended to ensure that jurors engaging in conduct which might call into question the fairness of a trial and therefore inflict damage

upon the administration of justice can be dealt with appropriately. This would deal with the situation that arose in the recent case of *Attorney-General v Davey* [2013] EWHC 2317 (Admin), where the defendant published on facebook his intention to prejudicially determine the issue, and ensure that the jury system operates fairly, and is perceived as doing so.

105. Ensuring that the jury system is reliable and is perceived as being fair is an important part of the criminal justice system. This offence aims to ensure both of these things. The restrictions meet the legitimate aims of 'maintaining the authority and impartiality of the judiciary' (which includes the jury) and 'the protection of the reputation or rights of others' (which includes the defendant's Article 6 rights). The restriction on the Article 10 rights of a juror is very narrow, and the Government's view is that the restriction is proportionate to the pressing social need of ensuring that jurors do not disclose bias or prejudice in relation to the case they are trying.

Clause 45 - Disclosing jury's deliberations

106. Clause 45 inserts new sections 20D to 20F into the Juries Act 1974. This makes it a criminal offence to disclose information about jury deliberations. That will replace section 8 of the Contempt of Court Act 1981, by virtue of which such conduct is currently a contempt of court.

Article 6

107..It is likely that Article 6 requires that a juror can disclose concerns about the propriety of jury deliberations during a trial. It is clear that Article 6 requires national courts to investigate suggestions that it is not constituted as an "impartial tribunal". In the case of *Remli v France* (application 16839/90), at paragraph 48, the Court held that "the Convention imposes an obligation on every national court to check whether, as constituted, it is an "impartial tribunal" within the meaning of that provision where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit". There is no particular case law on the subject though it appears likely that it is a corollary of that obligation is that it ought to be open to jurors to raise concerns about the impartiality of the jury where necessary.

108. To ensure that jurors can make such disclosure and to support Article 6, new sections 20E and 20F of the Juries Act 1974 includes a number of exceptions where disclosure of jury deliberations is permitted. The basic purpose of these exceptions is to ensure that irregularities in the jury deliberation process can be properly disclosed and investigated, but in such a way as to ensure that the important confidentiality of jury deliberations are not unnecessarily endangered.

109. The Government is clear that permitting such disclosure is sufficient to ensure that a juror who believes that there were irregularities such as to potentially render the trial unfair in terms of Article 6, for example a juror disclosing views which suggested the tribunal was

not an 'independent and impartial one', ensures that the offence will operate compatibly with Article 6.

Article 10

110. As above, this will constitute interference with Article 10 rights to freedom of expression, to impart and receive information, but is plainly justified under Article 10 (2) as a lawful restriction to protect the reputation and impartiality of the judiciary (the jury). The confidentiality of jury discussions is essential for the protection of jurors and confidence in the criminal justice process. In *Attorney General v Scotcher* [2005] UKHL 36, it was held that section 8 was compatible with Article 10, and that reasoning applies equally to this new proposed offence. Further, the ECtHR recently held in *Seckerson v UK* (32844/10) that section 8 of the 1981 Act operated compatibly with Article 10.

PART 4 – Judicial Review

Clause 50 – Likelihood of substantially different outcome for applicant

111. This clause amends courts' power to grant leave for an application for judicial review or to award a remedy where a rectification of the action complained of, for instance a procedural flaw, would in the court's view, be highly likely to have made no substantial difference to the original outcome. The power to refuse permission or a remedy exists under the current law. The current threshold derives from case-law and is whether it is 'inevitable' that the decision maker would have come to the same decision despite a procedural irregularity. The clause will lower the threshold and require that the court must not grant leave for judicial review or award a remedy if it would be highly likely that the outcome would not have been substantially different without the flaw.

Article 6 – whether substantially different outcome for applicant

112. For Article 6 to apply there needs to be (a) a genuine and serious dispute regarding a civil right, and (b) a determination of that right. If a person is making a claim for judicial review then it is possible that the dispute will be about a civil right. Where an application for judicial review shows that there is a genuine and serious dispute, judicial review is capable of determining that right. Article 6 does not just apply to how proceedings are carried out, but it also applies to the applicant's ability to bring proceedings in the first place. If an application for judicial review, relating to a defect unlikely to have caused a substantially different outcome for the applicant, is refused at the permission stage then this is potentially a restriction on the right of access to the courts.

113. In *Golder v United Kingdom* (1975) the European Court of Human Rights said that the guarantees that Article 6 provides concerning fairness, publicity and expeditiousness would be meaningless if there was no protection of the right to access to the court. Therefore the right to access to a court is implicitly protected by Article 6. However, the right is not absolute. In *Golder* the court said that the right may be subject to limitations as "by its very nature it calls for regulation by the state which may vary in time and place according to the needs and resources of the community and individuals".

114. Therefore there can be restrictions on the right of access to a court. However, any such restrictions need to be in pursuance of a legitimate aim and be proportionate to that aim.

115. The aim of the clause is to allow judicial reviews based on alleged flaws that would be highly likely to have made no substantial difference to be resolved in a proportionate manner - more quickly and with less resource. The Government considers that ECtHR case-law does not prevent member states from making decisions which affect access to the court to improve efficiency and because of resources. In the cases where permission is not given it will be on the basis that the court has considered that it was highly likely that there would be no substantial difference in the outcome, even if the alleged procedural flaw was proven. Judicial reviews based on alleged flaws which would have affected the outcome will proceed as they would now.

116. It has been argued that decisions taken after a procedural irregularity are not in fact unlawful if there has been no unfairness to the applicant. In *George v Secretary of State for the Environment* (1977) Lord Denning said:

"…it seems to me that there is no such thing as a 'technical breach of natural justice'…You should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of a mistake or error which has been made."

117. The new threshold for the no difference principle will apply both to the permission stage and to the courts discretion whether or not to allow a remedy. The use of the new threshold in relation to the permission stage is addressed above and is relevant to proportionality. The higher the threshold the more likely it is that the no difference principle will be a proportionate interference on the right to access to a court.

118. The new threshold is still high. It is set at 'highly likely that the outcome for the applicant would not have been substantially different''. Therefore the Government's view is that this provides protection for those cases were the procedural irregularity may have made a difference safeguarding access to justice where there is any genuine and serious dispute.

MINISTRY OF JUSTICE
5 February 2014