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

CRIME AND COURTS ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Courts and Justice

Section 17: Civil and family proceedings in England and Wales

283. Section 17(1), (2) and (5) create a single county court with a national jurisdiction for the whole of England and Wales, sitting at various locations within England and Wales in a similar way to the High Court and the Crown Court. The principal provision is *subsection (1),* which inserts into the County Courts Act 1984 ("the 1984 Act") a new section A1, providing for the establishment of a single county court.

284. The new section A1(1) provides for there to be a county court exercising jurisdiction in England and Wales, and for the jurisdiction of that court to be that which is conferred on it by or under the 1984 Act or any other Act, or any Act or measure of the National Assembly for Wales. This mirrors the position for the individual county courts at present, but on a national basis for the single court.

285. The new section A1(2) provides for the single county court to be a court of record with a seal. This again mirrors the position for the individual county courts at present (each of which is in its own right a court of record with its own seal), but on a national basis for the single court, with a single seal.

286. *Subsection (2)* repeals sections 1 and 2 of the 1984 Act, which provide for there to be individual county courts, each for its own district and with its own seal. These sections are replaced by the new section A1. With their repeal the geographical jurisdictional boundaries in the existing county court structure are removed.

287. *Subsection (3)* inserts a new section 31A of the Matrimonial and Family Proceedings Act 1984 to provide for the creation of a family court with jurisdiction throughout England and Wales. The family court will exercise the jurisdiction and powers conferred on it by statute, including the jurisdiction and powers currently exercised by county courts and magistrates' courts in relation to family proceedings. The family court will be a court of record and shall have a seal.

288. *Subsection (4)* repeals Part 2 of, and associated provisions in, the Children, Schools and Families Act 2010 (which relates to the publication of information relating to family proceedings).

289. *Subsection (5)* introduces Schedule 9, which makes amendments to the 1984 Act and in numerous other statutes in connection with and in consequence of the single county court replacing the existing county courts.

290. *Subsection (6)* introduces Schedules 10 and 11 which make further amendments to the Matrimonial and Family Proceedings Act 1984 and other enactments in connection with and in consequence of the creation of the single family court.

Schedule 9: Single county court in England and Wales

291. Schedule 9 makes amendments, particularly in the 1984 Act itself, but also in a wide range of other legislation referring to the existing county courts, in connection with and in consequence of the establishment of the single county court.

Part 1 of Schedule 9: Amendments of the County Courts Act 1984

292. Part 1 of the Schedule contains amendments to the 1984 Act, other than the principal provisions establishing the single county court which are contained in section 17. Of particular importance are the amendments made by *paragraphs 2 and 3* in relation to sittings of the single county court, and *paragraphs 4 to 6* in relation to the judges of the single county court.

293. *Paragraph 2*amends section 3 of the 1984 Act by substituting for *subsections (1) and (2)* (which provide for where and when the existing county courts may sit) four subsections which make flexible provision for the single county court to be able to sit anywhere in England and Wales, for sittings to be able to be continuous or intermittent or occasional, for sittings to be able to be simultaneously held in different places, and for the places where the county court sits, and the days and times at which it sits in any place, to be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice.

294. *Paragraph 3* amends section 4 of the 1984 Act, which provides for the use of public buildings for individual county courts, so that it provides for the use of such buildings for sittings of the single county court.

295. *Paragraph 4*substitutes for section 5 of the 1984 Act, which makes provision in respect of those judges (other than district judges) who may sit in the county courts, a new section 5. While, in practice, Circuit judges and district judges will remain the principal judges of the county court, the effect of this amendment and, in particular, *subsection (2)* of the new section 5, will be to enable a wider range of other judges to sit, on a flexible basis, in the single county court as "judges of the county court". The new section 5 does not reproduce those provisions of the present section 5 which provide for the assignment of circuit judges to districts, since, with the establishment of the single county court on a national basis, these are no longer required. *Paragraphs 5 and 6*similarly amend sections 6 and 8 of the 1984 Act to remove those provisions which relate to the assignment to districts of district judges and deputy district judges respectively.

296. *Paragraph 7*amends section 12 of the 1984 Act to replace the provision for the district judge for a district to keep such records as may be prescribed by the Lord Chancellor in regulations with a provision enabling the Lord Chancellor to provide by regulations for the keeping of records for the single county court.

297. *Paragraphs 8 and 9*make amendments to sections 13 (officers of the court not to act as solicitors of that court) and 14 (penalty for assaulting officers) of the 1984 Act, which make provision in relation to district judges of a county court, so that the provision operates instead in terms of judges of the single county court more generally.

298. *Paragraph 10*makes a large number of amendments to the remainder of the 1984 Act. A number of the amendments repeal existing provisions of the 1984 Act which provide for there to be specific county courts to exercise specialist jurisdictions, such as Admiralty and contentious probate jurisdiction (see sub-paragraph (3) in particular). Any such specialist jurisdiction will instead be conferred on the single county court as a whole, and exercised by such judges and in such locations as are determined under existing allocation powers (such as section 1 of the Courts and Legal Services Act 1990).

299. Other provisions in paragraph 10 remove or amend provisions which confer powers or functions specifically on district judges or circuit judges, so that those provisions instead confer the powers or functions on the court or on a judge of the court without

specifying whether this is a district judge, circuit judge or other judge (see, for example, *sub-paragraphs (12) to (20)*). The allocation of powers and functions to tiers of judge in the single county court will then be determined under existing powers of direction.

300. Further, other provisions in *paragraph 10* amend or remove provisions in the 1984 Act which operate by reference to an individual county court, or to a court's jurisdiction in relation to a specific district, so that they operate for the single county court as a whole (see, for example, *sub-paragraphs (35), (36), (42), (48), and (51) to (53)*); and other provisions simply amend references to "a county court" or "a court" or "any court" or to "county courts" or "courts" in the plural so that they refer instead to "the county court" and will operate appropriately in relation to the single county court (see, for example, *sub-paragraphs (63) to (67)*).

Parts 2 to 4 of Schedule 9: Other amendments and repeals

301. Parts 2 and 3 make consequential amendments to other Acts of Parliament which make reference to county courts and the judges who sit in them. The amendments are similar to those made to the 1984 Act by Part 1 of the Schedule. However, in relation to other Acts, by far the most numerous amendments are those which substitute, for references to "a county court", references to "the county court". Other amendments remove or modify provisions which tie jurisdiction to specific county courts or districts and judges for a district, and a small number of amendments repeal provisions which confer specialist jurisdiction on a specific county court or courts - in particular *paragraph 30*, which repeals those provisions of the Copyright, Designs and Patent Act 1988 which establish a Patents County Court (intellectual property jurisdiction will be re-allocated and structured under existing powers). Part 4 contains consequential repeals.

Schedule 10: The family court

302. *Paragraph 1* inserts new sections 31B to 31P into the Matrimonial and Family Proceedings Act 1984.

303. New section 31B (Sittings) provides that sittings of the family court and any other business of the court may take place anywhere in England and Wales. Sittings of the family court at any place may be continuous, intermittent or occasional (new section 31B(2)) and the court shall have power to adjourn cases from place to place at any time (new section 31B(3)). Under new section 31B(4) the Lord Chancellor, after consulting the Lord Chief Justice, shall direct where the family court shall sit and the days and times at which it will sit. The Lord Chief Justice may nominate a judicial office holder to exercise the Lord Chief Justice's functions under new section 31B (new section 31B(5)). It is expected that any delegation of powers would be to the President of the Family Division as the Head of Family Justice.

304. New section 31C (Judges) lists, at *subsection (1)*, the judges of the family court, and includes (amongst others) all levels of judiciary currently able to deal with family proceedings in the High Court, county courts and magistrates' courts. Decisions of the family court made by judges of the High Court and above and by former Court of Appeal and High Court judges will be binding on those listed at paragraphs (j) to (y) of *subsection (1)*. Such decisions will also be binding on justices' clerks and assistants to justices' clerks except where they are carrying out functions of the court with a judge listed in paragraphs (a), (b) and (c) of *subsection (2)*. *Subsection (3)* ensures that fee-paid, or unsalaried, part-time judges of the family court who are also engaged in legal practice do not sit in cases in which their firm is acting for a party.

305. New section 31D (Composition of the court and distribution of its business) provides at *subsection (1)* for the Lord Chief Justice or his or her nominated judicial office holder to make rules, with the agreement of the Lord Chancellor, about the composition of the family court and the allocation of the work of the court to the appropriate level of judiciary. Rules about the composition of the family court may provide for the court to be constituted differently for the purpose of deciding different matters (*subsectio*n (2)

(a)). For example, such rules may prescribe certain types of proceedings or applications within proceedings that are to be heard by a judge, a single justice of the peace or by a two or three magistrate bench. Rules may also allocate different types of proceedings to specified levels of judiciary and provide that only judges authorised for the purpose may deal with certain proceedings (new section 31D(3)), thereby ensuring that different types of cases are heard by those judges with the relevant expertise. This power to limit the range of proceedings that certain types of judge may deal with does not apply to High Court judges and above (*subsection (4)*). Before making Rules under new section 31D, the Family Procedure Rule Committee, which is the statutory body responsible for making rules of court governing the practice and procedure to be followed in family proceedings, must be consulted.

306. New section 31E (Family court has High Court and county court powers) enables the family court to make any order that could be made by the High Court if the proceedings were in the High Court, or any order that could be made by the county court if the proceedings were there (*subsection (1)*). The family court will be able to issue warrants making provision for anything which, were the matter in the High Court, could be included in a writ (*subsection (2)*). The power in *subsection (1)* will not extend to orders of a type listed in section 38(3) of the County Courts Act 1984 ("the 1984 Act") or to other orders prescribed by regulations made under that section (*subsection (3)*). The Lord Chancellor has the power to make provision in regulations dealing with the effect and execution of warrants issued by the family court. The provision in those regulations will mirror existing provision in relation to High Court writs or county court warrants *(subsection (5))*.

307. New section 31F (Proceedings and decisions) bestows on the family court certain powers relating to hearings and orders that mirror existing powers contained in the 1984 Act and the Magistrates' Courts Act 1980. This includes the power to adjourn hearings (*subsection (1)*). Provision is also made regarding the nature of orders of the family court (*subsection (2)*), their effect (*subsection (3)*), what may be contained in orders requiring something to be done, other than the payment of money (*subsection (4)*), what may be included in an order requiring the payment of money (*subsection (5)*) and the ability of the family court to vary, suspend, rescind or revive its orders (*subsection (6)*). The family court will have the ability to proceed in the absence of one or more parties, but this is subject to rules of court (*subsection (7)*) and it will have the same power as the High Court to enforce an undertaking given by a solicitor in relation to any proceedings before it (*subsection (8)*). *Subsection (9)* is a general provision enabling the family court to adopt and apply the general principles of practice in the High Court.

308. New section 31G (Witnesses and evidence), which is modelled on section 97 of the Magistrates' Courts Act 1980, sets out the circumstances in which the family court may summons a witness to give evidence and produce documents (*subsection (2)*) and specifies the penalties that the court may impose (*subsection (4)*) where a person fails to attend before the court or produce documents, without just excuse (*subsection (3)*). New section 31G(6) provides that where a self representing party appears to be unable to cross-examine a witness effectively, the court may put, or cause to be put, questions to the witness.

309. The family court will have the power to deal with all types of contempt of court that may currently be dealt with in family proceedings in the High Court, county courts and magistrates' courts. New section 31H (Contempt of court: power to limit court's powers) enables the Lord Chancellor, after consulting the Lord Chief Justice, to make regulations limiting or removing any of those powers in specified circumstances (*subsection (1)*). Such regulations may make different provision for different purposes (new section 31P(1)(b)) and may be used, for example, to impose limits on the penalties imposed for certain types of contempt by specified tiers of judiciary in the family court.

310. New section 31I (Powers of the High Court in respect of family court proceedings), which is modelled on section 41 of the 1984 Act, provides at *subsection (1)* that the

High Court may transfer proceedings pending in the family court to the High Court (which will continue to have all jurisdiction to deal with family proceedings that it currently has) where it considers it desirable to do so, without prejudice, and subject to, the matters set out in *subsection* (2).

311. New section 31J (Overview of certain powers of the court under other Acts) sets out for convenience certain powers of the family court contained in the Senior Courts Act 1981 and the 1984 Act.

312. New 31K (Appeals) provides that any party dissatisfied with a decision of the family court may appeal to the Court of Appeal, subject to any order made under section 56(1) of the Access to Justice Act 1999 which may alter the destination of appeals (*subsection* (1)). This provision does not duplicate or remove any right of appeal conferred under any other enactment (*subsection* (2)). Provision may be made by Order (made by the Lord Chancellor after consultation with the Lord Chief Justice or his or her nominee) as to when appeals may be made in relation to decisions on the transfer, or proposed transfer, of proceedings from or to the family court (*subsections* (3), (4) and (8)). Where requested by a party at any hearing where there is a right to appeal, a judge shall make a note of the matters referred to in *subsection* (5) which, when signed by the judge may be provided to the party and be used at any subsequent appeal hearing (*subsection* (6)).

313. New section 31L (Enforcement) makes specific provision at *subsection* (1) mirroring for the family courts the powers contained in section 140 of the Senior Courts Act 1981 in relation to the enforcement of the payment of a fine or penalty imposed by the court. *Subsection* (2) enables rules of court (which will be the Family Procedure Rules made under section 75 of the Courts Act 2003) to make provision for the recovery of periodical payments and the apportioning of payments in circumstances where there are two or more orders under which the same person is required to make periodical payments to the same recipient. *Subsections* (4) to (7) replicate the provisions in section 62 of the Magistrates' Courts Act 1980 allowing a person with whom a child has his or her home to take certain steps in their own name in relation to an order requiring periodical payments or a lump sum to be paid to a child, without affecting the right of the child to proceed in his or her own name.

314. New section 31M (Records of proceedings), which is modelled on section 12 of the 1984 Act, provides for the Lord Chancellor to make regulations, after consulting the Lord Chief Justice, for the keeping of records (*subsections* (1) and (3)). Entries made in a book or other document kept under such regulations or a signed and certified copy of such an entry will be admitted as evidence of the entry (*subsection* (2)).

315. New section 31N (Summonses and other documents) mirrors, for the purposes of the family court, the provisions of section 133(1) of the 1984 Act in relation to proof of service of a summons (*subsection* (1)), and applies sections 133(2) (*subsection* (2)), 135 and 136 of that Act (*subsection* (3)).

316. New section 31O (Justices' clerks and assistants: functions) contains provisions for the purposes of the family court based on sections 28, 29, 31 and 32 of the Courts Act 2003 regarding the functions (*subsections* (1), (2) and (3)), independence (*subsection* (4)) and immunity (*subsections* (5), (6) and (7)) of justices' clerks and assistants to justices' clerks.

317. New section 31P (Orders, regulations and rules under Part 4A) relates to the various powers of the Lord Chancellor to make provision in secondary legislation which are conferred under Part 4A of the Matrimonial and Family Proceedings Act 1984. The parliamentary procedures to apply to the statutory instruments made under those powers are specified in subsections (2) and (3) of that section. By way of example, the procedure in subsection (2), whereby specified regulations and rules may not be made unless a draft of the statutory instrument containing the regulations or rules has been laid before, and approved by, a resolution of each House of Parliament, will be applied when the Lord Chancellor makes the first rules under new section 31O(1) enabling functions of

the family court, or of a judge of the court, to be carried out by a justices' clerk, and enabling functions of a justices' clerk to be carried out by an assistant to a justices' clerk.

318. Part 2 *(paragraphs 2 to 98)* makes amendments to other enactments arising out of the creation of the family court. Principally these amendments are to enable existing family legislation to apply to proceedings in the new family court.

319. *Paragraph 99*contains repeals and revocations to legislation in consequence of Parts 1 and 2 of the Schedule.

Schedule 11: Transfer of jurisdiction to family court

320. *Paragraphs 1 to 209*make amendments to legislation providing for the transfer of jurisdiction to the family court. Principally these amendments reflect the fact that the county court and magistrates' courts will no longer deal with family proceedings and transfer their family jurisdiction to the new family court.

321. *Paragraph 210*contains repeals and revocations in consequence of Part 1 of the Schedule.

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

322. Section 18 amends the Policing and Crime Act 2009 with the effect that applications for injunctions to prevent gang related violence against persons aged 14 to 17 should be made in the youth court, sitting in a civil capacity, rather than in the county court or High Court. Section 18 also gives effect to Schedule 12.

Schedule 12: Gang-related injunctions: further amendments

323. Schedule 12 makes consequential amendments, including an amendment to secure that appeals against decisions of the youth court lie to the Crown Court.

324. Schedule 12 also makes a minor change to what may be permitted by rules of court for all gang-related injunctions, regardless of age, so that if a without notice application is dismissed an appeal may be brought by the applicant without informing the respondent.

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

325. Section 19 amends provisions in Chapter 3 of Part 3 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act") relating to the designation of a local authority for a child who is remanded to youth detention accommodation.

326. Section 102(6) of the 2012 Act requires the court (where a child is remanded to youth detention accommodation) to designate a local authority as the designated authority for the child. The designation operates for various purposes, including for the purpose of regulations made under section 103(2) about the recovery of costs from the designated authority.

327. Section 102(7)(a) provides that the court must, where the child is looked after, designate the authority which looks after the child. Section 102(7)(b) provides that, where section 102(7)(a) does not apply, the court must designate either the local authority in whose area it appears to the court that the child habitually resides, or the local authority in whose area it appears to the court that the offence was committed. *Subsection (4)* of section 19 inserts new section 102(7A) and (7B) into the 2012 Act to provide that a court is to designate the local authority in whose area the child habitually resides, unless it considers it inappropriate to do so, or is unable to identify any place in England and Wales where the child habitually resides. It also provides that where it appears to the court that the offence was not committed in England and Wales, and it is not required under new section 102(7A) to designate the local authority in whose area the

child habitually resides, the court may designate a local authority which it considers appropriate in the circumstances of the case.

328. *Subsection (5)* inserts new section 102(7C) to (7J) into the 2012 Act. These provisions give a court the power to make an order to replace a designated local authority with another local authority. A court currently has the power to change the designated authority, but such a change only has effect from the date on which the change is made. A replacement designation under the new provisions would have the effect that the newly designated local authority becomes liable, by virtue of any regulations made under section 103(2) of the 2012 Act, to pay any costs of accommodation, including during the period before the replacement (that is, when the original local authority was designated). The provisions would make further, ancillary provision. In particular, new section 102(7H) provides that if a designated local authority has paid an amount by virtue of regulations made under section 103(2) for the costs of the remand of a child to youth detention accommodation, and a replacement designation has been made, that amount must be repaid to the original local authority.

329. *Subsections (6) and (7)* provide that, although a replacement designation under new section 102(7C) of the 2012 Act may be made in respect of a remand ordered before the commencement of section 19, the substitution of a newly designated local authority does not have effect in respect to any time before commencement. Subject to this, the amendments to section 102 of the 2012 Act made by section 19 would only have effect in relation to remands ordered after commencement.

Section 20: Judicial appointments

330. Section 20 gives effect to Schedule 13.

Schedule 13: Judicial appointments

Part 1: Judges of the Supreme Court: number and selection

331. Part 1 of Schedule 13 amends aspects of the Constitutional Reform Act 2005 ("the CRA") which created the Supreme Court of the United Kingdom. The changes relate to the number of judges who are appointed to the UK Supreme Court and how they are selected.

332. *Paragraph 2* amends section 23 of the CRA to allow for there to be fewer than 12 full-time equivalent judges at any time. The paragraph provides that rather than specifying that the Court consists of 12 judges, the Court will instead consist of those persons appointed as its judges but there may be no more than the full-time equivalent of 12 at any time.

333. *Paragraph 3* amends section 26 of the CRA which makes provision for the selection of UK Supreme Court judges. *Sub-paragraph (2)* amends section 26(5) and *sub-paragraph (3)* inserts a new subsection (5A) into section 26 of the CRA to provide that the Lord Chancellor must convene a selection commission for a new appointment to the Court if there is a vacancy in the office of President of the Supreme Court or the office of Deputy President of the Court (or if it appears to the Lord Chancellor that there will soon be such a vacancy) or if the Lord Chancellor or the senior judge of the Court in consultation with the other, consider it desirable that a recommendation be made for an appointment. The new section 26(5B) provides that the senior judge means the President of the Court or, if there is no President, the Deputy President or, if there is no President and no Deputy President, the most senior ordinary judge of the UK Supreme Court.

334. *Paragraph 4*inserts new subsections (1A) to (1D) into section 27 of the CRA, which deals with the selection process for judges of the UK Supreme Court. These new subsections set out the requirements in relation to the composition of selection

commissions for UK Supreme Court appointments. A selection commission must include:

- a minimum of 5 members and in every case must consist of an odd number of members;
- at least one serving judge of the UK Supreme Court;
- at least one non-legally-qualified member; and
- at least one member of each of the following bodies:
  - — the Judicial Appointments Commission ("JAC");
  - — the Judicial Appointments Board for Scotland; and
  - — the Northern Ireland Judicial Appointments Commission.

335. Further provisions in relation to the composition of selection commissions for the appointment of the President of the Court and Deputy President of the Court are made; in particular, that they must not be a member of a selection commission convened to select their replacement. *Paragraph 4(2)* provides for a definition of "non-legally-qualified".

336. *Paragraph 5* inserts a new section 27A into the CRA, conferring a duty on the Lord Chancellor to make regulations to make further provision about the membership of selection commissions and the selection process to be applied in any case where a selection commission is required. The regulations must also secure that in every case there must come a point where a selection by the selection commission is accepted by or on behalf of the Lord Chancellor. These regulations must be made with the agreement of the senior judge and are subject to the affirmative resolution procedure by virtue of paragraph 7(9) of Schedule 13 which amends section 144(5) of the CRA.

337. *Paragraph 6* inserts new section 27B into the CRA. This sets out the procedure which the Lord Chancellor must follow when issuing guidance about the UK Supreme Court selection process and specifies the circumstances in which such guidance can be revoked. Specifically, it confers a duty on the Lord Chancellor to consult the senior judge of the UK Supreme Court before laying a draft of the proposed guidance before both Houses of Parliament. The guidance will be subject to the affirmative resolution procedure.

338. *Paragraphs 7 and 8* make consequential amendments, repeals and revocations. In particular, section 27(2) and (3) of, and Parts 1 and 2 of Schedule 8 to, the CRA are repealed, as are sections 28 to 31 and 60(5) of the CRA. *Paragraph 7(4)* inserts a new section 26(7A) into the CRA to define for the purposes of that section and Schedule 8 when a person is considered as having been selected.

Part 2: Diversity

339. Part 2 provides for measures to promote consideration of diversity in the appointments process.

340. *Paragraph 9*amends section 27 of the CRA to provide that a UK Supreme Court selection commission is not prevented from preferring one candidate over another for the purposes of increasing diversity in the UK Supreme Court where two candidates are of equal merit.

341. *Paragraph 10(3)* amends section 63 of the CRA. New section 63(4) of the CRA provides that neither the requirement to select candidates for judicial office solely on merit, nor Part 5 of the Equality Act 2010, prevents the selecting body from preferring one candidate over another, where two persons are judged to be of equal merit, for the purposes of increasing diversity within the judiciary.

342. *Paragraph 11* introduces a new section 137A to the CRA. The new section places the Lord Chancellor and Lord Chief Justice under a duty to take such steps as they consider appropriate for the purposes of encouraging judicial diversity.

343. *Paragraph 13* amends section 2 of the Senior Courts Act 1981 to allow the maximum number of ordinary judges of the Court of Appeal to be made up of a full-time equivalent ("FTE") of 38 ordinary judges, rather than a maximum of 38 individual judges. It also includes reference as to how to calculate the FTE, namely by taking the number of full-time ordinary judges and adding, for each ordinary judge who is not full-time, such fraction as is reasonable.

344. *Paragraph 14* amends section 4 of the Senior Courts Act 1981 to allow the maximum number of puisne judges of the High Court to be made up of a FTE of 108, rather than a maximum of 108 individual puisne judges. It also includes reference as to how to calculate the FTE, namely by taking the number of full-time puisne judges and adding, for each puisne judge who is not full-time, such fraction as is reasonable.

Part 3: Judicial Appointments Commission

345. Part 3 makes changes to the number of members of, and composition of, the JAC by amending Schedule 12 to the CRA. In particular it removes some of the detailed provisions of that Schedule and introduces new regulation-making powers.

346. *Paragraph 17* amends Schedule 12 to the CRA to enable the Lord Chancellor, with the agreement of the Lord Chief Justice, to determine the number of Commissioners of the JAC through regulations. Paragraph 1 of Schedule 12 currently requires that the JAC consist of a chairman and 14 other Commissioners.

347. *Paragraph 18*repeals paragraphs 2(2) to (5) and 4 to 6 of Schedule 12 to the CRA which provide for the composition of the JAC. Currently the JAC must consist of five judicial members, two professional members, five lay members, one member holding an office listed in Part 3 of Schedule 14 to the CRA (which lists members of tribunals and other similar office holders appointed by the Lord Chancellor) or an office listed in paragraph 2(2A) of Schedule 12 to the CRA, and one lay justice member.

348. *Paragraph 19*inserts new paragraphs 3A to 3C into Schedule 12 to the CRA. New paragraph 3A provides that the number of Commissioners who are judicial office holders must be less than the number of non-judicial office holders. New paragraph 3B enables the Lord Chancellor to make provision about the composition of the JAC in regulations agreed with the Lord Chief Justice. These regulations will make provision for the categories of different members of the JAC, but the Lord Chancellor must exercise his or her power so that the JAC includes judicial office holders, employed or practising lawyers and lay members. The regulations may include provisions about the number of Commissioners of any specified category (for example, the number of lay members) and may make provision about the eligibility for appointment as a Commissioner or chairman. New paragraph 3C enables the Lord Chancellor, with the agreement of the Lord Chief Justice, to make regulations defining the terms:

- "lay member" for the purposes of Part 4 of Schedule 12 to the CRA; and
- "holder of judicial office" for the purposes of the exercise of the regulation-making powers in paragraph 3A (number of Commissioners), paragraph 3B(2)(a) (composition of Commission), paragraph 11 (vice-chairman) and also paragraph 20(5) (committees of the Commission must include at least one judicial member if exercising the function of selection) of Schedule 12 to the CRA.

349. *Paragraph 20* substitutes paragraphs 7 to 10 of Schedule 12 to the CRA which deal with matters relating to the selection of Commissioners with new paragraphs 6A and 6B which provide that the Lord Chancellor may make regulations, with the agreement of the Lord Chief Justice, to make provision for or in connection with the selection or nomination of Commissioners. New paragraph 6A(2) provides details of the

matters that may be addressed in such regulations, including provision that selection or nomination is to be by a person, or body, specified in or appointed under the regulations; the matters which the selecting body or person is to, or is not to, have regard to; that the selecting body or person can determine its own selection procedure for the purpose of appointing a Commissioner; and requiring that there is a Commissioner who has special knowledge of a particular geographical area or of a particular matter. However, it is also specified in new paragraph 6B that the power to make regulations should be exercised with a view to ensuring that as far as practicable at least one of the lay Commissioners has special knowledge of Wales. The regulations may also make provision for payment to selectors of remuneration, fees and expenses incurred while carrying out their duties.

350. *Paragraph 21* amends paragraph 11 of Schedule 12 to the CRA which provides for the vice-chairman of the JAC. As now, the vice-chairman is to be the most senior of the judicial members of the Commission. However, the judicial member who ranks as the most senior will now be determined in accordance with regulations made by the Lord Chancellor with the agreement of the Lord Chief Justice (*sub-paragraph (3)*). *Sub-paragraph (4)* amends paragraph 11(3) of Schedule 12 to the CRA which lists those functions of the chairman of the JAC which the vice-chairman may not exercise in the absence of the chairman (on the grounds that, in the absence of the chairman, such functions should not be exercised by a judicial member of the JAC). The functions in question are sitting on the panel for selecting: judges of the UK Supreme Court; the Lord Chief Justice; a Head of Division; the Senior President of Tribunals; or a Lord Justice of Appeal.

351. *Paragraph 22* replaces paragraph 13 of Schedule 12 to the CRA which deals with the maximum term of office for a Commissioner with a new paragraph 13 providing a regulation-making power for the Lord Chancellor, in agreement with the Lord Chief Justice, to determine the period for which a Commissioner may hold office. New paragraph 13(2) also sets out what may be included in any such regulations, including the number of times a person can be appointed, the length of appointment and the total period for which they may hold office as a Commissioner. Currently a Commissioner may serve a maximum of two terms of up to five years apiece.

352. *Paragraph 23* replaces sub-paragraphs (1) and (2) of paragraph 14 of Schedule 12 to the CRA which deal with circumstances where persons cease to be a Commissioner or chairman on the basis that they are no longer eligible for appointment as a Commissioner or are no longer eligible to be a Commissioner of a particular description. New paragraph 14(1) of Schedule 12 to the CRA provides a regulation-making power for the Lord Chancellor, exercisable in agreement with the Lord Chief Justice, to provide when a Commissioner ceases to be a Commissioner or when the chairman ceases to be the chairman, and to provide a power to disapply or suspend these provisions in individual cases.

353. By virtue of the amendment made to section 144(5)(e) of the CRA by *paragraph 27*, all regulations made under Part 1 of Schedule 12 to the CRA, as amended, are subject to the affirmative resolution procedure.

354. *Paragraphs 24 to 28* make supplementary and consequential amendments to the CRA and the Tribunals, Courts and Enforcement Act 2007.

Part 4: Judicial appointments: selection, and transfer of powers of Lord Chancellor

355. Part 4 provides for responsibility for certain decisions in relation to judicial appointments to be transferred from the Lord Chancellor to the Lord Chief Justice and Senior President of Tribunals. It also makes amendments to the CRA in relation to the processes for selecting persons for appointment to judicial office.

356. The Lord Chief Justice will acquire the power to appoint persons to a number of courts-based judicial offices below the High Court and will acquire the power to decide upon

selections made by the JAC in relation to appointments to a number of other courts-based judicial offices where Her Majesty The Queen makes the appointment. The Lord Chancellor will retain the power to decide upon selections by the JAC, or selection panel, in relation to appointments to the High Court and above and will retain the power to appoint in relation to a number of other courts-based judicial offices.

357. In relation to those offices where the Lord Chief Justice will, in future, have the power to appoint, most if not all of those offices are held by the holders on a renewable fixed-term basis. The power to extend, or to refuse to extend, such fixed-term appointments will be retained by the Lord Chancellor.

358. The Lord Chancellor will retain overall responsibility and accountability for judicial terms and conditions of appointment and service.

359. The Senior President of Tribunals will acquire the power to appoint persons as judges or other members of the First-tier Tribunal, other members of the Upper Tribunal, Chamber Presidents and Deputy Chamber Presidents of the First-tier Tribunal or the Upper Tribunal and deputy judges of the Upper Tribunal. The Senior President of Tribunals will also acquire the power to decide upon selections made by the JAC in relation to appointments as judges of the Upper Tribunal for which Her Majesty The Queen has the power to appoint.

360. Where any of the offices for which the Senior President of Tribunals will, in future, have the power to appoint are held by the holder on a renewable fixed-term basis, the Lord Chancellor will retain responsibility for the extension of (or refusing to extend) such fixed-term appointments. The Lord Chancellor will retain power to remove a person from office and, again, the Lord Chancellor will retain responsibility for judicial terms and conditions of appointment and service.

361. *Paragraph 29*amends Part 1 of Schedule 14 to the CRA (appointments by Her Majesty) so as to transfer responsibility for deciding upon selections made by the JAC in relation to certain judicial appointments from the Lord Chancellor to the Lord Chief Justice or the Senior President of Tribunals. *Paragraph 30* makes consequential amendments to paragraphs 1(2)(d) and 1(3) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007.

362. *Paragraph 32*amends section 21 of the Courts Act 1971 which deals with the appointment of Recorders who are fee-paid Crown Court and county court judges who hold office for a renewable fixed-term. Section 21(3) deals with the terms of appointment of a Recorder. Subsection (3)(c) provides that the terms of appointment must specify the circumstances in which the Lord Chancellor may either terminate the appointment or decline to extend the term of the appointment. The power to renew or refuse to renew the fixed-term appointments of these judicial offices will remain with the Lord Chancellor and not be transferred to the Lord Chief Justice. *Sub-paragraph (3)* inserts a new subsection (8) to provide that subject to the preceding provisions of section 21 a person holds and vacates office as a Recorder in accordance with the terms of the person's appointment and those terms are to be such as the Lord Chancellor may determine. *Sub-paragraph (3)* also inserts a new subsection (9) into section 21 which enables the Lord Chief Justice to nominate a senior judge to exercise functions under section 21(4) or (4C).

363. *Paragraph 34* relates to the appointment of deputy Circuit judges by the Lord Chief Justice. *Paragraph 34(3)* amends section 24(1)(a) of the Courts Act 1971 to transfer the power to appoint persons as deputy Circuit judges from the Lord Chancellor to the Lord Chief Justice, but any decision to appoint a person must be made with the concurrence of the Lord Chancellor (reversing the current roles). *Paragraph 34(5)* inserts new subsections (5A) to (5D) into section 24 of the Courts Act 1971 to provide for the circumstances in which a deputy Circuit judge may be removed from office by the Lord Chancellor (new section 21(5A)), the extension of a deputy Circuit judge's fixed-term of appointment by the Lord Chancellor (with any agreement of the Lord Chief Justice,

or the Lord Chief Justice's nominee, that may be required by the terms and conditions of appointment and service (new section 21(5B) and (5C)), and the determination of other terms of appointment by the Lord Chancellor (new section 21(5D)).

364. *Paragraph 35* amends section 91 of the Senior Courts Act 1981, which deals with the appointment of deputy and temporary Masters, Registrars etc. of the High Court. *Paragraph 35(2)* amends section 91(1) to transfer to the Lord Chief Justice (from the Lord Chancellor) the power to appoint such office holders. *Paragraph 35(3)* substitutes section 91(1ZA) to provide that the Lord Chief Justice cannot appoint a holder of relevant office (as defined in section 91(1ZC)) as a deputy Master etc without the agreement of the Lord Chancellor. *Paragraph 35(4)*inserts new subsections (6A) to (6D) into section 91 to provide for the circumstances in which a deputy or temporary Master etc. may be removed from office by the Lord Chancellor (new section 91(6A)), the extension of a deputy or temporary Master's etc. fixed-term appointment by the Lord Chancellor (with any agreement of the Lord Chief Justice (or the Lord Chief Justice's nominee) that may be required by the terms and conditions of appointment and service (new section 91(6B) and (6C)), and the determination of other terms of appointment by the Lord Chancellor (new section 91(6D)).

365. *Paragraph 35(5) to (7)* make consequential amendments to the CRA and Tribunals, Courts and Enforcement Act 2007.

366. *Paragraph 36* amends section 102 of the Senior Courts Act 1981 which provides for the appointment of deputy district judges for the High Court. *Sub-paragraph (2)* amends section 102(1) to allow the Lord Chief Justice (rather than the Lord Chancellor) to appoint persons as deputy district judges. *Sub-paragraph (3)* amends section 102(1B) so that the Lord Chief Justice cannot appoint without the agreement of the Lord Chancellor a person who holds the office of district judge or a person who ceased to hold the office of district judge within two years ending with the date when the appointment takes effect. *Sub-paragraph (4)* inserts new subsections (5ZA) to (5ZE) into section 102 to provide for the circumstances in which a deputy district judge may be removed from office by the Lord Chancellor (new section 102(5ZA)), the extension of a deputy district judge's fixed-term of appointment by the Lord Chancellor (with any agreement of the Lord Chief Justice (or the Lord Chief Justice's nominee) that may be required by the terms and conditions of appointment and service) (new section 102(5ZB) and (5ZC)), the determination of other terms of appointment by the Lord Chancellor (new section 102(5ZD)) and the delegation of the Lord Chief Justice's functions under section 102 (new section 102(5ZE)). *Paragraph 36(5) and (6)* make consequential amendments to the Senior Courts Act 1981 and the CRA as a result of the above changes.

367. *Paragraph 37*makes similar provisions to those outlined above, but in relation to deputy district judges for the county court, by amending section 8 of the County Courts Act 1984.

368. *Paragraph 38*makes like provisions for Deputy District Judges (Magistrates' Courts) by amending section 24 of the Courts Act 2003.

369. *Paragraph 39* amends section 10 of the Courts Act 2003 and provides for the Lord Chancellor's powers of appointment in respect of lay justices (magistrates) to be transferred to the Lord Chief Justice. The appointments themselves will, as now, continue to be made in the name of Her Majesty The Queen. *Sub-paragraph (3)* inserts a new section 10(1A) to provide that a lay justice is to hold and vacate office in accordance with terms of appointment as determined by the Lord Chancellor. *Sub-paragraph (4)* inserts a new section 10(2ZA) to provide that the Lord Chief Justice must ensure that arrangements for the exercise (so far as affecting any local justice area) of functions under subsection (1) include arrangements for the consulting of persons appearing to the Lord Chief Justice to have special knowledge of matters relevant to the exercise of that function in relation to that area. *Sub-paragraph (6)* inserts a new

section 10(6A) to enable the Lord Chief Justice to nominate a senior judge (as defined by section 109(5) of the CRA) to exercise his power to appoint lay justices.

370. *Paragraph 40* introduces a requirement into section 94A of the CRA for the Lord Chancellor and the Lord Chief Justice to seek the concurrence of the other before making certain judicial appointments, selection for which is not undertaken by the JAC.

371. *Paragraph 41* amends Part 2 of Schedule 14 to the CRA so that the transfer of the power to appoint in relation to particular courts-based judicial offices from the Lord Chancellor to the Lord Chief Justice is reflected in that Schedule.

372. *Paragraphs 42 and 43*amend the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") to confer upon the Senior President of Tribunals (in place of the Lord Chancellor) the power to appoint Chamber Presidents for the First-tier Tribunal or the Upper Tribunal.

373. *Paragraph 44(1)* introduces a new subsection (1A) into section 8 of the 2007 Act, which restricts the power of the Senior President of Tribunals to delegate his power to appoint judges and other members to the First-tier Tribunal to a Chamber President of a chamber of the Upper Tribunal. *Paragraph 44(2)*amends section 8(2) of the 2007 Act in order to detail which functions the Senior President of Tribunals may not delegate. *Paragraph 44*(3) inserts new section 46(7) into the 2007 Act to provide a definition of 'senior judge' for the purposes of Schedules 2 to 4 to that Act in relation to refusals to extend fixed-term appointments.

374. *Paragraph 45(2)*amends Schedule 2 to the 2007 Act to confer on the Senior President of Tribunals the power to appoint judges and other members of the First-tier Tribunal. *Paragraph 45* further amends Schedule 2 to set out the grounds on which the Lord Chancellor may remove from office judges and other members of the First-tier Tribunal appointed on a fee-paid basis, and makes provisions regarding the extension of fixed-term appointments by the Lord Chancellor (with any agreement of a senior judge (as defined under section 46(7)), or a nominee of a senior judge, that may be required by the terms and conditions of appointment and service).

375. *Paragraph 46* makes similar provisions in relation to the appointment of other members of the Upper Tribunal by amending Schedule 3 to the 2007 Act, and also confers upon the Senior President of Tribunals the power to appoint deputy judges of the Upper Tribunal by way of amendment to paragraph 7(1) of Schedule 3.

376. *Paragraph 47* amends Schedule 4 to the 2007 Act to transfer certain functions from the Lord Chancellor to the Senior President of Tribunals in relation to the appointment of Chamber Presidents and deputy Chamber Presidents. *Sub-paragraph (14)* inserts new paragraph 5A into Schedule 4 to provide for the removal of Chamber Presidents and deputies from office by the Lord Chancellor and extensions of their appointments where they are fixed-term appointments by the Lord Chancellor (with any agreement of a senior judge (as defined under section 46(7)), or a nominee of a senior judge, that be required by the terms and conditions of appointment and service).

377. *Paragraph 48(2)* substitutes a new section 94B(1)(b) of the CRA to provide that for certain appointments (where section 94B applies) the Lord Chancellor and the Senior President of Tribunals are not to make an appointment (or recommendation for appointment) without the concurrence of the other.

378. *Paragraph 49* makes consequential amendments to Part 3 of Schedule 14 to the CRA to reflect the transfer of the Lord Chancellor's power to appoint in relation to certain tribunals-based judicial offices to the Senior President of Tribunals.

379. *Paragraph 50*amends section 50 of the Equality Act 2010 to amend the definition of "public office" so as to bring into its scope those judicial offices for which the Lord Chief Justice and the Senior President of Tribunals will, in future, have the power to appoint. It will therefore be unlawful for the Lord Chief Justice or the Senior President

of Tribunals to discriminate against, harass or victimise persons who are, or wish to be, appointed to those judicial offices for which the Lord Chief Justice and the Senior President of Tribunals will have the power to appoint.

380. *Paragraph 51* makes consequential amendments to section 51 of the Equality Act 2010.

381. *Paragraph 52*amends section 9 of the Senior Courts Act 1981 so that requests may only be made to a Circuit Judge, Recorder or Tribunal judge to sit in the High Court if they are a member of a pool selected by the JAC for such purposes.

382. *Paragraph 53*repeals several sections of the CRA, and inserts a new section 94C into that Act. The new section 94C will require the Lord Chancellor to make regulations with the agreement of the Lord Chief Justice to:

(a) make further provision about the process to be applied where the Lord Chancellor has requested the JAC to select persons for appointment as a High Court judge or to one of the offices listed in Schedule 14 to the CRA or to a pool mentioned in the amendment made by *paragraph 52*. Although the JAC will have the power under section 88(1) of the CRA to determine the selection process to be applied by it, the regulations may make further provision about the entire process;

(b) make further provision about the membership of the selection panels convened for selecting persons for appointment as Lord Chief Justice, Heads of Division, Senior President of Tribunals or ordinary judges of the Court of Appeal;

(c) make further provision about the process to be applied in a case where such a selection panel is required to be convened.

383. The regulations must also secure that in every case there must come a point where a selection by the JAC or selection panel is accepted. New section 94C(2) sets out what the regulations may in particular provide for. Notably, such regulations may give functions to the Lord Chancellor including the powers to require a selection panel to reconsider a selection or any subsequent selection, and to reject a selection. Furthermore, under these regulations the Lord Chancellor, Lord Chief Justice or Senior President of Tribunals (depending upon who has the power to decide upon a selection by the JAC) could be given power to reject or require reconsideration of initial or subsequent selections by the JAC made on a request under section 87, and to require reconsideration by the JAC of a decision where a selection process has not identified candidates of sufficient merit.

384. *Paragraphs 54 to 80* provide for other changes to be made to the CRA in relation to selection processes and complaints about the selection/appointment process. Paragraph 55 amends section 66(1)(a) of the CRA so that before issuing any guidance to the JAC about selection procedures the Lord Chancellor must now obtain the agreement of the Lord Chief Justice.

385. *Paragraph 58(2)* inserts new subsections (1A) to (1D) into section 70 of the CRA, setting out requirements in relation to the composition of selection panels for selecting persons for appointment as Lord Chief Justice or Heads of Division. Similarly, sections 75B and 79 are amended (*paragraphs 60(2) and 63(2)*) to set out requirements for the composition of selection panels for selecting persons for appointment as the Senior President of Tribunals and ordinary judges of the Court of Appeal, respectively. The new subsections notably require that the panel must consist of an odd number of members and not less than five, that at least two members must be non-legally qualified (which may be defined in regulations made under new section 94C), that at least two must be judicial members and that at least two must be members of the JAC.

386. *Paragraph 64(4)* provides for the Lord Chancellor, by order and after consulting the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland, to provide that section 85 of the CRA does not apply to appointments to an office listed in Schedule 14 to the CRA that is specified

in the order. In essence this will provide that certain offices may be removed from the scope of the JAC. Those offices may only be those that do not require particular legal qualifications.

387. *Paragraph 65* amends section 86 of the CRA, in relation to the duties to make appointments or recommendations for appointment.

388. *Paragraph 66* amends section 87 of the CRA. *Sub-paragraph (2)* inserts new subsection (1A) which provides that the Lord Chancellor may request the JAC to select a person for membership of a pool from which requests may be made under section 9(1) of the Senior Courts Act 1981 to assist with the business of certain courts.

389. *Paragraph 67* makes consequential amendments to section 88 of the CRA, which deals with the selection process. It includes an amendment to section 88(4) to provide that only one person may be selected in relation to each request for a person to be selected for membership of a pool for the purposes of section 9(1) of the Senior Courts Act 1981.

390. *Paragraph 68* substitutes a new section 94 into the CRA. If the Lord Chancellor gives the JAC notice of a request which the Lord Chancellor expects to make under section 87, the JAC must seek to identify persons it considers would be suitable for selection on the request. The Lord Chancellor, however, may with the agreement of the Lord Chief Justice make regulations about how the JAC is to comply with this duty. *Paragraph 69*provides further detail and consequential amendments to section 95 of the CRA regarding the Lord Chancellor's power to withdraw or modify a request made under section 69, 78 or 87 of the CRA or paragraph 2(5) of Schedule 1 to the 2007 Act.

391. *Paragraph 70*makes consequential amendments to section 97(1) and (4) of the CRA.

392. *Paragraphs 71 to 77*make consequential amendments to sections 99 to 105 of the CRA which concern complaints about the selection/appointment process, including referrals to the Judicial Appointments and Conduct Ombudsman ("Ombudsman"). *Paragraph 71* incorporates a definition of "LCJ complaint" and "SPT complaint" into section 99 of the CRA, and *paragraph 72* imposes a duty upon the Lord Chief Justice and Senior President of Tribunals to investigate complaints made to them. *Paragraphs 73 to 75* concern the duties of the Ombudsman to investigate complaints and submit reports to the Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor. *Paragraph 78*amends section 144(5) of the CRA to add to the list of orders and regulations that are subject to the affirmative resolution procedure. *Paragraphs 79*and*80*make further consequential amendments to the CRA.

Part 5: Selection of Lord Chief Justice and Heads of Division: transitory Provision

393. *Paragraph 82* temporarily amends the CRA to provide an amended selection process for appointments of the Lord Chief Justice or a Head of Division. This will allow the next Lord Chief Justice to be selected using a new selection process. These transitory provisions also provide a new selection process for a Head of Division should the next Lord Chief Justice be an existing Head of Division. Section 71 of the CRA currently provides that the panel for the selection of the Lord Chief Justice and Heads of Division is comprised of four persons and chaired by the most senior England and Wales Supreme Court judge, who has an additional casting vote in the event of a tie. As provided for by the temporary new section 71(2) and 71(3) of the CRA as inserted by *paragraph 82(3)* of Schedule 13, under the new process for the selection of a Lord Chief Justice there will be a five member panel chaired by a lay commissioner of the Judicial Appointments Commission. For Heads of Division, new sections 71A(2) and 71A(3) as inserted by *paragraph 82(3)* of Schedule 13 provide that the selection panel will comprise five members and be chaired by the Lord Chief Justice. Furthermore, new section 70(2A)(a) of the CRA, inserted by *paragraph 82(2)* of Schedule 13, will require the Lord Chancellor to be consulted as part of the processes for selecting Heads of Division and the Lord Chief Justice. In the case of the selection of the Lord Chief

Justice, new section 70(2A)(b) as inserted by *paragraph 82(2)* of Schedule 13 requires the First Minister for Wales to be consulted as well as the Lord Chancellor. New section 94C of the CRA as inserted by *paragraph 53* of Schedule 13 provides for these selection processes in future to be set out in secondary legislation. Following the completion of the selection exercise for the next Lord Chief Justice and the making of the secondary legislation under new section 94C this transitory provision will be removed by virtue of *paragraph 81*and cease to have effect.

Part 6 – Appointment of judge to exercise functions of a Head of Division in case of incapacity or a vacancy etc.

394. *Paragraphs 83 to 88* provide for the Lord Chief Justice, with the concurrence of the Lord Chancellor, to temporarily appoint a judge of the Senior Courts to exercise relevant functions of a Head of Division where that Head of Division is incapable of exercising those functions or the office is vacant. *Paragraph 84* provides that the appointment must be in writing, specify the functions that may be exercised by the appointed judge and must set out the duration of the appointment. *Paragraph 85* defines "Head of Division". These are the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court. *Paragraph 86* defines "relevant functions" and *paragraph 87* provides that the Lord Chancellor may amend by order the list of relevant functions in *paragraph 86*. *Paragraph 88* amends section 10 of the Senior Courts Act 1981 by inserting a new subsection (6A) which has the effect that where a Head of Division is incapacitated, that office is to be treated as vacant for the purpose of section 10(6).

Part 7: Abolition of office of assistant recorder

395. From April 2000, appointments to the office of assistant Recorder (fee-paid judicial office holders with a fixed-term appointment) were no longer made, with all subsequent appointments being made to the office of Recorder. However, residual references to the office of assistant Recorder still remain in legislation. *Paragraph 89* removes any reference to this office in section 24 of the Courts Act 1971, and provides for consequential amendments to be made to that Act, the Judicial Pensions and Retirement Act 1993, the Senior Courts Act 1981, the Courts Act 2003, the CRA and the 2007 Act.

Section 21: Deployment of the judiciary

396. Section 7(2) of the CRA lists responsibilities of the Lord Chief Justice as President of the Courts of England and Wales. These responsibilities include, at paragraph (c), the "maintenance of appropriate arrangements" for the deployment of the judiciary of England and Wales. Similarly, Part 2 of Schedule 4 to the 2007 Act specifies that the Senior President of the Tribunals has the function of assigning judges and members to the chambers of the First-tier Tribunal and Upper Tribunal.

397. In the tribunals, the scheme of assignment is in part specified in the 2007 Act itself and supplemented by a policy which the Senior President of Tribunals is required to publish (by paragraph 13 of Schedule 4). Within the court system the arrangements for deploying judges are largely uncodified. Each piece of legislation dealing with court jurisdiction specifies which judicial office holders may sit in that court, and arrangements for their deployment to that court are overseen by the Lord Chief Justice.

398. Judges of the First-tier Tribunal and Upper Tribunal cannot at present be deployed into the courts at all. The purpose of section 21 and Schedule 14 is to resolve these difficulties. See also the provisions inserted by Schedules 9 and 10 about who are to be judges of the county court and family court.

399. Section 21 expands the Lord Chief Justice's deployment responsibilities insofar as they are not already covered by section 7(2) of the CRA, and requires him or her to have regard to the similar responsibilities of the Senior President of Tribunals. The responsibilities are to maintain appropriate arrangements for the deployment to

tribunals of judiciary who are deployable to tribunals, and for the deployment to courts in England and Wales of judiciary who are deployable to those courts. Further, it provides that Schedule 14 has effect.

Schedule 14: Deployment of the judiciary

400. In summary, Schedule 14 expands the lists in statute of the judicial office holders who are capable of sitting in each type of court and tribunal.

401. Schedule 14 is divided into seven parts:

- Parts 1 is concerned with judicial office holders who may sit in the Senior Courts (in particular, the Court of Appeal and High Court);
- Part 2 is concerned with the judicial office holders who may sit in the magistrates' courts;
- Part 3 is concerned with the judicial office holders who may sit in the Court of Protection;
- Part 4 is concerned with the judicial office holders who may sit in the First-tier Tribunal and Upper Tribunal;
- Parts 5, 6 and 7 are concerned with the judicial office holders who may sit in the Employment Appeal Tribunal and the Employment Tribunals.

Part 1: Deployment under section 9 of the Senior Courts Act 1981

402. Part 1 provides for a wider range of judicial office holders to provide assistance with the transaction of judicial business in the Senior Courts. The intended position is shown in Annex B. It also provides that selection for appointment to the office of deputy judge of the High Court under section 9(4) of the Senior Courts Act 1981 ("the 1981 Act") should be by the JAC.

403. *Paragraph 1* amends section 9 of the 1981 Act. *Sub-paragraph* (2) provides that a person who has been a puisne judge of the High Court or has been a Court of Appeal judge can be requested to sit in the family and county courts. *Sub-paragraph* (3) adds the Senior President of Tribunals to those who may be requested to sit in the Court of Appeal or the High Court. *Sub-paragraphs (4)* and *(5)* provide that the Upper Tribunal judges and the Presidents of the Employment Tribunals are added to the table (in section 9(1) of the 1981 Act) and so are able to be requested to sit in the High Court. *Sub-paragraph* (6) provides that a request to the Senior President of Tribunals may only be made after consulting the Lord Chancellor. *Sub-paragraph* (7) provides for the concurrence of the JAC in relation to a request for a Circuit judge to sit in the Criminal Division of the Court of Appeal. *Sub-paragraph* (8) specifies which judges must comply with a request and those judges that do not have to comply with a request.

404. New subsections (8A) and (8B) of section 9 of the 1981 Act (inserted by *paragraph 2(3)*) expressly provide the Lord Chancellor with the power to remove deputy judges of the High Court and determine the terms of their appointments.

405. *Paragraph 3(1)* inserts the deputy judge of the High Court into new Table 2 of Part 2 of Schedule 14 to the CRA (as created as a result of the amendments made by paragraph 41 of Schedule 13 to the Act) which requires appointments made under section 9(4) of the 1981 Act, to be made following a JAC selection process.

406. *Paragraph 3(3)* inserts new section 94AA into the CRA which provides for a limited exception to the requirement that the appointments of deputy judges of the High Court are to be made following a JAC selection process. New section 94AA enables the Lord Chief Justice to appoint a person as a deputy judge of the High Court, after consultation with the Lord Chancellor, where: (a) there is an urgent need in respect of particular business of the High Court or Crown Court; (b) it is expedient as a temporary measure

to make an appointment to dispose of the particular business and; (c) there are no other reasonable steps that may be taken in the time available (new section 94AA(2)). In such circumstances the normal JAC selection process is dis-applied and a person may be appointed as a temporary deputy judge of the High Court for a specified period in order to deal with the urgent business or until when the urgent business is expected to conclude (new section 94AA(3)).

Part 2: Deployment of judges to the magistrates' court

407. *Paragraph 4* amends section 66 of the Courts Act 2003 to expand the list of judges who have the powers of a justice of the peace who is a District Judge (Magistrates' Courts). The offices which have been added are, the Master of the Rolls, an ordinary judge of the Court of Appeal, the Senior President of Tribunals, judges of the First-tier and Upper Tribunals, county court and High Court district and deputy district judges and Masters, and members of a panel of Employment Judges.

Part 3: Deployment of judges to the Court of Protection

408. *Paragraph 5* amends section 46 of the Mental Capacity Act 2005 to add to the list of judges who may be nominated by the Lord Chief Justice, or a person acting on his behalf, to sit as a judge of the Court of Protection.

Part 4: Deployment of judges to the First-tier Tribunal and the Upper Tribunal

409. *Paragraph 7* amends section 4(1) of the 2007 Act to provide that any judge specified in new section 6A of that Act (inserted by *paragraph* 9 of Schedule 14) is a judge of the First-tier Tribunal).

410. *Paragraph 8* amends section 6(1) of the 2007 Act to provide that the following judges are also judges of the First-tier and Upper Tribunals: the Lord Chief Justice of England and Wales, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division, the Chancellor of the High Court, the Judge Advocate General and a deputy judge of the High Court.

411. *Paragraph 9*inserts a new section 6A into the 2007 Act which expands the list of judges who are First-tier Tribunal judges to include a deputy Circuit Judge, a Recorder, High Court Masters, county court and High Court deputy district judges, Deputy District Judges (Magistrates' Courts), the Vice Judge Advocate General and Assistant Judge Advocates General.

Part 5: Deployment of judges to the Employment Appeal Tribunal

412. *Paragraph 11*amends section 22 of the Employment Tribunals Act 1996 ("the 1996 Act") by expanding the list of judicial office holders that may be nominated by the Lord Chief Justice to sit in the Employment Appeal Tribunal. Currently, only judges of the Court of Appeal or the High Court may be nominated to sit in the Employment Appeal Tribunal. Following the changes, the Senior President of Tribunals, the Judge Advocate General, deputy judges of the High Court, Circuit Judges, judges of the Upper Tribunal, district judges and District Judges (Magistrates' Courts) will be able to be nominated by the Lord Chief Justice.

Part 6: Deployment of judges to the employment tribunals

413. *Paragraph 12* amends section 5D of the 1996 Act which relates to the provision of judicial assistance in the employment tribunals. The list of judges that may be deployed to the employment tribunals is expanded to include the Lord Chief Justice and (with the Lord Chief Justice's consent) any of the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division, the Chancellor of the High Court in England and Wales, a deputy judge of the High Court, a Recorder, a county court or High Court deputy district judge, a Deputy District Judge (Magistrates'

Court), High Court Masters and both the Judge Advocate General and any non-temporary assistants. Lastly, the paragraph makes it possible for the Senior President of Tribunals to sit in employment tribunals.

Part 7: Amendments following renaming of chairmen of Employment Tribunals

414. *Paragraph 13* updates various statutory references to "chairmen of employment tribunals" to "Employment judges". This change of name was given effect to by paragraph 247 of Schedule 1 to the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (S.I. 2008/2683) which in turn amended regulation 8(3)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (S.I. 2004/1861) which provides for the membership of Employment Tribunals.

Section 22: Transfer of immigration or nationality judicial review applications

415. Currently the only class of immigration and asylum judicial review applications and applications for permission to apply for judicial review that may be transferred to the Upper Tribunal are those which call into question a decision by the Secretary of State not to treat submissions as an asylum or human rights claim (within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002) wholly or partly on the basis that they are not significantly different from material that has been previously considered. Certain other conditions must also be met. These types of cases are commonly referred to as "fresh claim" judicial reviews. *Subsection (1)* amends section 31A of the Senior Courts Act 1981 to remove this limitation in respect of applications for judicial review or for permission to apply for judicial review made to the High Court in England and Wales. Any classes of immigration and nationality judicial reviews will therefore be capable of being designated in a direction made by, or on behalf of, the Lord Chief Justice under Schedule 2 to the CRA. *Subsection (2)* amends section 20 of the Tribunals, Courts and Enforcement Act 2007 to remove the same restrictions which apply to the transfer to the Upper Tribunal of applications made to the supervisory jurisdiction of the Court of Session. *Subsection (3)* amends section 25A of the Judicature (Northern Ireland) Act 1978 to remove the same restrictions which apply to transfers from the High Court in Northern Ireland to the Upper Tribunal of applications for judicial review or leave to seek judicial review. *Subsection (4)* repeals section 53 of the Borders, Citizenship and Immigration Act 2009 which introduced the exception for fresh claim cases to the general bar on transferring immigration and nationality cases; given that the generality of such cases may now be transferred there is no need for the exception.

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

416. Section 23 amends section 13 of the Tribunals, Courts and Enforcement Act 2007 to allow a rule of court in Scotland that would reintroduce the "second-tier appeals test" for applications for permission to appeal from the Upper Tribunal to the Court of Session. This test requires that an application should demonstrate that the appeal would raise an "important point of principle or practice", or "some other compelling reason for the court to hear the appeal". The test applies in England and Wales and in Northern Ireland. The same test, provided for in a rule of court, was in place in Scotland before that rule was recently found to be *ultra vires* in the Court of Session's decision in *KP and MRK v. The Secretary of State for the Home Department*. This section provides the statutory basis should such a rule be made again in Scotland.

Section 24: Appeals relating to regulation of the Bar

417. Section 24 abolishes the jurisdiction of High Court judges to sit as Visitors to the Inns of Court and confers on the Bar Council and the Inns of Court the power to confer rights of appeal to the High Court in relation to the matters that were covered by the Visitors' jurisdiction. The section applies to matters relating to, among other things:

- Persons seeking relief from disciplinary decisions of the Council of the Inns of Court and decisions of the Bar Council;
- Aspiring barristers seeking to overturn the decisions of the Qualifications Committee of the Bar Council (these relate primarily to requests for complete or partial exemptions from the Bar qualification criteria); and
- Disputes between an Inn of Court and a member of the Inn, or a dispute between members of the Inn on property matters such as the letting of chambers within the Inns of Court and dues payable to the Inn by its members.

418. This is achieved by repealing section 44 of the Senior Courts Act 1981 in so far as it confers jurisdiction on High Court Judges to sit as Visitors of the Inns of Court (*subsection (1)*) and conferring power on the Bar Council and the Inns of Court to confer rights of appeal to the High Court (*subsections (2) and (3)*).

419. The Bar Council, an Inn of Court, or two or more Inns of Court acting collectively (such as in the form of the Council of the Inns of Court), may confer a right of appeal to the High Court in respect of a matter relating to: (a) regulation of barristers; (b) regulation of other persons regulated by the person conferring the right; (c) qualifications or training of barristers or persons wishing to become barristers; or (d) admission to an Inn of Court or call to the Bar (*subsection (2)*). It is drafted in general terms to reflect the historically wide extent of the Visitors' jurisdiction in addition to encompassing how it is currently exercised.

420. An Inn of Court may also confer a right of appeal to the High Court in respect of: (a) a dispute between the Inn and a member of the Inn; or (b) a dispute between members of the Inn (*subsection (3)*). Any reference to a member of an Inn includes a reference to a person wishing to become a member of that Inn. Subsection (3) is in recognition of the fact that, historically, the Visitors' jurisdiction extended to appeals from all decisions relating to the conduct of an Inn's affairs.

421. A decision of the High Court on an appeal under this section is final (*subsection (4)*) with the exception of a decision to disbar a person (*subsection (5)*). As a result, such a decision may be appealed to the Court of Appeal (with permission). The High Court may make such order as it thinks fit on an appeal under this section (*subsection (6)*). Subsection (7) provides for the person who confers a right of appeal to remove it, for example, should regulatory arrangements change in future. It also enables any Inn to remove a right of appeal conferred by two or more Inns acting collectively in so far as it relates to that Inn. This reflects the ability of any Inn to cancel or amend on its part the undertaking currently agreed between the Bar Council and the Council of the Inns of Court.

Section 25: Enforcement by taking control of goods

422. Section 25 amends Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Schedule 12 makes provision for a codified procedure of "taking control of goods" to be followed by enforcement agents when seizing goods and will replace the existing law relating to the powers of bailiffs in this respect.

423. *Subsections (2) and (3)* insert new paragraph 18A(1) into Schedule 12 to the 2007 Act. New paragraph 18A(1) provides a general power, which replaces existing uncodified powers, to use reasonable force (but not against the person) to enter commercial premises to enforce High Court and county court debts pursuant to a writ or warrant of control.

424. *Subsection (4)* (together with subsection (2)) inserts new paragraph 19A(1) into Schedule 12 of the 2007 Act. New paragraph 19A(1) provides for a general power, which replaces existing uncodified powers, to use reasonable force (but not against the

person) to secure re-entry to all premises without a court warrant (or further warrant) providing the conditions detailed in new paragraph 19A(1) are met.

425. *Subsection (5)* removes the power for regulations to prescribe circumstances in which force against the person may be used, so that force against the person may not now be permitted. *Subsection (8)* is consequential on the removal of the power to authorise the use of force against a person, and clears away references to the power which is being removed.

426. *Subsections (6) and (7)* amend the current definition of the "abandonment" of goods. This would mean that goods unsold at auction would no longer be deemed abandoned and would not further require the enforcement agent to "take control" of them again.

427. *Subsection (9)* makes updating amendments to Schedule 13 to the 2007 Act.

Section 26: Payment of fines and other sums

428. Section 26 makes provision: (a) to enable the recovery of charges for some or all of the administrative costs of collecting or pursuing criminal financial penalties from offenders who have defaulted on that sum; and (b) to facilitate the performance of the functions of fines officers by staff provided under contract.

429. *Subsection (1)* inserts a new section 75A into the Magistrates' Courts Act 1980 ("the 1980 Act"), which deals with the recovery of fine collection costs. A charge may be made in relation to the administrative costs incurred for the purpose of collecting or pursuing criminal financial penalties (new section 75A(1)). The charge would be added to the amount outstanding of the financial penalty imposed on conviction and treated in the same way (new section 75A(2)). This also means the charge would be recoverable in the same way and subject to the same sanctions for default. The offender must be notified of the obligation to pay the charge (new section 75A(3)): this will either be done in the collection order where the court has made such an order (a collection order is an order, which the court is required under paragraph 12 of Schedule 5 to the Courts Act 2003 ("the 2003 Act") to make unless it is impracticable or inappropriate to do so, relating to the payment of the financial penalty and containing information about the amount of the financial penalty and how it is to be paid) or via some other form of notice where no collection order is made.

430. The collection costs will not be chargeable where the court has allowed time to pay or where a person is paying by instalments and the sum has been satisfied within the time allowed or the payments are up to date (new section 75A(4) and (5)). The collection costs do not apply to costs related to taking control of goods (new section 75A(6)).

431. *Subsection (2)* inserts a new section 36A into the 2003 Act which makes it clear that the role and functions of the magistrates' court fines officer under that Act are to be treated as not involving the making of judicial decisions or the exercise of judicial discretion. This would facilitate the performance of those functions by staff provided under contract under section 2(4) of the 2003 Act.

432. *Subsections (3) to (8)* make amendments to other legislation consequential on the main changes made by subsections (1) and (2). *Subsection (3)* inserts provision into Schedule 5 to the 2003 Act to ensure that collection orders contain an explanation of the possibility of collection costs being chargeable in the event of default. *Subsection (4)* amends section 85 of the 1980 Act to provide that collection costs may be remitted in the same way as a fine to which they are added. *Subsection (5)* amends section 139 of the 1980 Act, which makes provision for how the balance of receipts on account of fines is to be applied: the amendment makes the provision subject to directions which may be made under section 139A of that Act. *Subsection (6)* inserts that new section 139A into the 1980 Act. The new section 139A enables the Lord Chancellor to give directions for money received in respect of collection costs to be paid to the person who charged the

amount, which allows for flexibility in the arrangements for applying that money, for example if fine collection functions were to be performed under contract.

433. *Subsection (7)* amends section 24(2) of the Criminal Justice Act 1991 to ensure that regulations about applications by courts for benefit reductions for payment of fines may make provision about deductions in connection with the sum being increased on account of collection costs. *Subsection (8)* amends section 56(3) of the Education and Skills Act 2008 (which provides for non-participation fines imposed in respect of failure to attend education or training to cease to be enforceable as fines once the person in question has reached 18, except in so far as necessary to complete enforcement which is already under way) so that it covers amounts in respect of collection costs incurred in relation to such a fine in the same way as amounts in respect of the fine itself.

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

434. Paragraphs 9A to 9C of Schedule 5 to the Courts Act 2003 (the "2003 Act"), as amended by this section, will enable the Secretary of State, a Northern Ireland department and Her Majesty's Revenue and Customs to share social security and finances information with Her Majesty's Courts and Tribunals Service for the purpose of facilitating the making of a decision by a court or a fines officer as to whether to make an attachment of earnings order or an application for benefits deductions against the offender, or of facilitating the making of such an order or application.

435. New paragraph 9A(2) of Schedule 5 to the 2003 Act defines finances information to include details about an offender's income, gains or capital and social security information to include information which is held for the purposes of functions relating to social security. The new paragraph 9A(1) refers to a Northern Ireland Department to ensure that social security information on Northern Ireland residents held on the Department for Work and Pension's database can be shared with Her Majesty's Courts and Tribunals Service.

436. *Subsections (6)* to *(8)* amend the criminal offence in paragraph 9B to prevent further disclosure of any information shared with Her Majesty's Courts and Tribunals Service save in the circumstances set out in amended paragraph 9B(3) and (4). *Subsections (9)* and *(10)* increase the maximum penalties in relation to the offence to be imprisonment not exceeding two years and/or a fine if tried on indictment and imprisonment not exceeding 6 months (increasing to 12 months when section 154(1) of the Criminal Justice Act 2003 is brought into force) and/or a fine not exceeding the statutory maximum if tried summarily.

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

437. Section 28 makes provision for the disclosure of information about tax credits, social security information and information about a person's income, gains or capital in order to determine a person's eligibility for a remission from paying fees to courts, tribunals or the Public Guardian.

438. *Subsection (1)* provides that the Secretary of State (in practice, the Secretary of State for Work and Pensions), or a relevant Northern Ireland Department, or a person providing services to them, may disclose social security information to a relevant person in order for that person to determine whether an applicant is eligible for a fee remission.

439. *Subsection (2)* enables Her Majesty's Revenue and Customs to disclose tax credit information or information about a person's income, gains or capital to a relevant person in order for that person to determine whether an applicant is eligible for a fee remission.

440. *Subsection (3)* provides that information disclosed to a relevant person under *subsection (1) or (2)* may only be shared with another relevant person who wants the

information to assess whether someone is eligible for a fee remission; such information cannot be used for any other purpose.

441. *Subsection (4)* explains the limited circumstances in which information received for the purpose of deciding whether someone is eligible for a fee remission under either *subsection (1)* or *(2)* may be further disclosed. Further disclosure is only permitted where that information has already been disclosed to the public with lawful authority, where it is disclosed in a form such that information about an individual cannot be identified from it or where disclosure is necessary to comply with a court order or statutory duty.

442. *Subsection (5*) provides that it is an offence to disclose or use this information other than for the purposes specified.

443. *Subsection (6)* provides that where a person is charged with an offence under subsection (5)*,* it is a defence that they reasonably believed that the disclosure or use of the information was lawful.

444. *Subsection (7)* sets out the applicable penalties where a person is guilty of the offence under subsection (5). A conviction on indictment may attract a sentence of imprisonment for a term not exceeding two years, a fine or both. On summary conviction a person is liable to a term of imprisonment not exceeding 12 months, a fine not exceeding the statutory maximum, or both.

445. *Subsection (8)* provides that in relation to summary convictions for the offence at *subsection (5)*, a prison sentence not exceeding 6 months applies to offences committed in England and Wales before the implementation of section 154(1) of the Criminal Justice Act 2003 (which provides that a magistrates court does not have the power to impose a sentence of more than 12 months for one offence) or for offences committed in Northern Ireland.

446. *Subsection (9)* provides that, in England, Wales, and Northern Ireland, a person may only be prosecuted for an offence under this section by or with the consent of the relevant Director of Public Prosecutions.

447. *Subsection (10)* defines the terms used in this section. It sets out what is meant by a relevant person and includes a list of court, tribunal and other fee-charging provisions to which the disclosure regime applies.

Section 29: Supreme Court chief executive, officers and staff

448. *Subsection (1)* amends section 48 of the Constitutional Reform Act 2005 making the President of the UK Supreme Court responsible for the appointment of the Chief Executive of the UK Supreme Court instead of the Lord Chancellor.

449. *Subsection (3)* amends section 49 of the Constitutional Reform Act 2005 removing the requirement that the Lord Chancellor agree the numbers of officers and staff of the UK Supreme Court, and the terms on which these officers and staff are to be appointed.

450. *Subsection (4)* amends the same section inserting a new subsection (2A) which provides that all UK Supreme Court staff and officers, including the Chief Executive, are civil servants.

Section 30: Supreme Court security officers

451. *Subsection (1)* inserts new sections 51A to 51E in the Constitutional Reform Act 2005 which provide for Supreme Court security officers who will operate in any building where the business of the UK Supreme Court or the judicial committee of the Privy Council is carried on. The new sections are based on sections 51 to 57 of the Courts Act 2003 (security officers for other courts).

452. *Subsection (2)* amends section 48 of the Constitutional Reform Act 2005 so that the power of the President of the UK Supreme Court to appoint security officers provided in the new provisions on court security (new sections 51A to 51E) may be delegated to the Chief Executive of the UK Supreme Court

453. New section 51A (Supreme Court security officers) establishes that every Supreme Court security officer must be appointed by the President of the Supreme Court under section 49(1) or provided under a contract. They must also be designated as security officers by the President. It is envisaged that there will be a period of training. New section 51A(2) enables the President to give directions for training and to specify the conditions which must be met before a person can be designated as a Supreme Court security officer. New section 51A(3) provides that Supreme Court security officers must be identifiable. For the purposes of these sections "court building" means any building where the business of the UK Supreme Court, or of the Judicial Committee of the Privy Council, is carried on, and where the public has access.

454. New section 51B (Powers of search, exclusion, removal and restraint) gives a Supreme Court security officer power to search a person who is entering, or who is already in, a court building and also any article in such a person's possession. Supreme Court security officers may only require the removal of a coat, jacket, headgear, gloves or footwear. New section 51B(4) provides the Supreme Court security officers with powers to restrain persons, or exclude or remove them from the UK Supreme Court. Officers may exclude or remove a person who has refused to submit to a search, or has refused the officer's request for surrender of an article where the officer reasonably believes that the article ought to be surrendered on the grounds that it may jeopardise the maintenance of order in the UK Supreme Court, may risk the safety of a person, or because the article may be evidence of or in relation to an offence. They also have the power to restrain, exclude or remove a person if it is reasonably necessary to do so to maintain order, secure the safety of people in the UK Supreme Court or enable its business to be conducted without disruption. New section 51B(6) provides that a Supreme Court security officer may also remove any person from a courtroom at the request of a judge of the UK Supreme Court or a member of the Judicial Committee of the Privy Council. New section 51B(7) provides that the powers to exclude, remove and restrain persons include the power to use reasonable force.

455. New section 51C (Surrender, seizure and retention of knives and other articles) requires a Supreme Court security officer to request the surrender of any article that the officer reasonably believes ought to be surrendered. An officer may also seize an article where the officer has requested its surrender but the request has been refused. Specific grounds for surrender and seizure are laid out in new section 51C(2)(a) to (c): because possession of the article may jeopardise the maintenance of order in the UK Supreme Court building, or may risk the safety of a person in that building or because the article may be evidence of or in relation to an offence. A Supreme Court security officer may retain an article surrendered or seized until the person from whom it was taken is leaving the court building. However, where the officer reasonably believes that the article may be evidence of or in relation to an offence, the officer may retain it until the person from whom it was taken is leaving the court building, or, for a limited period of up to 24 hours from the time the article was surrendered or seized, to enable the officer to draw it to the attention of a police constable.

456. In conjunction with the Supreme Court security officers' powers to retain an article surrendered or seized under new section 51C it is important that any items so retained are suitably recorded. The person from whom the article is taken must also be provided with adequate information about the terms of retention and given notice that when an article becomes unclaimed it will be disposed of. New section 51D (Regulations about retention of knives and other articles) provides the Lord Chancellor with a power to make regulations which include provision of written information about the powers of retention; the keeping of records; the period of retention; and the disposal of articles after this period. This new section defines an unclaimed article as one that has been

retained and which a person is entitled to have returned but which the person has not requested and which has not been returned.

457. New section 51E (Assaulting and obstructing court security officers) provides that assaulting a Supreme Court security officer in the execution of the officer's duty is an offence punishable on summary conviction with a fine not exceeding level 5 (£5000) on the standard scale or imprisonment for up to six months. It also provides that resisting or wilfully obstructing a Supreme Court security officer in the execution of the officer's duty is an offence punishable on summary conviction with a fine not exceeding level 3 (£1000) on the standard scale.

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

458. The purpose of this section is to disapply the provisions relating to the prohibition on sound recording and the subsequent broadcasting of any such recordings, as contained within section 9 of the Contempt of Court Act 1981, in relation to UK Supreme Court proceedings.

459. *Subsection (2)* inserts new subsection (1A) into section 9 of the Contempt of Court Act 1981. Subsection (1A) disapplies the prohibition laid out in section 9(1)(b) of the Act (which prohibits the broadcast of sound recordings of legal proceedings) where a recording of UK Supreme Court proceedings is broadcast or disposed of with the leave of the Court.

460. *Subsection (3)* provides that the UK Supreme Court is able to grant leave to use in court, or to bring into court for use, any tape recorder or other instrument for the purpose of recording sound, subject to any conditions the UK Supreme Court considers appropriate relating to the subsequent publication or disposal of any recording.

461. *Subsection (4)* makes it a contempt of court to publish or dispose of any sound recording which is made in contravention of any conditions of leave granted under new subsection (1A).

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

462. The purpose of this section is to permit filming and broadcast of proceedings in courts and tribunals in certain circumstances. It is expected that such circumstances will be set out in secondary legislation and where appropriate in non-statutory operational guidance.

463. *Subsection (1)* provides that the Lord Chancellor may, by order made with the agreement of the Lord Chief Justice, provide that the enactments in *subsection (2)* do not apply. Any such order is subject to the affirmative resolution procedure (see section 58(4)).

464. Subsection (2) contains the enactments that may be disapplied. They are section 41 of the Criminal Justice Act 1925, which prohibits photography or drawing in court, and section 9 of the Contempt of Court Act 1981, which prohibits sound recordings in court without the permission of the court.

465. *Subsection (3)* provides that, where an order has been made, a court or tribunal may direct that the enactments in subsection (2) may continue to apply, or will only be disapplied if certain conditions are satisfied. The court may only give such a direction if this is in the interests of justice or to ensure that a person is not unduly prejudiced.

466. *Subsection (4)* provides that any direction under subsection (3), or a decision not to make a direction, is not subject to appeal

467. *Subsection (5)* defines 'recording' and 'prescribed'.

468. *Subsection (6)* clarifies that the preceding provisions do not apply in relation to the broadcasting of proceedings from the UK Supreme Court.

469. *Subsections (7)* and *(8)* amend section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981 so as to provide that the restrictions they impose are to be read as being subject to this section.

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

470. *Subsection (1)* abolishes the common law offence of scandalising the judiciary (also referred to as scandalising the court or scandalising judges) as a form of contempt of court in England and Wales.

471. *Subsection (2)* clarifies that conduct that is contempt of court (such as abuse of a judge in the face of the court or that otherwise interferes with particular proceedings) and that would also have been scandalising the judiciary remains contempt of court.

Section 34: Awards of exemplary damages

472. Section 34 establishes when exemplary damages may be awarded against a relevant publisher (defined in section 41) upon a finding of liability under a relevant claim (as defined in section 42). By *subsection (2)*, a defendant who was a member of an approved regulator at the material time (defined in section 42) would be entirely excluded from liability to exemplary damages, whether under the common law or this statutory scheme. However, *subsection (3)* allows the court to disregard subsection (2) if it considers that a decision by an approved regulator either to impose a penalty on the defendant or not to do so was manifestly irrational, and that otherwise it would have made an award of exemplary damages against the defendant. For unregulated defendant publishers, *subsection (4)(b)* prevents exemplary damages being awarded in respect of relevant claims under the common law – they may only be awarded under the statutory scheme. Exemplary damages must be specifically claimed by the claimant. The test of liability is in *subsection (6)* – exemplary damages require conduct:

(a) showing a deliberate or reckless disregard of an outrageous nature for the claimant's rights;

(b) of an order meriting punishment (that is, some response beyond just compensation of the victim); and

(c) in relation to which other remedies are insufficient to punish (for example, the size of the compensation is not sufficient punishment in itself on the facts of the case).

473. The court will look at all the circumstances. Under *subsection (8)* the decision on whether to award exemplary damages, and if so the decision as to the size of the award, may only be made by a judge - jury involvement is excluded.

Section 35: Relevant considerations

474. Section 35 gives the court detailed guidance about particular factors to take into account in deciding whether to award exemplary damages. Under *subsection (2)* the court should not usually award exemplary damages if a defendant has already been punished in relation to the same conduct through a criminal conviction. *Subsection (3)* provides that the court should also take account of whether the defendant could have joined a regulatory scheme and if they did not, the reasons for that decision. In addition, under *subsections (3) and (4)* the court should consider whether, irrespective of regulatory scheme membership, the defendant had satisfactory internal compliance procedures in place in relation to how material is obtained and the circumstances in which it is published, and adhered to them. *Subsection (5)* provides that the court may have regard to the need for deterrence – both of the defendant and others. The provisions of *subsection (6)* make clear, notwithstanding these specific directions, that the court has a general discretion to look at all relevant circumstances.

Section 36: Amount of exemplary damages

475. Section 36 provides that when determining the amount of exemplary damages, the court must have regard to the need for the award to be no more than the minimum needed to punish the defendant, and must ensure that the award is proportionate to the seriousness of the conduct. The court is also required to take account of the nature and extent of loss or harm caused, or intended to be caused, by the defendant's conduct, and the benefit the defendant derived, or hoped to derive, from that conduct. As with section 35, *subsection (4)* provides that the court may have regard to the need for deterrence – both of the defendant and others, while *subsection (5)* makes clear that the court has a general discretion to look at all matters relevant to its decision on determining the amount of exemplary damages.

Section 37: Multiple claimants

476. Section 37 applies to claims involving more than one claimant. In such cases, *subsection (5)* prevents any later claims for exemplary damages where an earlier award of such damages has been made. Additionally, *subsection (4)* ensures that the total amount awarded by way of exemplary damages where two or more claimants are concerned is not excessive and with this purpose in mind, *subsection (2) and (3)* ensure that prior out of court settlements made by the defendant with other claimants can be taken into account.

Section 38: Multiple defendants

477. Section 38 applies to claims involving more than one defendant. In such cases *subsection (1)* provides that in relation to exemplary damages awarded under section 34 liability will always be "several" so that the court can look at each defendant individually and punish that defendant according to the actual extent of their wrongdoing. Notwithstanding subsection (1), *subsection (2)* preserves the position as regards joint liability in relation to partnerships. *Subsection (3)* prevents defendants from seeking contributions from other defendants in relation to the exemplary damages paid where their liability is several as a result of this provision.

Section 39: Awards of aggravated damages

478. Section 39 makes clear that "aggravated damages" are distinct from exemplary damages. Aggravated damages relate to mental distress caused by the defendant's wrongdoing which goes over and above the level of mental distress that the basic award of compensation addresses. However, they are essentially still compensatory not punitive, unlike exemplary damages. Section 39 puts this question beyond doubt in relation to the type of cases to which section 34 applies.

Section 40: Awards of costs

479. Section 40 relates to cases where the relevant publisher is a defendant to a relevant claim. In such cases, when making a decision about whether and to what extent the defendant should pay the claimant's costs of the case, the usual costs rules will not apply and the court will be required either to award, or not to award, costs against the defendant in accordance with *subsections (2) and (3)*. Subsection (2) applies where at the time the claim was commenced, either the defendant was a member of an approved regulator or was unable to be a member for reasons beyond the defendant's control, or it was unreasonable in the circumstances for the defendant to have been a member. In those circumstances the court must not award costs against the defendant regardless of the outcome of the case – unless the court is satisfied that one of two exceptions applies. The exceptions are that the issues raised by the claim could not have been resolved by using an arbitration scheme provided by the approved regulator, or that in all the circumstances of the case it is just and equitable to award costs against the defendant. Subsection (3) would apply where at the time the claim was commenced

the defendant was not a member of an approved regulator but could have been, and it was reasonable for the defendant to have been a member. In those circumstances, the position is the converse of that under subsection (2) and the court must award costs against the defendant, regardless of the outcome of the case, unless the court is satisfied that one of two exceptions applies. The exceptions are that the issues raised by the claim could not have been resolved by using an arbitration scheme provided by the approved regulator, or that in all the circumstances of the case it is just and equitable to make a different order, or no order, as to costs.

480. *Subsection (4)* concerns costs protection other than that for defendants under subsection (2), and would require the Secretary of State to take steps to put in place arrangements for protecting the position in costs of parties to relevant claims who are represented under a conditional fee agreement under section 58 of the Courts and Legal Services Act 1990. *Subsection (5)* provides that this section is not to be read as limiting any power to make rules of court. *Subsection (6)* makes transitional provision, to the effect that the section's provisions do not apply until such time as a body is first recognised as an approved regulator.

Section 41: Meaning of "relevant publisher"

481. Section 41 sets out to whom the provisions in sections 34 to 40 are to apply, subject to the exclusions contained within Schedule 15. A number of elements make up the definition in order to establish who is covered by the "relevant publisher" test. *Subsection (1)* provides that a relevant publisher is a person publishing news-related material (defined by section 42) as part of their business, whether or not that business is carried on with a view to making a profit. The material must be written by different authors and be subject to some degree of editorial control. Editorial control is defined in *subsection (2)*, which provides that editorial control is exercised if a person, whether the publisher, or another person, such as an employee, has editorial or equivalent responsibility for the content of the material, how that material is to be presented, and whether to publish it. *Subsections (3) and (4)* provide that, in relation to a website, a publisher is not to be considered as exercising editorial responsibility if they did not post the relevant material to the website themselves, or if they only exercise moderation functions over such material. This definition therefore excludes single author bloggers, tweeters, news aggregators, social networking sites, website moderators and moderated forums. There are then a series of express exclusions from this test. *Subsections (5) and (6)* provide that, notwithstanding a publisher may fall within the provisions of subsection (1), they will not be regarded as a relevant publisher if either they are specified by name in Schedule 15, or their publication of news-related material falls within the category or case of a person set out in that Schedule.

Schedule 15: Exclusions from Definition of "Relevant Publisher"

482. Schedule 15 provides for certain persons, and certain activities to be excluded from the definition of "relevant publisher" set out in section 41. As subsections (5) and (6) of section 41 make clear, the exclusions operate to either exclude a named person, or to exclude a person insofar as they carry out activity set out in the Schedule. *Paragraphs 1 and 2* exclude the British Broadcasting Corporation and Sianel Pedwar Cymru (the broadcaster S4C). The effect of these paragraphs is that all activities carried on by these bodies will be excluded from the definition of relevant publisher, and they will fall outside the provisions of section 34 to 42 entirely. *Paragraph 3* excludes the holders of a licence under the Broadcasting Acts 1990 and 1996, insofar as they publish news-related material in connection with their broadcasting activities as regulated by their licence. *Paragraph 4* excludes the publishers of special interest titles, which are connected with pastimes, hobbies, trade, business, industry or a profession in relation to their publication of news-related material which is incidental to, and relevant to, the subject matter of that title. *Paragraph 5* excludes scientific and academic publications, where news-related material is incidental to, and relevant to, the scientific and academic content. *Paragraph 6* excludes publications made by public bodies and charities where

they publish news-related material in connection with the carrying out of their functions. Public body is defined as a person or body whose functions are public functions.

483. *Paragraph 7* is a similar exclusion, but excludes persons publishing newsletters or circulars, rather than titles, about their own business, where the news-related material is relevant to that business. *Paragraph 8* excludes persons carrying on a micro-business having fewer than 10 employees and with an annual turnover not exceeding £2,000,000, where they publish news-related material contained either in a multi-author blog, or published on an incidental basis relevant to the main activities of the business. *Paragraph 9* excludes the publishers of books. Books do not include a title published on a periodic basis with substantially different content.

Section 42: Other interpretative provisions

484. Section 42 provides interpretative provisions for the operation of sections 34 to 41 and Schedule 15. An "approved regulator" and the concept of recognition as a regulator are central to identifying whether the statutory exemplary damages regime applies to a particular publisher. *Subsections (2) and (3)* define an "approved regulator" for the purpose of sections 34 to 41 and Schedule 15. *Subsection (4)* lists six types of "relevant claim" which are potentially relevant to the situation where a person experiences wrongful behaviour by a publisher and are therefore covered by sections 34 to 41 and Schedule 15. *Subsection (5)* explains that this does not include claims under section 13 of the Data Protection Act 1998, and that "harassment" means a claim under the Protection from Harassment Act 1997.

485. *Subsection (6)* defines "material time" as referring to the time of the events which gave rise to the claim. This is relevant in particular to the incidence of the power to award exemplary damages, the relevance of membership of an approved regulator to the decision whether to award exemplary damages and the availability of the provisions on costs. "News related material" is defined in *subsection (7)* to capture news, information and opinion about current affairs, and gossip about celebrities, other public figures and those in the news. *Subsection (8)* sets out the relationship between publication of news-related material and a relevant claim – this relationship is made clear in order to avoid the application of the statutory scheme to behaviour of relevant publishers which is unrelated to their news publishing activities (for example, an harassment claim relating to the relevant publisher's private rather than professional activities). *Subsection (9)* makes clear that publications are caught regardless of the medium on which they are made. *Subsection (10)* clarifies that "conduct" can relate both to omissions, and also to activity following a point after which the events giving rise to the claim occurred (for example, in defamation cases, conduct of the defendant after the defamatory publication itself can be relevant to the court's decisions on damages).

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

486. Section 76 of the Criminal Justice and Immigration Act 2008 applies when the court is considering the question of whether the level of force used by a defendant who claims to have acted in self defence was reasonable in the circumstances as he or she believed them to be.

487. Section 43 amends section 76 of the 2008 Act to give people who defend themselves or others from intruders in their homes greater legal protection. For the purpose of this section, these cases are known as householder cases.

488. *Subsection (2)* inserts new subsection (5A) of section 76. This provides that in a "householder case", the level of force used by householders when defending themselves from trespassers (or people they believe to be trespassers) will not be regarded as having been reasonable in the circumstances as they believed them to be if that level of force was grossly disproportionate in those circumstances. In other words, it could be reasonable for householders to use disproportionate force to defend themselves from burglars in their homes.

489. *Subsection (3)* amends section 76(6) to make it clear that in cases other than householder cases (for example, when people are acting for other legitimate purposes such as defending themselves when they are attacked outside their dwellings, defending property or preventing crime) the current law continues to apply.

490. *Subsection (4)* inserts new subsections (8A) to (8F) of section 76. These subsections define the meaning of "a householder case" for the purposes of subsection (5A).

491. Subsection (8A) states that the heightened defence applies when (a) householders are defending themselves or others; (b) they are in, or partly in, a building or part of a building that is a dwelling or is armed forces accommodation; (c) they are not trespassing at the time the force is used; and (d) they are defending themselves from a person who they believe is in or entering the building as a trespasser. The use of the terms 'partly in' in subsection (8A)(b) and 'entering' in subsection (8A)(d) ensure that a householder could rely on the defence for example if he or she encountered an intruder on the threshold of his or her dwelling. The heightened defence would not apply, however, if the confrontation occurred wholly outside the building or part.

492. Subsection (8B) ensures that people who live in buildings which serve a dual purpose as a place of residence and a place of work (for example, a shopkeeper and his or her family who live above the shop) can rely on the defence regardless of which part of the building they were in when they were confronted by an intruder, providing that there is internal means of access between the two parts of the building. The defence would not extend to customers or acquaintances in the shop unless they were also residents in the dwelling.

493. Subsection (8C) creates a similar provision for the armed forces whose living or sleeping accommodation may be in the building they work in and where there is internal access between the two parts.

494. Subsection (8D) applies subsections (4) and (5) of section 76 for the purposes of subsection (8A)(d). This means that householders can still rely on the new defence provided they have a genuine belief that the person is a trespasser. This applies even if their belief was mistaken. A person does not, however, cease to be a trespasser just because they have the permission of a trespasser to be on the premises (subsection (8E)).

495. The term 'building' for the purposes of the new subsections includes a vehicle or vessel. This means that people who live in caravans or houseboats, for example, could rely on the heightened defence. It also defines the meaning of 'forces accommodation' for those purposes.

496. *Subsection (5),* in amending section 76(9), confirms that these new provisions change the law and are not merely intended to be clarificatory. The amendments will not operate retrospectively *(subsection (6)).*

Section 44: Dealing non-custodially with offenders

497. This section gives effect to Schedule 16.

Schedule 16: Dealing non-custodially with offenders

Part 1 – Community Orders: punitive elements

498. Part 1 of Schedule 16 amends section 177 of the Criminal Justice Act 2003 ("the CJA 2003") so as to require a court imposing a community order either to include a requirement that fulfils the purpose of punishment in the order or to impose a fine (or do both) unless there are exceptional circumstances that would make that unjust.

499. At present, when a court imposes a community order it may choose from a menu of thirteen possible requirements, namely:

- Unpaid work (known as community payback);
- Residence (requiring an offender to reside at a place specified in the court order);
- Mental health treatment;
- Drug rehabilitation;
- Alcohol treatment;
- Supervision (requiring an offender to attend appointments as instructed by a probation officer);
- Attendance centre (requiring an offender under 25 to attend a particular centre at specified times);
- Prohibited activity (requiring an offender to refrain from participating in certain activities as set out in the court order);
- Curfew (confining an offender to a specified place for a specified number of hours per day);
- Exclusion (prohibiting the offender from entering a place specified in the court order);
- Programme (requiring the offender to participate in an accredited programme such as anger management courses);
- Activity (requiring the offender to participate in certain activities such as basic skills classes).
- Foreign travel prohibition requirement.

500. Section 76 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act") provides for a fourteenth community order requirement: an alcohol abstinence and monitoring requirement. Under section 77 of the 2012 Act, this requirement must be piloted before it can be rolled out nationally.

501. When dealing with an offender for his or her offence the court is required to have regard to the five statutory purposes of sentencing (namely: punishment, crime reduction, rehabilitation, public protection and reparation). However, none of the requirements of the community order currently has to fulfil any specific one of these purposes.

502. Under *paragraph 2*, when a court is imposing a community order it must either include in the order at least one requirement that has the purpose of punishment, or impose a fine, or do both (new section 177(2A) of the CJA 2003). New section 177(2A) does not set out which requirements fulfil the purpose of punishment; this will be for the court to decide in all the circumstances of the particular offence and offender before it.

503. The requirement for a community order to include a punitive element applies in all cases except where the court considers that there are exceptional circumstances relating to the offender or to the offence which would make the imposition of a punitive requirement or a fine unjust (new section 177(2B) of the CJA 2003).

504. When a court imposes a community order, the requirements imposed must, in the court's opinion, be the most suitable for the offender and any restrictions on the offender's liberty must be commensurate with the seriousness of the offending. *Paragraph 3* makes these conditions subject to the new duty on the court to impose a punitive element (by virtue of the amendment made to section 148 of the CJA 2003).

Part 2: Deferring the passage of sentence to allow for restorative justice

505. Section 1 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act") provides for courts to defer for up to six months passing sentence after an offender has been convicted if the offender consents and undertakes to comply with any requirements that the court considers it appropriate to impose. The current provisions also provide for the offender to be returned to court (in case of breach) before the end of the period of deferment. They also provide for the court to appoint a supervisor.

506. *Paragraph 5* inserts a new section 1ZA into the 2000 Act to make it explicit that the court's existing power to defer sentence after conviction includes a power to defer sentence to allow for restorative justice activities in cases where the offender and every other person who would be a participant in the activity consents (new section 1ZA(1) and (3)).

507. A restorative justice activity is an activity:

- involving the offender and one or more victims;.
- which seeks to bring home to the offender the impact of their offending on the victim or victims; and
- which gives the victim or victims the opportunity to talk about, or otherwise express, the impact of the offending upon them (new section 1ZA(2)).

508. New section 1ZA(6) of the 2000 Act requires those persons running restorative justice activities to have regard to any guidance that the Secretary of State issues, with a view to encouraging good practice in the delivery of such activities.

509. A victim is a victim of, or other person affected by, the offending (new section 1ZA(7)). Restorative justice activities might include the victim and offender meeting face to face to discuss the crime, or giving the victim an opportunity to explain by other means to the offender the impact of the crime. These activities can conclude with an agreement which involves the offender making some form of reparation to the victim.

510. The court may have regard to the offender's engagement (or lack of engagement) when they pass their sentence. However, the participation of the offender in restorative justice activities will not automatically affect the sentence that he or she receives. It will be for the court to decide on the sentence that is ultimately imposed.

Part 3: Removal of limits on compensation orders made against adults

511. Part 3 makes changes to the current power of magistrates' courts (in section 131 of the 2000 Act) to impose a compensation order on an offender who has caused personal injury, loss or damage to a victim. The maximum value of a single compensation order made by a magistrates' court is currently £5,000. There is no limit on the value of a compensation order made by the Crown Court.

512. *Paragraph 8* amends section 131 of the 2000 Act to provide that the current £5000 limit will only apply in the case of a compensation order imposed on a young offender (that is an offender under the age of 18). The effect of the amendment is that in future there will be no limit on the value of a single compensation order handed down to an adult offender by a magistrates' court.

513. *Paragraph 9* makes a consequential amendment to section 33B of the Environmental Protection Act 1990, which concerns offences related to the deposit or disposal of waste. The amendment updates the reference to section 131 of the 2000 Act and makes it clear that section 131 will only apply in relation to young offenders.

Part 4: Electronic Monitoring of offenders

514. Part 4 broadens the provisions in the CJA 2003 that enable the courts to impose an electronic monitoring requirement as part of a community order or suspended sentence order.

515. *Paragraphs 12 and 13* amend sections 177 and 190 of the CJA 2003 so as to add "electronic monitoring requirement" to the list of primary requirements that may be imposed as part of a community order or suspended sentence order respectively, so that electronic monitoring may be imposed for the purpose of monitoring compliance with other requirements of the order or for the purpose of monitoring an offender's whereabouts.

516. *Paragraph 16* extends the definition of "electronic monitoring requirement" to enable the courts to impose the monitoring of an offender's whereabouts as a requirement as well as for monitoring compliance with other requirements. *Paragraph 16* also makes express provision that an offender subject to an electronic monitoring requirement (whether one imposed for the purpose of monitoring whereabouts or one imposed for the purpose of monitoring compliance) must submit to the fitting, installation, inspection or repair of the tagging equipment and must not interfere with that equipment. Tampering with a tag to the extent that it stops functioning constitutes a breach of an electronic monitoring requirement and the provision simply puts the matter beyond doubt.

517. The use of location data gathered under an electronic monitoring requirement (whether one imposed for the purpose of monitoring whereabouts or one imposed for the purpose of monitoring compliance) is subject to the requirements of the Data Protection Act 1998. *Paragraph 17* inserts a new section 215A into the CJA 2003 which imposes a duty on the Secretary of State to issue a code of practice on the retention, use and sharing of such data.

518. Amendments to section 218 of the CJA 2003 restrict the power for courts to impose requirements for the purpose of monitoring whereabouts to cases where the court has been notified by the Secretary of State that the necessary electronic monitoring facilities are available in the local justice area. In addition, courts must be satisfied that the offender can be fitted with any necessary apparatus under the arrangements currently available and that arrangements are generally operational throughout England and Wales under which the offender's whereabouts can be monitored (see *paragraph 18*).

519. *Paragraph 20* allows for the transfer of electronic monitoring arrangements to Northern Ireland when the offender lives, or intends to move to, that jurisdiction, and where the court is satisfied that arrangements are in place for the requirement to be enforced.

Part 5: Community Orders: further provision

520. *Paragraph 22*removes uncommenced elements of section 67 of the 2012 Act and makes a minor consequential amendment to the CJA 2003. This removes a court's power to take no action if an offender is brought back to court as a consequence of a breach of a community order. The effect is that if a court finds that an offender has breached an order without reasonable excuse, it must make the order more onerous, revoke the order and re-sentence for the original offence, or impose a fine.

521. *Paragraph 23*amends section 150 of the CJA 2003. This section, itself amended by the 2012 Act, inadvertently prevented the court from giving a 16 or 17 year old a Youth Rehabilitation Order for the new aggravated offence of knife possession. *Paragraph 23* corrects this technical error, so that the new provisions work as they were originally intended to.

Part 6: Statements of assets and other financial circumstances of offenders etc

522. Part 6 makes changes to the current powers of courts to order offenders to provide a statement of their financial circumstances in various contexts. These powers exist in order to support courts in fixing a fine or other financial order that is proportionate and equitable with regard to an offender's circumstances. The provisions in Part 6 make it clear that courts can order such a statement to provide details of an offender's assets as well as their income or outgoings. Courts' powers under existing provisions are broadly framed, and provide them with discretion to require such details as they see fit. As a result, these changes will give courts the discretion to request information about offenders' assets, rather than requiring them to do so in every case.

523. *Paragraph 24* amends the power of courts under section 162 of the CJA 2003 to order a statement of an offender's financial circumstances before sentencing him or her. Section 162, as amended, makes it clear that a court can order an offender to provide such a statement of his or her assets and other financial circumstances as the court may require.

524. *Paragraph 25* amends the power of magistrates' courts (in section 84 of the Magistrates' Courts Act 1980) to require a statement of an offender's means before considering whether to issue a distress warrant or commit to custody in cases involving offenders who have defaulted on a fine or other sum payable on conviction. This change makes it clear that a statement required under section 84 may relate to an offender's assets as well as to the offender's other financial circumstances.

525. *Paragraph 2*6 makes consequential amendments to the offence under section 20A of the Criminal Justice Act 1991 of failing to provide information about financial circumstances to a court after an official request. The amendments make it clear that the references in the section to a statement of financial circumstances include references to a statement of assets, of other financial circumstances or of both.

526. *Paragraph 27* amends the power of courts (in section 13B of the Crime and Disorder Act 1998) to order a statement of financial circumstances when considering whether to impose a parental compensation order on the parent or guardian of a child under 10 who, were it not for their age, would by their behaviour have committed an offence. The amendments make it clear that the statement may relate to assets as well as to other financial circumstances.

527. *Paragraph 28* makes consequential amendments to the offence under Schedule 5 to the Courts Act 2003 of making a false statement in response to a request for information about financial circumstances. It also amends the power of magistrates' courts under Schedule 6 to that Act to order a statement of financial circumstances from a fine defaulter in respect of whom the court is considering making a work order. The amendments make it clear that the statements concerned may relate to assets as well as to other financial circumstances.

Part 7: Information to enable a court to deal with an offender

528. Part 7 creates a new data sharing gateway to enable the Secretary of State (in practice the Department for Work and Pensions) and a Northern Ireland Department and Her Majesty's Revenue and Customs ("HMRC") to share social security information and finances information on defendants with Her Majesty's Courts and Tribunals Service ("HMCTS") and the Service Prosecuting Authority ("the SPA") for service court proceedings.

529. *Paragraph 29(9)*defines terms used in *paragraph 29*, including "finances information" and "social security information". "Finances information" is certain information about a defendant's income, gains or capital and "social security information" is certain information which is held for the purposes of functions relating to social security. *Paragraph 29* refers to a Northern Ireland Department to ensure that social security

information on Northern Ireland residents held on the DWP's database can be shared with HMCTS and the SPA.

530. *Paragraph 29(1) and (2)* enable the Secretary of State, a Northern Ireland Department and HMRC to share social security and finances information respectively with a "relevant person", which will be a person in HMCTS or the SPA because of the definition of "relevant person" in *paragraph 29(9)*. *Paragraph 29(3) and (6)* secure that information can be further disclosed by a relevant person to a court or service court at any time after a defendant has been charged with an offence but only where the court or service court is inquiring into or determining a person's financial circumstances in connection with dealing with the person for an offence. This will assist the court when it is imposing a fine or compensation order. *Paragraph 29(5)* prohibits further disclosure of any information shared with HMCTS or the SPA (except to a court or service court as mentioned above or to relevant persons who want the information so that it can be put before a court or service court as mentioned above). *Paragraph 29(5)* does not apply in the circumstances set out in *paragraph 29(7)* (for example, where disclosure is to the defendant or his or her representative; where disclosure is of summary information from which the defendant cannot be identified; where disclosure is of information that has already been disclosed to the public with lawful authority; and where disclosure is necessary to comply with a duty imposed by or under any Act or with an order of a court or tribunal).

531. *Paragraph 30*makes it an offence to disclose or use any information shared with HMCTS or the SPA in contravention of paragraph 29(5). *Paragraph 30(3)* provides for the maximum penalties to be imprisonment not exceeding two years and/or a fine if tried on indictment, and imprisonment not exceeding 6 months (increasing to 12 months when section 154(1) of the CJA 2003 is brought into force) and/or a fine not exceeding the statutory maximum if tried summarily.

Part 8: Related amendments in Armed Forces Act 2006

532. Part 8 makes amendments in relation to the sentencing powers available to service courts under the Armed Forces Act 2006. It makes provision equivalent to or consequential on, the amendments to criminal courts' sentencing powers in Part 1 (punitive elements), Part 3 (compensation orders), Part 4 (electronic monitoring) and Part 6 (statements of assets and other financial circumstances).

533. *Paragraph 32* amends section 178 of the Armed Forces Act 2006 so that the duty on courts to include a punitive element in a community order or to impose a fine applies to service courts imposing a service community order.

534. *Paragraph 33* amends section 182 of the Armed Forces Act 2006 so that that duty also applies to service courts imposing an overseas community order on an offender who is aged 18 or over when convicted. *Paragraph 34* amends section 270 of the Armed Forces Act 2006 so that existing restrictions on the requirements that may be included in a service community order or overseas community order are subject to that duty.

535. *Paragraph 36* amends section 284 of the Armed Forces Act 2006 so that the £5,000 limit to which the Service Civilian Court is currently subject when imposing a service compensation order applies only where the offender is aged under 18 on conviction.

536. *Paragraph 37* amends sections 182 and 183 of the Armed Forces Act 2006 to provide that an electronic monitoring requirement may not be included in an overseas community order.

537. *Paragraph 38* amends section 266 of the Armed Forces Act 2006 to make it clear that a service court's power to make a financial statement order includes power to require information about an offender's assets as well as other financial circumstances.

Section 45: Deferred prosecution agreements

538. This section gives effect to Schedule 17.

Schedule 17: Deferred prosecution agreements

Part 1: General

539. *Paragraph 1* sets out the principal characteristics of a deferred prosecution agreement ("DPA"). A DPA is an agreement between a prosecutor and an organisation facing prosecution for an alleged economic or financial offence specified in Part 2 of the Schedule. *Paragraph 1(2)* sets out the two sides of this agreement. The organisation agrees to comply with a range of terms and conditions (*paragraph 1(2)(a)*) and the prosecutor agrees to institute but then defer criminal proceedings for the alleged offence in accordance with paragraph 2 on approval of the DPA (*paragraph 1(2)(b)*).

540. *Paragraph 2* details the court process once a DPA has been approved – essentially, the prosecution is commenced but is then deferred. Paragraph 2(1) provides that a prosecutor must commence proceedings by bringing charges against an organisation for the alleged offence in the Crown Court by way of a modified procedure for preferring a voluntary bill of indictment. This means that there is no need for any involvement of a magistrates' court in the DPA process. Once the proceedings have been instituted in this way, they are automatically suspended (paragraph 2(2)). Paragraph 2(3) provides that the suspension of the proceedings can only be lifted upon application by the prosecutor which may not occur whilst the DPA is in force (that is, the suspension of the proceedings may only be lifted following the DPA's termination as a consequence of a breach of the Agreement). The suspension of the proceedings is the means by which the prosecution is deferred. The threat of the prosecution proceeding in the event of breach hangs over the organisation to make compliance with the DPA more likely.

541. Paragraph 2(4) provides that no other person (this would include a private prosecutor), may bring charges against the organisation for the same alleged offence whilst the prosecution is deferred.

542. *Paragraph 3(1)* specifies the "designated prosecutors" who may enter into a DPA. The Schedule provides that these are the Director of Public Prosecutions ("DPP") and the Director of the Serious Fraud Office ("DSFO"), and any other prosecutor the Secretary of State designates by order (made subject to the affirmative procedure) (paragraph 3(1)(c)).

543. *Paragraph 3(2)* provides that the decision to enter into a DPA must be exercised personally by a designated prosecutor (that is, either by the DPP or DSFO). However, *paragraph 3(3)* provides that, if the designated prosecutor is unavailable, another person who has been authorised in writing by that prosecutor to exercise the power to enter into a DPA may do so, but they must do so personally.

544. *Paragraph 4* sets out those organisations which may enter into a DPA with a prosecutor. It also provides that an individual may not enter into a DPA.

545. Paragraph 4(2) and (3) provide that when the organisation that is a party to the DPA is a partnership or an unincorporated association, the DPA must be entered into in the name of the partnership or association (and not in the names of the partners or members) and any money payable under the DPA must be paid out of the funds of the partnership or association.

546. *Paragraph 5* outlines the content of a DPA. Paragraph 5(1) provides that every DPA must contain a statement of facts relating to the alleged offence which may include admissions made by the organisation. There is no requirement for admissions to be made by an organisation but any that are made will be included in the statement. The statement will have been agreed by the parties before inclusion in the DPA. The inclusion of a statement of facts in every DPA is to ensure openness and transparency. If

the organisation subsequently breaches the DPA, and criminal proceedings are brought, this statement of facts will be treated as an admission by the organisation (*see paragraph 13(2)*).

547. Paragraph 5(2) sets out the only other mandatory requirement for every DPA: each agreement must specify an expiry date upon which it will cease to have effect (unless, in a particular case, it has already been terminated following breach – see paragraph 9). This is to ensure that both parties have clarity about the duration of the deferral period. There is no prescribed maximum or minimum period as the terms of each DPA will depend on the particular circumstances of the case.

548. Paragraph 5(3) provides a non-exhaustive illustrative list of potential terms and conditions that may be included in a DPA. This list is not prescriptive. This is to ensure that each DPA can be tailored to the particular facts of an individual case. Paragraph 5(3) also provides that the DPA can set time limits for the organisation to comply with specific terms of the agreement within the deferral period. For example, the agreement could specify dates for the payment of compensation (paragraph 5(3)(b)) or of a financial penalty (paragraph 5(3)(a)). Any financial penalty will be collected by the prosecutor and paid into the Consolidated Fund (as set out at *paragraph 14*). Any disgorgement of profits under the Agreement (*paragraph* 5(3)(d)) will also be collected by the prosecutor and paid into the Consolidated Fund in the same way. Alongside or instead of monetary conditions, a DPA could also include terms such as the implementation of a compliance programme which could require, for example, revisions to an organisation's anti-corruption or anti-fraud policies and procedures and additional training provision for staff (paragraph 5(3)(e)); or cooperation with any related investigations, either of individuals or other organisations (paragraph 5(3)(f)). It may also include the appointment of an independent monitor to scrutinise the implementation of any compliance measures.

549. A DPA may also provide for the payment of reasonable prosecution costs (paragraph 5(3)(g)). The expectation is that the amount of the costs negotiated and agreed by the parties will be clearly set out on the face of the agreement, and they will be treated independently of any financial penalty, that is the prosecutor will not be able to defray any of its costs from a financial penalty paid by the organisation. This provision reflects the position regarding the payment of prosecutorial costs in ordinary criminal proceedings.

550. Paragraph 5(4) provides that the amount of the financial penalty agreed by the parties under a DPA must broadly reflect the likely fine that a court would have imposed on the organisation on conviction for the alleged offence following a guilty plea. When setting this amount, both parties will need to take into account all the relevant factors that would be considered by a sentencing court. These would include relevant Sentencing Guidelines covering specific offences and other matters such as the principle of a reduction of sentence following the entry of a guilty plea at the first reasonable opportunity. Consideration would also need to be given to the means of the organisation, any compensation or charitable donations payable, the extent of any disgorgement of profits, and prosecutor's costs that would be payable.

551. Paragraph 5(5) states that the DPA itself may provide for the consequences of an organisation's failure to comply with the agreement. For example, the DPA may include a term specifying a punitive rate of interest for a late payment of a financial penalty. In the event that such a term were to be engaged, the prosecutor would have the option of either: (i) settling the failure to comply in accordance with the term provided in the agreement; or (ii) applying to the court under paragraph 9 (breach of a DPA).

552. *Paragraph 6* provides for a DPA Code of Practice for prosecutors setting out guidance on the DPA process. The Code must be issued jointly by the DPP and DSFO. Paragraph 6(1)(a) explains that this Code must give guidance on general principles to be applied by prosecutors in determining whether a DPA is likely to be appropriate in a given case. The Code must also include guidance on the disclosure of information by a prosecutor to

the organisation both in the course of DPA negotiations and after a DPA has been agreed (paragraph 6(1)(b)). It is expected that guidance on disclosure in the DPA process included in the Code will reflect existing guidance on this subject (such as the Attorney General's Guidelines on Plea Discussions and the Attorney General's Guidelines on Disclosure) and general common law principles. Paragraph 6(2) sets out other relevant matters that may be included in the Code, including guidance on variation, breach and termination of a DPA. Prosecutors must take account of the Code when exercising their functions throughout the DPA process (paragraph 6(6)).

553. The DPP is obliged to set out this Code in his or her annual report to the Attorney General which is laid before Parliament (paragraph 6(3)). This is consistent with the process for publishing the Code for Crown Prosecutors under section 10 of the Prosecution of Offences Act 1985. Paragraph 6(4) requires that any alterations to the Code must be agreed between the DPP and DSFO and any other designated prosecutor. Following any amendments to the Code, paragraph 6(5) provides that any alterations to the Code or any new Code must be set out in the DPP's annual report to the Attorney General.

554. *Paragraph 7* outlines the court's role at the preliminary hearing. Following a prosecutor's indication that it is minded to enter into a DPA, and having negotiated outline terms with the organisation, paragraph 7(1) provides that the prosecutor must seek a declaration from the Crown Court that entering into a DPA with the organisation is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.

555. Paragraph 7(2) provides that the court must give reasons for its decisions at a preliminary hearing. The court's declaration and reasons would remain confidential to the judge, prosecutor and the organisation under paragraph 7(4), but would be made publicly available under paragraph 8(7) in the event that a DPA were to be approved (subject to any restrictions necessary to protect ongoing or future prosecutions).

556. Paragraph 7(3) allows flexibility for there to be several preliminary hearings if for whatever reason the court has declined to declare that a DPA is likely to be in the interests of justice, and/or, its terms are fair reasonable and proportionate.

557. Paragraph 7(4) provides that the preliminary hearing must be held in private and any declarations also made in private. This is to avoid jeopardising any future prosecution of the organisation, and to limit any potential damage to the organisation's commercial interests at this stage. For example, if the detail of a preliminary hearing were made public, particularly where a judge considered that the alleged conduct was such that a DPA would not be likely to be in the interests of justice, it may be prejudicial to future criminal proceedings, whether against the organisation or another person.

558. *Paragraph 8* outlines the court's function at the final hearing. Once the court has approved the DPA in principle at a preliminary hearing and the terms have been agreed by both parties, paragraph 8(1) provides that the prosecutor must apply to the Crown Court for a final declaration that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. Paragraph 8(3) provides that the DPA only takes effect when the court has made this final declaration. Paragraph 8(4) provides that the court must give reasons for its decision whether or not to make a declaration.

559. Paragraph 8(5) provides that the final hearing may be held in private: this is to allow the final proposed DPA to be set out before the judge and any final issues to be resolved in a free and frank environment. But if the court decides to approve the DPA and make a declaration, the court must do so in open court, giving reasons for its decision (paragraph 8(6)). Upon approval of the DPA, the prosecutor will be obliged to publish the final Agreement and all declarations made by the court at the preliminary and final hearings, including the reasons for these decisions (paragraph 8(7)). The prosecutor should publish these documents immediately, unless an enactment or an order of the

court under paragraph 12 made to avoid prejudice to any ongoing or future proceedings prevents him from doing so.

560. *Paragraph 9* makes provision for any instances where an organisation fails to comply with any term of the DPA. Following any breach of the Agreement (including any instance of breach provided for in the DPA itself as outlined at paragraph 5(5)), the prosecutor may seek a factual determination from the court as to whether or not there has been a breach (paragraph 9(1)). Paragraph 9(2) provides that the court must then decide whether, on the balance of probabilities, the organisation has failed to comply with the terms of the Agreement. If the court determines that a breach has occurred, paragraph 9(3) provides that the court may either: (i) invite the parties to agree proposals to remedy the breach; or (ii) decide to terminate the Agreement. The court must give reasons for the decision it has made (paragraph 9(4)).

561. If the Agreement is terminated, then the prosecutor may seek to have the suspension of the criminal proceedings against the organisation lifted (see paragraph 2(3)).

562. Paragraph 9(5) provides that in cases where the court finds that the organisation has not failed to comply with terms of the DPA, the prosecutor must publish the court's decision and the reason for this decision (unless prevented by an enactment or order of the court made under paragraph 12 to avoid prejudice to any ongoing or future proceedings).

563. The prosecutor will be required to publish the court's decision and reasons to invite the parties to agree proposals to remedy the organisation's failure to comply with the Agreement (paragraph 9(6)). Similarly, paragraph 9(7) ensures that, upon termination of a DPA following breach, the prosecutor must publish both the fact of the termination and the court's reasons for its decision. Both these publication requirements are subject to any enactment or order of the court made under paragraph 12 to prevent prejudice to any ongoing or future proceedings.

564. There is also an obligation on the prosecutor, set out at paragraph 9(8), to publish a decision not to bring a suspected breach of a DPA before the court, in order to ensure that such decisions are made transparently. This would include any instance of breach for which the consequences were provided for in the Agreement (as set out at paragraph 5(5)). In these cases the prosecutor is obliged to publish reasons both for their belief that the organisation has failed to comply and for their decision not to bring the suspected breach before the court. These reasons might include the prosecutor's view that the matter was capable of being dealt with adequately through the mechanism provided in the DPA. This might be the case in particular where the organisation agrees that a breach has occurred, and is content to settle the matter with the prosecutor without involving the court.

565. *Paragraph 10* deals with variation of the DPA. Variation of the DPA may occur where the court has invited the parties under paragraph 9(3)(a) to remedy a breach of the DPA through varying its terms (paragraph 10(1)(a)). Paragraph 10(1)(b) provides that variation will otherwise be permissible only in exceptional cases. These are limited to situations where variation is necessary to avoid a breach of the DPA, and the circumstances giving rise to the potential breach could not have been foreseen at the time that the DPA was agreed. Paragraph 10(2) provides that the court must approve any application to vary the Agreement. By virtue of paragraph 10(3), any variation will only take effect once the court gives its approval. The court will have discretion whether to approve the proposed variation and will apply the same tests as for the original terms of the DPA, that is, whether the variation is in the interests of justice and the terms as varied are fair, reasonable and proportionate. The court must give reasons for the decision made (paragraph 10(4)). Where it refuses to approve the variation the original Agreement will stand.

566. Paragraph 10(5) provides that the hearing for an application for variation may be held in private to allow the proposed variation and the reasons for it to be set out before the judge confidentially. This may be necessary, in particular, if the reasons giving rise to

the proposed variation are commercially, or otherwise, sensitive. However, if the judge decides to approve the variation and make a declaration to that effect, the judge must do so in open court, and must give reasons for that decision. The prosecutor is required to publish the varied DPA and the court's declaration, unless prevented by any enactment or order of the court made under paragraph 12 to avoid prejudice to future or ongoing proceedings. Paragraph 10(7) provides that, if the court does not decide to approve the variation, the prosecutor must also publish this decision and the reasons for it (subject to the same restrictions).

567. If the organisation complies with the terms of the DPA throughout its duration, the DPA will expire on the expiry date set out in the Agreement in accordance with paragraph 5(2).*Paragraph 11* provides that the criminal proceedings against the organisation that were instituted under paragraph 2 are to be discontinued on expiry of the Agreement. Once the prosecutor has discontinued proceedings in this way, paragraph 11(2) provides a bar to any further criminal proceedings being brought against the organisation for the same offence (but this would not prevent proceedings being instituted against any other person for the same offence). This gives certainty to the organisation that, upon complying with the terms of the Agreement, it will not be vulnerable to future prosecution for the same alleged offending. However, this bar does not prevent the institution of fresh proceedings against the organisation for the same offence if the prosecutor finds that during negotiations for the DPA the organisation provided inaccurate, misleading or incomplete information to the prosecutor (paragraph 11(3)).

568. Paragraph 11(4) to (7) provide that if, in the particular circumstances of a case, there are ongoing breach proceedings and the Agreement's expiry date has been reached, the DPA will not be considered to have expired until the entire process for dealing with the breach has been completed, including full compliance with any remedy for the breach agreed by the parties.

569. Following full compliance with the Agreement**,** paragraph 11(8) provides that the prosecutor must publish the fact of the discontinuance of proceedings and details of how the organisation complied with the DPA (unless prevented from doing so by any enactment or order of the court made under paragraph 12 to prevent prejudice to any future or ongoing proceedings).

570. *Paragraph 12* provides that the court may order the postponement of the publication of information relating to the DPA process. This will cover the obligations on the prosecutor to publish the final Agreement and all court rulings upon approval of the Agreement; details of the facts and approach taken in the event of any breach or variation of the Agreement and details of how the terms and conditions of the DPA have been complied with by the organisation at the end of the DPA process. This is to ensure there is no prejudice to any ongoing or future proceedings by the publication of such material. The court may make such an order on its own motion or following an application.

571. *Paragraph 13* concerns the use of material arising out of the DPA process in criminal proceedings. Where a DPA has been entered into (subject to any necessary publication restrictions to avoid prejudice to future prosecutions) the final Agreement, including the statement of facts, will be a matter of public record. Once a DPA has been approved, paragraph 13(1) and (2) provide that the statement of facts, having been agreed by the organisation, can be treated as a formal admission in any future criminal proceedings against the organisation.

572. Where a DPA has not been approved (paragraph 13(3)), a prosecutor will not be able to rely either on the fact that it conducted DPA negotiations with the organisation, or on any draft DPA created during the negotiations in any future criminal proceedings, save in the circumstances set out at paragraph 13(4). These circumstances would be: (i) any criminal proceedings against the organisation for an offence consisting of the provision of inaccurate, misleading or incomplete information; or (ii) in proceedings for another offence, where the organisation makes a statement in evidence that is inconsistent with

a statement it made in the course of the DPA process. Paragraph 13(6) sets out the range of material created in the course of unsuccessful DPA negotiations (a draft DPA, draft statement of facts and any statement indicating that the organisation entered into DPA negotiations) that cannot be used against the organisation except in these circumstances. However, prosecutors would not be prevented from relying on evidence obtained from investigations pursued as a result of anything said in any unsigned statement of facts or draft DPA. Further, any pre-existing material provided by the organisation during the DPA process would be admissible in proceedings for any offence (subject to existing rules on admissibility of evidence).

573. *Paragraph 14* provides that any money received by a prosecutor under a term of a DPA (that is, either a financial penalty or disgorged profits) must be paid into the Consolidated Fund.

Part 2: Offences in relation to which a DPA may be entered into

574. *Paragraphs 15 to 30* specify each of the economic or financial offences in relation to which a DPA will be available, including common law, statutory and ancillary offences.

575. *Paragraph 31* confers a power on the Secretary of State, exercisable by order made by statutory instrument (subject to the affirmative resolution procedure), to amend Part 2, either by adding or removing an economic or financial offence from that Part.

Part 3: Deferred prosecution agreements: consequential and transitional provision

576. *Paragraphs 32 to 38* make consequential amendments to other enactments.

577. *Paragraph 39* provides that DPAs will be available for conduct that took place before the commencement of this Schedule, where no proceedings have yet commenced against the organisation. Paragraph 39(2)(b) ensures that this general provision for the retrospective application of DPAs also applies to any new offences added by order made by the Secretary of State to Part 2 of the Schedule.

Section 46: Restraint orders and legal aid

578. This section amends section 41 of the Proceeds of Crime Act 2002 ("POCA") which relates to restraint orders; a restraint order is an order made in court to preserve assets where there is a risk of dissipation ahead of any court hearing or enforcement activity relating to criminal conduct (see section 40 of the POCA). *Subsection (2)* provides that an exception must be made to a restraint order to enable relevant legal aid payments to be made. A relevant legal aid payment is that which a person specified in the restraint order is obliged to make by regulations made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for legal aid provided in relation to an offence which falls within section 41(5) of the POCA. *Subsection (5)* inserts new subsections (5A) and (5B) into section 41 of the POCA which provide that a legal aid exception to a restraint order must be made subject to prescribed restrictions as to the amount of any payments and as to the circumstances in which payments may be made, and subject to any other prescribed conditions. The court retains the power to impose conditions on exceptions to restraint, whether relating to legal aid payments or otherwise. *Subsection (6)* provides that regulations under new subsection (5A) will be made by the Secretary of State. *Subsection (7)* amends section 459 of the POCA to provide that regulations made under new section 41(5A) of that Act will be subject to the affirmative resolution procedure.

Section 47: Restraint orders and legal aid: supplementary

579. Section 47 allows the Secretary of State to make regulations about the making of relevant legal aid payments from property subject to a restraint order under Part 2 of the POCA, and in connection with cases in which such payments are or may be made.

Subsection (2) sets out a non-exhaustive list of the types of provision that the Secretary of State might make in regulations. The types of provisions that might be made include provision about how much property may be restrained, including provision framed by reference to the amount or estimated amount of relevant legal aid payments. They also include provision to allow a restraint order to remain in force until a relevant legal aid payment is made when the order would otherwise be discharged. Provision may also be made about powers of investigation, entry, search and seizure and about the disclosure and use of documents, information and other evidence. Provision may also be made about the use of property in cases in which there is or has been a restraint order, including about the order in which different payment obligations may or must be satisfied. Provision may also be made about the payment of compensation by the Lord Chancellor. *Subsection (3)* provides that regulations made under this section may amend, repeal, revoke or modify existing primary legislation and may make provision conferring or removing functions. Regulations made under this section will be subject to the affirmative resolution procedure.

Section 48: Civil recovery of the proceeds etc of unlawful conduct

580. *Subsection (2)* of section 48 inserts new section 282A into Chapter 2 of Part 5 of the POCA which provides expressly that the High Court in England and Wales and the Court of Session in Scotland have the power to make orders under that Chapter in respect of property, wherever that property is situated, and in respect of a person, wherever that person is domiciled, resident or present. However, the High Court in England and Wales or the Court of Session in Scotland may not make such an order in respect of property outside the United Kingdom or property in the United Kingdom but otherwise outside the jurisdiction of the court unless there is or has been a connection between the case and the jurisdiction of the court.

581. A non-exhaustive list of connecting factors is provided in new Schedule 7A to the POCA (inserted by *subsection (3)*) and this includes (but is not limited to) connections arising from the unlawful conduct, the property (including property held on trust) or the person.

582. The term “unlawful conduct” refers to the conduct through which the property (or property representing that property) was obtained (see sections 241 and 242 of the POCA).

583. New section 316(8B) of the POCA, inserted by *subsection (5)*, clarifies that an enforcement authority in England and Wales and Scotland may take proceedings in respect of any property or person, irrespective of whether the property or person is in that part of the United Kingdom.

584. *Subsection (7)* provides that the amendments to the POCA made by this new section and Schedule 18 have retrospective effect.

585. *Subsection (8)* provides that the amendments to the POCA made by this section and Schedule 18 do not affect the extent to which other provisions of the POCA or other enactments apply in respect of persons or property outside the jurisdiction of the court.

586. In respect of Scotland, these provisions are applicable rather than those in section 20 of, and Schedule 8 to, the Civil Jurisdiction and Judgments Act 1982 (“CJJA”).

Schedule 18: Proceeds of crime: Civil recovery of the proceeds etc of unlawful conduct

587. Part 1 of Schedule 18 amends section 18 of the CJJA, which provides for the enforcement of judgments made in one part of the United Kingdom in another part of the United Kingdom. It provides that the arrangements under the CJJA for the recognition of judgments apply in relation to interim orders made under Chapter 2 of Part 5 of the POCA. There are four types of civil interim orders provided for in connection with

civil recovery under that Chapter. A property freezing order freezes property and an interim receiving order freezes property with the addition of a court appointed receiver to manage and investigate property. The equivalent orders in Scotland are a prohibitory property order and an interim administration order. These orders are all made before a civil recovery order.

588. Part 2 of Schedule 18 amends Chapter 2 of Part 5 of the POCA by inserting new sections 282B to 282F. The new provisions facilitate the enforcement outside the United Kingdom of orders made under Chapter 2 of Part 5 of the POCA and the transmission of requests for evidence held outside the United Kingdom. The provisions are modelled on existing mutual legal assistance provisions in Chapter 2 of Part 1 of the Crime (International Co-operation) Act 2003 and section 74 of the POCA.

589. New section 282B of the POCA makes provision for an enforcement authority to transmit a request for certain assistance in relation to property to the Secretary of State with a view to it being forwarded to the government of the receiving country. Enforcement authorities are those who can take civil recovery proceedings in the High Court in England and Wales and the Court of Session in Scotland. In respect of England and Wales, the enforcement authorities are the Serious Organised Crime Agency (in future, the National Crime Agency), the Crown Prosecution Service and the Serious Fraud Office. In Scotland, the enforcement authority is the Scottish Ministers. An enforcement authority may send a request for assistance if the property freezing conditions are met, the property is not property to which a recovery order applies, and the enforcement authority believes that the property is in a country outside the United Kingdom (the “receiving country”). It is envisaged that the government of the receiving country would secure that any person is prohibited from dealing with the property and that assistance is given in the management of the property (which includes securing its detention, custody or preservation). The Secretary of State retains discretion to forward the request for assistance onto the government of the receiving country. Also it will be for government of the receiving country, in accordance with its own law, to decide whether or not to accede to a request, and how that request will be executed. The property freezing conditions for England and Wales are set out in section 245A(5) and (6) of the POCA and for Scotland in section 255A(5) and (6) of the POCA.

590. New section 282C of the POCA makes provision about enforcement abroad by a receiver, or in Scotland, an administrator before a civil recovery order is made. Assistance can only be requested if a property freezing order, interim receiving order or interim administration order has effect in relation to the property and the receiver or administrator believes that the property is in a country outside the United Kingdom (“receiving country”). The request would be for the government of the receiving country to secure that any person is prohibited from dealing with the property and to assist in connection with the management of the property (which includes securing its detention, custody or preservation). The request is sent to the Secretary of State, who must forward the request to the government of the receiving country. In contrast to the provisions in new section 282B, there is no discretion on the part of the Secretary of State to refuse to forward the request. This is considered appropriate because receivers and administrators have been appointed by a court.

591. New section 282D of the POCA makes provision about the obtaining of evidence located overseas by an interim receiver or, in Scotland, an interim administrator, or a person subject to an investigation by the interim receiver or the interim administrator. An interim receiver or an interim administrator can make a direct request for assistance if it is thought that there is relevant evidence in a country outside the United Kingdom. There must be an interim receiving order or an interim administration order in effect in relation to property and it must be an order which requires the interim receiver or interim administrator to take steps to establish whether the property is recoverable property or associated property or any other property is recoverable property (in relation to the same unlawful conduct) and, if it is, who holds it. The High Court in England and Wales or the Court of Session in Scotland can make a request for assistance on an application by

an interim receiver or interim administrator or a person subject to their investigation if the court thinks there is relevant evidence in a country outside the United Kingdom. A request for assistance may be sent to a court, tribunal, government or authority where the evidence is to be obtained. This mirrors the existing provisions for the obtaining of evidence for criminal investigations. Alternatively, a request may be sent to the Secretary of State, who must forward the request to the court, tribunal, government or authority. There is no discretion on the part of the Secretary of State to refuse to transmit the request. If the matter is urgent, a request may be sent to the International Criminal Police Organisation or any person competent to receive it under any provisions adopted under EU Treaties, for onward transmission. The term "International Criminal Police Organisation" refers to Interpol and Europol.

592. New section 282D(11) of the POCA provides that there is a power to make rules of court with regard to the practice and procedure to be followed in connection with proceedings relating to requests for assistance made by a judge.

593. New section 282E of the POCA provides that evidence obtained by means of a request for assistance under section 282D cannot be used for any purpose other than for carrying out the functions of the interim receiver or interim administrator, or for the purposes of certain proceedings. However, the court, tribunal, government or authority that received the request and provided the evidence can consent to the use of the evidence for other purposes.

594. New section 282F of the POCA makes provision about how a civil recovery order made in England and Wales or Scotland may be enforced abroad by an enforcement authority or the trustee for civil recovery. If a civil recovery order has effect in relation to the property and the enforcement authority or trustee for civil recovery believes that the property is in a country outside the United Kingdom ("the receiving country"), a request for assistance may be sent to the Secretary of State with a view to this being forwarded to the receiving country. The request for assistance is a request to the receiving country for assistance in connection with the management and disposal of the property. The Secretary of State must forward the request made by the trustee for civil recovery to the receiving country, but has discretion as to whether to forward a request for assistance from an enforcement authority. This reflects the fact that a trustee for civil recovery is court appointed. If the receiving country issues a certificate of realisation of the property, it is admissible as evidence of the facts it states, if it states the property has been realised in pursuance of a request made by an enforcement authority or the trustee for civil recovery, the date of the realisation and the proceeds of the realisation.

Section 49: Investigation

595. Section 49 introduces Schedule 19 which makes provisions about orders and warrants, including provision for obtaining evidence overseas, in connection with civil recovery investigations under Part 8 (investigations) of the POCA.

596. Part 8 of the POCA has five types of investigation orders: production orders require a person to either produce or allow access to material; search and seizure warrants provide the power to enter premises to seize and retain material; disclosure orders authorise the investigator to require a person to answer questions, provide information and/or produce documents; customer information orders authorise the investigator to request certain details of clients' names, dates of birth and addresses, account numbers, dates that accounts were held and similar information; and account monitoring orders authorise the monitoring of account transactions in a specific account over a certain period.

Schedule 19: Proceeds of crime: Investigation

597. Part 1 of Schedule 19 amends Part 8 of the POCA. The main changes are changes to the definition of a civil recovery investigation to clarify that the focus of an investigation can be a person or property and also to clarify that there can be an investigation into property that has not yet been clearly identified. As a result, an investigation

may begin with a person and, as property is identified and more is known about the property, become an investigation into property. Equally, an investigation may begin with property, and as more information about its ownership emerges, become an investigation into a particular person.

598. Part 2 of Schedule 19 inserts new sections 375A, 375B, 408A and 408B into the POCA. These provisions are modelled on sections 7 to 9 of the Crime (International Co-operation) Act 2003.

599. New section 375A of the POCA makes provision for evidence to be obtained from a court, tribunal, government or authority outside the United Kingdom ("receiving country") if a person or property is subject to a civil recovery investigation, a detained cash investigation or an exploitation proceeds investigation (as defined in section 341). It enables a judge to make a request for assistance upon an application by an appropriate officer or a person subject to the investigation, providing that the judge thinks there is relevant evidence in a country or territory outside the United Kingdom. However a senior appropriate officer or the relevant Director may make a direct request for assistance if it is thought that there is relevant evidence in a country or territory outside of the United Kingdom. The meanings of "appropriate officer", "senior appropriate officer" and "relevant Director" are found in sections 352(5A) and 378 of the POCA. In the case of urgency, a request may be sent via the International Criminal Police Organisation (Interpol or Europol) or any person competent to receive it under any provisions adopted under the EU Treaties, for onward forwarding to the receiving country.

600. New section 375A(10) of the POCA provides a power to make rules of court as to the practice and procedure to be followed in connection with proceedings relating to requests for assistance made by a judge.

601. New section 375B of the POCA provides that evidence obtained by a request for assistance under new section 375A must not be used for any other purpose other than for the purpose of the investigation for which it was obtained or for the purposes of certain proceedings. However, the court, tribunal, government or authority that received the request and provided the evidence, can consent to the use of the evidence for other purposes.

602. New sections 408A and 408B of the POCA provide the equivalent provisions to sections 375A and 375B of the POCA for Scotland.

603. Part 3 of Schedule 19 makes consequential amendments to the provisions of the POCA, as amended by Parts 1 and 2 of that Schedule, to insert references to immigration officers and officers of the National Crime Agency.

Section 50: Extradition

604. Section 50 gives effect to Schedule 20

Schedule 20: Extradition

605. Part 1 of Schedule 20 amends the Extradition Act 2003 ("the EA 2003") to provide for a new forum bar to extradition. Forum concerns the place where a person ought to be prosecuted for an offence he or she is alleged to have committed. *Paragraphs 1, 2 and 3* of Schedule 20 amend Part 1 of the EA 2003, which deals with extradition to European Union Member States, while p*aragraphs 4, 5 and 6* similarly amend Part 2 of the EA 2003, which deals with extradition to non-European Union Member States with which the UK has extradition relations.

606. The amendments to the EA 2003 would require the judge at an extradition hearing to consider the issue of forum when deciding whether an individual should be extradited to face prosecution. Paragraphs 3 and 6 of Schedule 20 insert new sections 19B and 83A into the EA 2003, which provide that extradition can be barred by reason of forum if the

judge decides that: firstly, a substantial measure of the relevant activity was performed in the UK; and secondly, having regard to a list of specified matters, it would not be in the interests of justice for the extradition to take place. Subsection (3) of new sections 19B and 83A outlines the specified matters relating to the interests of justice: (i) where most of the harm or loss occurred; (ii) the interests of any victims; (iii) any belief of a UK prosecutor that the UK is not the most appropriate place to prosecute the person; (iv) whether evidence needed to prosecute the person is or could be made available in the UK; (v) any delay that may result in proceeding in one country rather than another; (vi) the desirability and practicality of all prosecutions relating to the offence taking place in one place; and (vii) the person's connections with the UK.

607. Paragraphs 3 and 6 also insert new sections 19C, 19D and 19E, and 83B, 83C and 83D into the EA 2003, which provide that extradition cannot be barred on forum grounds if a designated prosecutor issues a certificate that he or she has: firstly, considered the offences for which the person could be prosecuted in the UK; secondly, decided that there are one or more such offences which correspond to the extradition offence; and, thirdly, decided that either the person should not be prosecuted in the UK for a corresponding offence because the prosecutor believes that there is insufficient admissible evidence or it would not be in the public interest, or believes that the person should not be prosecuted in the UK because of concerns about disclosure of sensitive material. A designated prosecutor may apply for an adjournment in the proceedings in order to consider whether to give a certificate. The certificate can be challenged, but only as part of an appeal to the High Court under the EA 2003. The High Court must apply the procedures and principles of judicial review when reviewing a certificate. If the High Court quashes a certificate, it must then consider the issue of forum.

608. *Paragraphs 7, 8 and 9* contain transitional provisions, savings and repeals consequent to the amendments made by paragraphs 1 to 6.

609. *Paragraphs 10, 11, 12 and 13* of Part 2 of Schedule 20 amend the EA 2003 to provide that in Part 2 cases, that is those involving extradition to non-European Union Member States with which the UK has extradition relations, human rights issues, including those raised after the end of the normal statutory process, must not be considered by the Secretary of State, but may be raised with the courts right up until the time of surrender. At present, human rights matters in Part 2 cases are considered by the judge at an extradition hearing and any subsequent appeal hearing(s). However, once the appeal process is complete, but before the person's surrender has taken place, the person may raise human rights issues with the Secretary of State, but only new representations that have not already been considered by the courts.

610. Paragraphs 10 to 13 of the new Schedule amend the process by ensuring that the Secretary of State is not to consider human rights issues raised after the end of the statutory appeal process or indeed at any time during the Part 2 process. Instead, in cases where the person wishes to raise late human rights issues he or she will be able to give notice of appeal out of time. The High Court will consider the appeal if it is satisfied that: (i) the appeal is necessary to avoid real injustice; and (ii) the circumstances are exceptional and make it appropriate to consider the appeal.

611. Part 3 of Schedule 20 addresses concerns raised by the UK Supreme Court about certain aspects of the operation of the EA 2003 when an appeal of a devolution issue is made to the UK Supreme Court under the Scotland Act 1998. Part 3 of the Schedule principally provides that where the authority or territory seeking a person's extradition intends to appeal to the UK Supreme Court against the determination of a devolution issue, the court must remand the person whose extradition is sought in custody or on bail.

612. *Paragraph 17* provides that where a judge has ordered a person's discharge at an extradition hearing and the authority that issued the arrest warrant under Part 1 of the EA 2003 ("the issuing authority") intends to appeal to the High Court under section 28 of the EA 2003, then the judge must remand the person in custody or on bail whilst the appeal is pending. Paragraph 17 secures that section 30 of the EA 2003 does not

apply to Scotland and inserts a new section 30A into the EA 2003 setting out when an appeal ceases to be pending where the issuing authority intends to appeal to the High Court under section 28 of the EA 2003. This new section 30A takes account of there being a subsequent appeal of a devolution issue to the UK Supreme Court by the issuing authority.

613. Section 33 of the EA 2003 sets out the powers of the UK Supreme Court when considering an appeal under Part 1 of that Act in English and Welsh extradition proceedings. This includes setting out when the UK Supreme Court must remand in custody or on bail the person who is the subject of extradition proceedings. This section only applies to appeals to the UK Supreme Court under Part 1 of the Act and so does not apply to an appeal of a devolution issue to the UK Supreme Court in Scottish extradition proceedings. *Paragraph 18* inserts new section 33ZA into the EA 2003 requiring the UK Supreme Court to remand a person in custody or on bail if on an appeal of a devolution issue in extradition proceedings the UK Supreme Court order that person's extradition or remits the case to the High Court.

614. Section 33A of the EA 2003 requires the court to remand a person in custody or on bail whilst an appeal by the issuing authority to the UK Supreme Court under section 32 of the EA 2003 is pending. Section 33A does not apply to Scotland. *Paragraph 19* inserts new section 33B into the EA 2003 to require the High Court to remand a person is custody or on bail while an appeal of a devolution issue by the issuing authority to the UK Supreme Court is pending.

615. *Paragraph 20* amends section 34 of the EA 2003 to make clear that the provisions of the EA 2003 do not prevent an appeal of a devolution issue to the UK Supreme Court.

616. Section 36 of the EA 2003 sets out the time limit for extraditing a person where there is an appeal under section 26 of that Act and the result of the appeal process is that the person is to be extradited. Section 36 does not take account of the possibility of an appeal of a devolution issue to the UK Supreme Court in Scottish extradition proceedings. *Paragraph 21* amends section 36 so that it does not apply to Scotland and inserts new section 36A that only applies to Scotland. The new provision sets out the time limit for extraditing a person where there is an appeal under section 26 in Scottish extradition proceedings and the result of the appeal process is that the person is to be extradited.

617. Section 107 of the EA 2003 applies where a judge has ordered a person's discharge at an extradition hearing and the category 2 territory requesting the person's extradition intends to appeal to the High Court under section 105 of the EA 2003. In these circumstances the judge is required to remand the person in custody or on bail while the appeal is pending. In determining when an appeal ceases to be pending section 107 does not take account of there being a subsequent appeal of a devolution issue to the UK Supreme Court. *Paragraph 23* provides that section 107 does not apply to Scotland and inserts new section 107A into the EA 2003 which only applies to Scotland. The new provision is based on section 107 but in determining when an appeal ceases to be pending takes account of there being a subsequent appeal of a devolution issue to the UK Supreme Court.

618. Section 112 of the EA 2003 applies where the Secretary of State or Scottish Ministers order a person's discharge from extradition proceedings. Where the category 2 territory intends to appeal against this decision to the High Court under section 110, the remand order in respect of the person whose extradition is sought remains in force while the appeal is pending. In determining when the appeal ceases, section 112 does not take account of the category 2 territory subsequently appealing a devolution issue to the UK Supreme Court. *Paragraph 24* provides that section 112 does not apply to Scotland and inserts new section 112A into the EA 2003 which only applies to Scotland. The new provision is based on section 112 but in determining when an appeal ceases to be pending, takes account of there being a subsequent appeal to the UK Supreme Court

by the category 2 territory to the UK Supreme Court against the determination of a devolution issue by the High Court.

619. Section 115A of the EA 2003 applies where on appeal under Part 2 of the Act, the High Court orders a person's discharge and the category 2 territory requesting the person's extradition intends to appeal against the High Court's decision under section 114 of the Act. In these circumstances, the court must remand the person in custody or on bail while the appeal is pending. This section does not apply to Scotland as there can be no appeal to the UK Supreme Court under section 114. There is no equivalent provision where the category 2 territory intends to appeal a devolution issue to the UK Supreme Court. *Paragraph 25* inserts new section 115B into the EA 2003 which applies to Scotland and provides where on an appeal under Part 2 of the EA 2003 the High Court orders a person's discharge and the category 2 territory intends to appeal a devolution issue to the UK Supreme Court. In these circumstances the High Court must remand the person is custody or on bail pending the UK Supreme Court appeal.

620. Section 116 of the EA 2003 provides that a decision by a judge, the Secretary of State or Scottish Ministers under Part 2 of the Act can only be challenged by means of an appeal under Part 2 of the Act. *Paragraph 26* amends section 116 to make clear that this section does not prevent an appeal of a devolution issue to the UK Supreme Court in Scottish extradition proceedings.

621. Section 118 of the EA 2003 applies where there is an appeal to the High Court under Part 2 of the Act against a decision relating to a person's extradition and the effect of the appeal process is that the person is to be extradited. Section 118 sets out the time limit for the person's extradition. Section 118 does not take account of there being an appeal of a devolution issue to the UK Supreme Court in Scottish extradition proceedings. *Paragraph 27* amends section 118 so that it does not apply to Scotland and inserts new section 118A of the EA 2003 which only applies to Scotland. The new provision sets out the time limit for extraditing a person where there is an appeal under Part 2 and the result of the appeal process is that the person is to be extradited and takes account of there being an appeal of a devolution issue to the UK Supreme Court.

622. Section 115 of the EA 2003 sets out the powers of the UK Supreme Court where there is an appeal under section 114 of the Act including the circumstances when the UK Supreme Court must remand a person in custody or on bail. Section 114 does not apply to Scotland. There is no equivalent provision in relation to remand where a devolution issue is appealed to the UK Supreme Court. *Paragraph 28* inserts new section 118B into the EA 2003 requiring the Supreme Court to remand a person in custody or on bail if on an appeal of a devolution issue the UK Supreme Court orders the person's extradition or remits the case to the High Court.