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

CRIMINAL JUSTICE AND COURTS ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Criminal Justice

Dangerous offenders

Section 1: Maximum sentence for certain offences to be life imprisonment

113. Section 1 increases the maximum penalty on indictment for three terrorism-related offences to life imprisonment in *subsections (1), (2) and (3)*. These are the offences of making or possession of explosive under suspicious circumstances (section 4 of the Explosive Substances Act 1883); weapons training for terrorism (section 54 of the Terrorism Act 2000); and training for terrorism (section 6 of the Terrorism Act 2006). Those provisions extend to England and Wales, Scotland and Northern Ireland.

114. *Subsection (4)* of section 1 provides that a life sentence may only be imposed for one of these offences where the offence is committed on or after the date of the commencement of these provisions.

Section 2: Specified offences

115. Section 2 provides for the offence of making or possession of explosive under suspicious circumstances to be added to Schedule 15 to the Criminal Justice Act 2003. It also adds offences of encouraging or assisting in the commission of an offence of murder to that Schedule. Schedule 15 sets out serious sexual and violent offences which are subject to the dangerous offenders sentencing scheme. Schedule 15 is relevant for the purposes of: eligibility for an extended determinate sentence (imposed under sections 226A and 226B of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006); and the duty to impose a life sentence (imposed under section 225 or 226 of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006) where the offence carries a maximum sentence of life imprisonment and the court considers that there is a significant risk to the public of serious harm from further such offences.

116. *Subsection (2)* adds the offence under section 4 of the Explosive Substances Act 1883 (making or possession of explosive under suspicious circumstances) to Part 1 of Schedule 15 to the Criminal Justice Act 2003: thereby making it a specified violent offence for the purposes of Chapter 5 of Part 12 of the Criminal Justice Act 2003 and eligible for the dangerous offenders sentencing scheme in sections 225, 226, 226A and 226B.

117. *Subsection (4)* adds the offence under Part 2 of the Serious Crime Act 2007 of encouraging or assisting the commission of the offence of murder and incitement to murder to Schedule 15. *Subsection (4)* also restates provision about an attempt to commit murder and conspiracy to commit murder.

118. In light of the express reference to Part 2 of the Serious Crime Act 2007 added by the amendment made by *subsection (4), subsections (3) and (7)* restate the other provisions about inchoate offences in Schedule 15 to add an express reference to offences under Part 2 of that Act involving other offences listed in that Schedule.

119. *Subsection (5)* omits the offence under section 33 of the Sexual Offences Act 1956 (keeping a brothel) from Schedule 15 and *subsection (6)* adds the offence under section 33A of that Act (keeping a brothel used for prostitution) to Schedule 15.

120. *Subsection (8)* provides that where an offender is sentenced after commencement of these provisions, these provisions will apply, regardless of when the offence was committed.

121. However, *subsections (10) and (11)* provide for some different transitional arrangements for these provisions. A life sentence (under section 225 or 226 of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006) can only be imposed for an offence under section 4 of the Explosive Substances Act 1883 or an offence of encouraging or assisting the commission of the offence of murder if that offence is committed on or after the date of the commencement of these provisions.

Section 3: Schedule 15B offences

122. Section 3 adds various terrorism and terrorism-related offences to Schedule 15B to the Criminal Justice Act 2003. Schedule 15B sets out particularly serious sexual and violent offences which are relevant for the purposes of: eligibility for the automatic life sentence for a second Schedule 15B offence imposed under section 224A and corresponding provision in the Armed Forces Act 2006; the availability of an extended determinate sentence under section 226A and corresponding provision in the Armed Forces Act 2006, as a conviction for a Schedule 15B offence satisfies the 'previous conviction' condition for the imposition of an extended determinate sentence; and the release arrangements for those serving an extended determinate sentence (imposed under sections 226A and 226B and corresponding provision in the Armed Forces Act 2006). This change has the effect that an offender given an extended determinate sentence for one of these offences will not be eligible for automatic release once the two-thirds point of the appropriate custodial term has been reached, but instead will be referred by the Secretary of State to the Parole Board at that point. (Section 4 of the Act will make early release from an extended determinate sentence discretionary in all cases).

123. *Subsections (2) to (5)* add the listed terrorism and terrorism-related offences to Schedule 15B to the Criminal Justice Act 2003.

124. *Subsections (6) to (8)* clarify the application of Schedule 15B to the Criminal Justice Act 2003 to foreign EU member State service offences. Paragraph 49B of Schedule 15B as inserted provides a new definition of a member State service offence, which will ensure that previous convictions from a foreign EU service court operating outside that EU Member State will count as relevant previous convictions for the purposes of eligibility for the life sentence in section 224A of the Criminal Justice Act 2003; and eligibility for imposition of an extended determinate sentence under section 226A of that Act.

125. *Subsection (9)* provides that an automatic life sentence can only be given on account of one of these offences where the 'second strike' offence is committed on or after the date of the commencement of these provisions.

126. *Subsection (10)* provides that a previous conviction for one of these offences will satisfy the 'previous conviction' condition for the imposition of an extended determinate sentence for offenders sentenced on or after the date of the commencement of these provisions, regardless of when that prior offence was committed.

127. S*ubsection (11)* provides that the changes to the release arrangements for offenders given an extended determinate sentence for one of these offences apply to offenders serving a sentence imposed on or after the date of the commencement of these provisions, whenever the offence in question was committed.

128. *Subsection (12)* makes provision about determining the date of an offence for the purposes of section 224A of the Criminal Justice Act 2003 and section 218A of the Armed Forces Act 2006. It provides that offences found to have been committed over a period of two or more days, or at an unknown point during a period of two of more days, are to be treated as though committed on the last of those days.

Section 4: Parole Board release when serving extended sentences

129. Section 4 alters the release arrangements for extended determinate sentences, so that all offenders serving such sentences are subject to Parole Board release between the two-thirds and end points of the custodial term (instead of automatic release at the two-thirds point) rather than only offenders serving sentences imposed for more serious offences, as at present.

130. Section 4 amends section 246A of the Criminal Justice Act 2003, which sets out the arrangements for the release of prisoners serving extended determinate sentences (imposed under sections 226A and 226B of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006).

131. *Subsections (2) and (3)* amend section 246A to provide that, in relation to offenders sentenced to an extended determinate sentence after the commencement of these provisions, the Secretary of State must refer all such prisoners to the Parole Board when the two-thirds point of the appropriate custodial term has been reached under section 246A(4).

Section 5: Minor amendments

132. This section makes provision in relation to the life sentence under section 224A of the Criminal Justice Act 2003 (and corresponding provision in the Armed Forces Act 2006), and the extended determinate sentence under section 226A of that Act.

133. *Subsection (1)* makes provision about determining the date of an offence for the purposes of section 224A of the Criminal Justice Act 2003. It provides that offences found to have been committed over a period of two or more days, or at an unknown point during a period of two or more days, are to be treated as though committed on the last of those days. *Subsection (3)* makes equivalent provision for corresponding provision in the Armed Forces Act 2006.

134. *Subsection (2)* extends the provision allowing courts to treat certificates from another court, in respect of a previous conviction, as evidence of the nature of the crime (for example, that an offence of robbery included the use of a firearm), so that it applies for the purpose of determining eligibility for an extended determinate sentence under section 226A of the Criminal Justice Act 2003 as well as a life sentence under section 224A of that Act.

Other offenders of particular concern

Section 6: Sentence and Parole Board release for offenders of particular concern

135. Section 6 gives effect to Schedule 1 which sets out arrangements for the sentencing of, and release of, offenders convicted of the listed offences of particular concern. Offenders on whom the new sentence is imposed will be subject to Parole Board release between the halfway and end point of the custodial term instead of automatic release at the halfway point. Paragraph 2 of the Schedule inserts new section 236A of the Criminal Justice Act 2003, which provides for the new sentence; paragraph 6 of the Schedule

inserts new section 244A of that Act, which provides for the release arrangements for the new sentence.

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

136. Schedule 1 introduces a new sentence for adult offenders who have been convicted of an offence listed in new Schedule 18A to the Criminal Justice Act 2003 and have been given a sentence of imprisonment (but not a life sentence or an extended determinate sentence under section 226A). The new sentence must consist of a custodial term and a one year period of licence, and offenders serving the new sentence will be subject to discretionary release by the Parole Board between the halfway and end point of the custodial term.

137. Schedule 1 amends the Criminal Justice Act 2003, in particular to insert new sections 236A and 244A and new Schedule 18A.

138. *Paragraph 2* inserts new section 236A, which forms a new Chapter 5A of Part 12.

139. Subsection (1) of new section 236A sets out the circumstances in which an offender will fall to be sentenced under subsection (2). Where the court decides to impose a custodial sentence in respect of an offence listed in Schedule 18A (committed when the offender is 18 or older), and the court does not impose a life sentence or an extended determinate sentence (under section 226A of the Criminal Justice Act 2003), the court is obliged to impose a sentence of imprisonment which consists of the appropriate custodial term and a 1 year period to be spent on licence. Where the offender is aged 18-20, the sentence will be for detention in a young offender institution (see *paragraph 10)*.

140. Subsection (3) of new section 236A defines 'the appropriate custodial term' as that which in the opinion of the court ensures the sentence imposed is appropriate. Subsection (4) prevents the offender from receiving a longer sentence than could have been given at the time the offence was committed.

141. Subsection (5) clarifies that this sentence may be imposed in respect of one offence, or in respect of one or more associated offences. Subsection (6) of new section 236A gives the Secretary of State a power to add or remove offences by order (subject to the affirmative procedure) to or from Schedule 18A, or to amend those offences; subsection (7) provides that an amendment made by such an order could apply to anyone sentenced on or after the date on which the amendment comes into force, regardless of when the offence was committed.

Offences of particular concern

142. *Paragraph 4* inserts new Schedule 18A ("Sentence under section 236A: offences") into the Criminal Justice Act 2003. Offences listed in Schedule 18A are subject to the sentence in section 236A and the release arrangements in new section 244A of the Criminal Justice Act 2003.

Terrorism

143. Paragraphs 1 to 18 of new Schedule 18A list the terrorism and terrorism-related offences which fall under the new sentencing arrangements set out in new section 236A. In relation to the terrorism-related offences listed in paragraphs 1 to 6, these are only subject to the sentence in section 236A and the release arrangements in new section 244A if they are committed with a terrorist connection. A terrorist connection is defined in paragraph 24 of the Schedule; a court must have determined that there is such a connection under section 30 of the Counter-Terrorism Act 2008.

Sexual offences

144. Paragraphs 19 and 20 list the sexual offences which fall under the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

Attempts etc to commit preceding offences or murder

145. Paragraphs 21 and 22 provide for inchoate offences involving an offence listed in paragraphs 1 to 20 and inchoate offences in connection with murder where there is a terrorist connection to be included in the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

Abolished offences

146. Paragraph 23 ensures that historic offences which have been abolished but which are equivalent to the Schedule 18A offences fall under the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A.

Release on licence to be directed by the Parole Board

147. *Paragraph 5*amends section 244(1) of the Criminal Justice Act 2003 to exempt the Secretary of State from the general duty to release a fixed-term prisoner on licence once they have served the requisite custodial period, in a case where the prisoner will be released in accordance with new section 244A of the Criminal Justice Act 2003.

148. *Paragraph 6* inserts new section 244A ("Release on licence of prisoners serving sentence under section 236A") into the Criminal Justice Act 2003. Section 244A provides for the release arrangements which apply to any offender sentenced under new section 236A.

149. Under subsection (2) of section 244A such offenders must be referred to the Parole Board once they have served the requisite custodial period, which is defined in section 244A(6) as half of the appropriate custodial period imposed by the court (or where a prisoner is serving consecutive or concurrent sentences the requisite custodial period calculated in accordance with the aggregation of the sentences under sections 263(2) and 264(2)). Section 244A(6) defines 'the appropriate custodial term' as that determined by the court as such under section 236A. If an offender is referred to the Parole Board and is not released at that time, they are entitled to be referred to the Parole Board again at least every two years (see section 244A(2)(b)).

150. In accordance with subsections (3) and (4) of section 244A, if the Parole Board believes it is not necessary for the protection of the public for the offender to be detained they may direct the offender's release and the Secretary of State must release a prisoner if the Parole Board so directs.

151. Subsection (5) of section 244A obliges the Secretary of State to release a prisoner at the end of the appropriate custodial term imposed by the court, unless the prisoner has already been released on licence and recalled under section 254 of the Criminal Justice Act 2003 within that time.

152. *Paragraph 7* amends section 246 of the Criminal Justice Act 2003 to provide that release on Home Detention Curfew is not available to these offenders.

153. *Part 2* of Schedule 1 inserts provision in the Armed Forces Act 2006 that is equivalent to the new sentencing arrangements in new section 236A of the Criminal Justice Act 2003.

154. *Part 3* of Schedule 1 makes transitional and transitory provision in relation to the new sentencing arrangements set out in section 236A of the Criminal Justice Act 2003 (and corresponding provision in the Armed Forces Act 2006). *Paragraph 9* provides that

the new sentencing arrangements apply to anyone sentenced on or after the date of the commencement of these provisions, even if that person was convicted prior to that date. *Paragraph 10*contains a transitory provision to convert references to imprisonment in the new provisions, as they apply to persons aged 18-20, into references to detention in young offender institutions. Such a sentence is still possible, pending the coming into force of section 61 of the Criminal Justice and Court Services Act 2000 (which will abolish a sentence of detention in a young offender institution).

155. *Part 4* of Schedule 1 makes provision consequential on the creation of the new sentencing arrangements set out in new section 236A of the Criminal Justice Act 2003, the release arrangements in new section 244A of that Act and the corresponding provisions in the Armed Forces Act 2006.

Release and recall of prisoners

Section 7: Electronic monitoring following release on licence etc

156. Section 7 makes provision for a mandatory electronic monitoring condition to apply to offenders released from custody on licence. The electronic monitoring condition may be for monitoring of compliance with other licence conditions or monitoring of whereabouts as a stand alone licence condition, or both. Under the legislation prior to the changes in this Act, contained in section 62 of the Criminal Justice and Court Services Act 2000, these conditions may be imposed but only on a discretionary, case by case, basis. In addition, by virtue of section 31 of the Crime (Sentences) Act 1997, conditions may only be attached to an indeterminate sentence prisoner's licence on the recommendation of the Parole Board.

157. *Subsection (2)* amends section 62 of the Criminal Justice and Court Services Act 2000 and provides that any electronic monitoring condition must also state who is responsible for the monitoring and gives the Secretary of State an order-making power, subject to the negative procedure, to specify a description of a person responsible for electronic monitoring.

158. *Subsection (3)* inserts new sections 62A and 62B into the Criminal Justice and Court Services Act 2000. Section 62A(1) provides for an order-making power, subject to the negative procedure, to allow the Secretary of State to provide that offenders released from custody on licence must be subject to compulsory electronic monitoring. Section 62A(2) allows for the Secretary of State to require electronic monitoring in particular cases and to specify the duration of the compulsory condition, which may be for a period shorter than the licence period. The period may be different for different groups of offenders (as provided for by section 76 of the Criminal Justice and Court Services Act 2000). Section 62A(3) allows for the Secretary of State to specify which offenders will be subject to electronic monitoring by reference to whoever is monitoring the offender. It also allows the Secretary of State to make provision by reference to whether a person specified in the order is satisfied of a matter. For example, it might refer to cases in which the Secretary of State is satisfied that the offender has a physical or mental health problem which renders the offender unsuitable for the licence condition, or cases in which a person is satisfied that it is impossible to make arrangements for the offender to recharge the battery in the tag. The Secretary of State may prescribe which offenders must be subject to compulsory electronic monitoring; for example, groups of offenders by type of offence, such as all burglars, or by type of sentence, such as all those serving an Extended Determinate Sentence.

159. New section 62A(4) has the effect that, if an offender is serving one of the specified sentences, a compulsory electronic monitoring condition cannot be applied to that person. The sentences are certain custodial sentences available for young offenders. Under these sentences, electronic monitoring will still be available but on a discretionary basis.

160. The use of data, including location data, gathered under an electronic monitoring condition (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. Section 62B imposes a duty on the Secretary of State to issue a code of practice on the processing of such data (which will include retention, use and sharing of data).

161. *Subsection (4)* introduces Schedule 2 which contains a number of consequential provisions.

162. *Subsection (5)* applies the provisions to offenders released from custody on or after the day on which they are commenced.

Schedule 2: Electronic monitoring and licences etc: consequential provision

163. Schedule 2 makes consequential amendments relating to the provisions in section 7. In particular, *paragraph 1* amends section 31 of the Crime (Sentences) Act 1997 to enable a compulsory electronic monitoring licence condition to be imposed on a life sentence prisoner without a recommendation or direction from the Parole Board.

Section 8: Recall adjudicators

164. Section 8 provides a power for the Secretary of State to appoint "recall adjudicators" whose function is to review the detention of recalled determinate sentence prisoners. This function is currently performed by the Parole Board. This section removes the statutory requirements in the Criminal Justice Act 2003 ("2003 Act") for the Secretary of State to refer determinate sentence recalled prisoners to the Parole Board and replaces references to the Board in that context with references to a "recall adjudicator". The Secretary of State is able to appoint the Parole Board or any other person to be a recall adjudicator.

165. *Subsection (1)* inserts a new section in the 2003 Act after section 239. New section 239A provides for the Secretary of State to appoint and remunerate recall adjudicators to carry out all or some of the review functions for recalled determinate sentence prisoners. The Secretary of State's power includes power to appoint people to carry out such functions only in a specified geographical area or only in relation to a specified type of case. Such functions have to be carried out in accordance with any guidance issued by the chief recall adjudicator as appointed by the Secretary of State. The Secretary of State is able to issue rules about proceedings of recall adjudicators. The rules will be made by statutory instrument subject to the negative procedure.

166. *Subsection (2)* confirms that the amendments of the 2003 Act in section 9 of the Act, which deal with the test for release after recall for determinate sentence prisoners, confer functions on recall adjudicators.

167. *Subsection (3)* introduces the new Schedule 3 which provides for further consequential changes to other enactments to reflect the appointment of recall adjudicators.

168. In particular, Schedule 3 amends:

- *Mental Health Act 1983* – There is provision in section 50 of that Act under which Parole Board powers in respect of the release of prisoners may be disregarded in respect of prisoners subject to the Mental Health Act 1983. The same provision has been made in respect of recall adjudicators' powers to direct the release of determinate sentence recalled prisoners. Similarly, section 74 of that Act makes references to the Parole Board and restricted patients subject to restriction directions. References to recall adjudicators have been added.

- *Criminal Justice Act 2003* –

— Section 250 (licence conditions) is amended to provide that, in respect of a prisoner serving an extended sentence, where the Parole Board directs the initial release the Board is responsible for setting and varying certain licence conditions (as now) but where a recall adjudicator directs release following recall, the adjudicator has those responsibilities in respect of the licence.

— Section 260(2B) (early release from prison of extended sentence prisoners who are liable to be removed from the United Kingdom) provides that the Secretary of State's power of removal applies whether or not the Parole Board has given a direction to release. Equivalent provision has been made in relation to recall adjudicators.

— A definition of "recall adjudicator" has been added to section 268 (interpretation of Chapter 6 of Part 12).

— For prisoners whose release is subject to the modifications in Schedule 20B of the 2003 Act (transitional provision for certain cases, including those originally dealt with under the Criminal Justice Act 1967 and the Criminal Justice Act 1991), similar amendments have been made in respect of the setting and varying of licence conditions and the early release of prisoners liable to be removed from the UK.

- *Domestic Violence, Crime and Victims Act 2004* – Schedule 9 to this Act has been amended so that recall adjudicators are listed as one of the authorities falling within the remit of the Commissioner for Victims and Witnesses, in the same way as the Parole Board.

- *Offender Management Act 2007* – Section 3(7)(a) (arrangements for the provision of probation services: risk of conflict of interest) has been amended to require the Secretary of State to have regard to the need to take reasonable steps to avoid a conflict of interest between the obligations of providers of probation services to provide assistance to recall adjudicators and their financial interests. Section 14 has also been amended to provide that the Secretary of State can disclose information to recall adjudicators for offender management purposes.

- *Coroners and Justice Act 2009* – The work of the Parole Board is covered by section 131 (annual report of Sentencing Council for England and Wales: effect of factors not related to sentencing). This has been amended to include reference to the work of recall adjudicators.

- *Equality Act 2010* – Schedule 19 lists the public authorities that are covered by the provisions of the Act, which includes the Parole Board. Recall adjudicators have been added to this list.

Section 9: Test for release after recall: determinate sentences

169. Section 9 amends the provisions dealing with the recall and further release of prisoners in Chapter 6 of Part 12 of the Criminal Justice Act 2003. It adds to the public protection test, applicable prior to this Act, to include consideration of whether the offender is highly likely to breach their licence conditions if released. This test applies where the Secretary of State is determining whether a recalled prisoner is suitable for automatic release and, where they are subject to discretionary release, when the Secretary of State and recall adjudicators are considering re-release.

170. *Subsection (2)* inserts a new subsection (4A) into section 255A of the Criminal Justice Act 2003 to require the Secretary of State to consider the likelihood of further non-compliance with licence conditions when deciding on the appropriate type of recall for an offender, as well as whether they present a risk of serious harm to the public.

171. *Subsection (3)* amends section 255B of that Act which deals with recalled offenders who are subject to automatic release after 28 days. *Subsection (3)(b)* inserts a new subsection (3A) in section 255B which provides that the Secretary of State must consider when exercising discretionary release powers whether it appears that the offender would be highly likely to breach a condition contained in their licence. This is in addition to the existing restriction based on risk of serious harm to the public.

172. Where a referral is made to a recall adjudicator to consider the offender's release before the end of the automatic release period, *subsection (3)(d)* inserts further subsections in section 255B – (4A), (4B) and (4C) – which set out the basis on which the adjudicator may consider release in these circumstances.

173. New subsection (4A) provides for the directions the recall adjudicator may make when determining the referral. New subsection (4B) reproduces the current public protection release test to be applied by the adjudicator when considering release. New subsection (4C) adds to that test by restricting the adjudicator's power to release where the adjudicator considers the offender would be highly likely to breach a condition contained in their licence if released.

174. *Subsection (3)(e)* replaces the current subsection (5) to make clear that the Secretary of State must give effect to any direction of the recall adjudicator to release.

175. *Subsection (4)* makes the same changes in respect of the discretion of the Secretary of State and recall adjudicators to release recalled offenders not subject to the automatic release provision in section 255B who are, instead, liable to be detained until the end of their sentence. It imposes a restriction on the exercise of the discretion where the prisoner would be highly likely to breach a condition contained in their licence if released by inserting new subsections (3A), (4A), (4B) and (4C) in section 255C of the Criminal Justice Act 2003 . These replicate the new subsections inserted in section 255B.

176. *Subsection (5)* repeals section 256 of the Criminal Justice Act 2003. Section 256 provides for how the Secretary of State and the Parole Board deal with referrals of recalled prisoners where the Board does not direct immediate release. This section is no longer needed as provision for how the Secretary of State and, now, recall adjudicators are to deal with such cases is now made in each of the relevant sections of that Act as amended by section 9.

177. *Subsection (6)* replaces subsection (1) of section 256A of the Criminal Justice Act 2003 with three new subsections, (1), (1A) and (1B), dealing with the further review of recalled prisoners. For a recalled prisoner who is serving one sentence of imprisonment the prisoner must have their case referred to a recall adjudicator annually. Where the prisoner is serving multiple sentences, however, and the recall period is running concurrently with the custodial part of another sentence (for example, where a further sentence has been imposed in addition to the recall for offences committed while on licence) then the case will not be referred to an adjudicator until the custodial part of the other sentence has been completed and the prisoner can be released on all sentences – rather than referred annually during that period.

178. *Subsection (6)(d)* replaces the provision for the Parole Board to fix a date for release on licence (section 256A(4)(b) of the Criminal Justice Act 2003) with provision for a recall adjudicator to direct that the prisoner be released on licence as soon as conditions in the direction are met. This is to allow conditional release of an offender on a given set of circumstances, for example when a particular accommodation is available.

179. *Subsection (6)(f)* inserts new subsections (4A) and (4B) in section 256A to provide that recall adjudicators must apply the risk of breach of a licence condition test as well as the public protection test when considering the release of recalled prisoners whose cases have been referred to an adjudicator on their review date under section 256A.

180. *Subsection (7)* removes a transitional provision for prisoners subject to earlier release provisions which becomes redundant on the repeal of section 256 of the Criminal Justice Act 2003.

181. *Subsection (8)* provides that the amendments made by this section apply to those recalled before the day on which these changes are brought into force, as well as those recalled after that date.

Section 10: Power to change test for release after recall: determinate sentences

182. Section 10 inserts a new section – 256AZA – in Chapter 6 of Part 12 of the Criminal Justice Act 2003. This provides an order-making power subject to the affirmative procedure to change the test to be applied (provided for in section 9) when the Secretary of State decides whether automatic release recall is suitable (as prescribed in section 255A) and the tests applied by the Secretary of State and recall adjudicators for release following recall (as prescribed in sections 255B, 255C and 256A).

Section 11: Initial release and release after recall: life sentences

183. *Subsection (1)* amends section 28(7) of the Crime (Sentences) Act 1997 to refer to the 'requisite custodial period' which is defined in section 268(1A) of the Criminal Justice Act 2003 (as inserted by section 14). Section 28(7)(c) of the Crime (Sentences) Act 1997 makes provision in relation to the point at which a life prisoner may require the Secretary of State to refer their case to the Parole Board to consider their release, where such a prisoner is also serving a determinate sentence of imprisonment or detention. This amendment is a consequence of the creation of the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A of the Criminal Justice Act 2003 (as inserted by Schedule 1); and of the creation of the extended determinate sentence under section 226A and 226B of that Act, as inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

184. *Subsection (2)* amends section 32 of the Crime (Sentences) Act 1997 by inserting the public protection release test applied when considering initial release so that it also applies where the Board is considering the release of recalled life sentence prisoners. This includes prisoners serving sentences of Imprisonment for Public Protection (IPP) who have been recalled.

185. *Subsection (3)* inserts a new paragraph in section 128(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which allows the release test to be changed by an order subject to the affirmative procedure. This ensures that the power to change the release test applies equally to the test as it appears in new subsection (5A) of section 32 of the 1997 Act, in relation to the release of recalled IPP prisoners. The power to amend the release test in section 128 does not apply to the test in respect of those serving life sentences, which cannot be amended by order.

186. *Subsections (4) and (5)* provide that the amendments made by subsections (1) and (2) of this section apply to those sentenced or recalled before the day on which these changes are brought into force, as well as those sentenced or recalled after that date.

Section 12: Offence of remaining unlawfully at large after recall

187. Section 12 creates a new offence of remaining unlawfully at large following a recall to custody.

188. *Subsection (1)* inserts a new section 32ZA into the Crime (Sentences) Act 1997 to provide for it to be a criminal offence for recalled indeterminate sentence prisoners to remain unlawfully at large. The offence is committed once the offender has been notified of the recall and fails to take all necessary steps to return to prison unless they have a reasonable excuse. Subsection (2) of section 32ZA provides that an offender is treated as being notified of recall if written notification has been delivered to an

appropriate address and the period specified in the notice has expired. Subsection (3) of section 32ZA defines an appropriate address as either an address at which the offender is permitted to stay or an address which is nominated under their licence. Subsection (4) of section 32ZA provides that an offender is also treated as being notified of their recall if their licence requires them to keep in contact with probation in accordance with instructions given by probation officers, they have failed to comply with an instruction and they have not complied with an instruction for at least 6 months.

189. Subsection (5) of section 32ZA provides that the offence of being unlawfully at large can be tried in either the magistrates' court or the Crown Court (an "either way" offence). The maximum penalty of 6 months which can be imposed by a magistrates' court will become 12 months when section 154(1) of the Criminal Justice Act 2003 is commenced (subsection (6) of section 32ZA). Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, when brought into force, will remove the limit on the fine that can be imposed in the magistrates' court for this offence; however until that point any fine imposed by the magistrates' court may not exceed the statutory maximum (subsection (7) of section 32ZA).

190. *Subsection (2)* inserts a new section 255ZA into the Criminal Justice Act 2003 to provide for it to be a criminal offence for recalled determinate sentence prisoners to remain unlawfully at large and provides the same provisions as outlined in paragraphs 187 and 188 above.

191. *Subsection (3)* provides that the offence of remaining unlawfully at large after recall will apply to all those who are already unlawfully at large after the revocation of their licences. Therefore, on commencement, offenders who are already unlawfully at large will be committing this offence if they have been notified of the recall, the time in the notification expires and the offender has not, without reasonable excuse, taken all necessary steps to return to prison.

Section 13: Offence of remaining unlawfully at large after temporary release

192. Section 13 provides for an increase in the maximum sentence for the offence of remaining unlawfully at large after a period of temporary release on licence and makes it an offence which can be tried in either the magistrates' court or Crown Court (an "either way" offence).

193. The section amends section 1 of the Prisoners (Return to Custody) Act 1995. *Subsection (2)* provides that the maximum penalties that can be imposed by (a) the Crown Court and (b) the magistrates' court to 2 years and 12 months respectively.

194. *Subsection (3)* provides that until section 154(1) of the Criminal Justice Act 2003 is commenced the maximum penalty which can be imposed by a magistrates' court is 6 months.

195. It also provides that until section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is commenced the maximum fine which can be imposed by a magistrates' court is a fine not exceeding the statutory maximum (currently £5,000).

196. *Subsection (4)* provides that the increased maximum penalties will not apply to those whose period of temporary release on licence had expired, or whose order of recall was made, before commencement.

Section 14: Definition of "requisite custodial period"

197. Section 14 inserts a definition of "requisite custodial period" into the interpretation provision in Chapter 6 of Part 12 of the Criminal Justice Act 2003. "Requisite custodial period" has different meanings for different sentences. For the purposes of a standard determinate sentence (covered by section 243A and 244), the 'requisite custodial period' ends at the half-way point; for the purposes of an extended determinate sentence (imposed under section 226A or 226B) it ends at the two-thirds point of the custodial

term, or the half-way point of the custodial term for extended sentences imposed under the previous regime (under section 227 or 228) (see sections 246A and 247); for the purposes of the new sentencing arrangements under new section 236A (inserted by Schedule 1 to this Act), it ends at the half-way point of the custodial term (see new section 244A). The definition of 'requisite custodial period' is relevant for the purposes of sections; 246 (power to release prisoners on licence before required to do so), 256A (as amended by section 9 of this Act) (further review), 260 (early removal of prisoners liable to removal from the United Kingdom) 261 (re-entry into United Kingdom of offender removed from prison early), paragraph 8 of Schedule 20A (modification of section 260) and section 28 of the Crime (Sentences) Act 1997 (as amended by section 11 of this Act) (initial release and release after recall: life sentences).

198. *Subsection (3)* makes amendments to section 247 of the Criminal Justice Act 2003 to introduce a definition of the 'requisite custodial period' in respect of an offender serving one sentence or two or more concurrent or consecutive sentences. The requisite custodial period for this type of extended sentence is one half of the custodial term imposed by the court where one sentence is being served and, for those serving multiple sentences, it is the period determined by sections 263(2) and 264(2) which deal with calculating relevant dates for concurrent and consecutive sentences.

Section 15: Minor amendments and transitional cases

199. Section 15 makes minor consequential amendments and provision to deal with transitional cases stemming from the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Prisons

Section 16: Drugs for which prisoners etc may be tested

200. Section 16 amends the provisions in the Prison Act 1952 ("the 1952 Act") which deal with testing prisoners for drugs. It expands the definition of drugs that a prisoner can be tested for to include a drug that is not controlled under the Misuse of Drugs Act 1971 ("the 1971 Act") and which is specified by the Secretary of State in prison rules. Currently, under section 16A of the 1952 Act, if an authorisation is in force in a prison, a prison officer may, in accordance with prison rules require a prisoner to provide a sample of urine for the purpose of ascertaining whether the prisoner has any drug in his body. Section 16A(3) defines "drug" as meaning any controlled drug for the purposes of the 1971 Act. Section 2 of, and Schedule 2 to, the 1971 Act define "controlled drug" as any substance or product specified in Part 1, 2 or 3 of that Schedule or that is subject to temporary control.

201. *Subsection (2)* amends section 16A(3) of the 1952 Act by expanding the definition of drug to include a "specified drug" which is defined as any substance or product specified in prison rules for the purposes of section 16A.

202. *Subsection (3)* inserts a new subsection (3A) into section 47 of the 1952 Act. Section 47 gives the Secretary of State the power to make rules for the regulation and management of prisons and other places of detention. Subsection (3A) provides that rules made under section 47 may specify any substance or product (which is not a controlled drug for the purposes of the 1971 Act) in relation to which a person may be required to give a sample for the purposes of section 16A. The effect of subsection (3A) is that the Secretary of State can specify in prison rules and rules for other places of detention a drug that is not controlled under the 1971 Act and which should be subject to testing under section 16A of the 1952 Act.

Cautions

Section 17: Restrictions on use of cautions

203. Currently, a simple caution provides a means for a constable to deal with a person aged 18 or over who has admitted committing a criminal offence in England and Wales and agrees to be given a caution. It does not involve any court or tribunal process or the imposition of any condition or sanction. The current provisions for adult simple cautions are set out in non-statutory guidance issued by the Secretary of State for Justice.

204. Section 17 places restrictions on the circumstances in which cautions may be used. The restrictions are greater the more serious the offence. *Subsection (1)* provides that the section applies where the person is aged 18 or over, has committed an offence in England and Wales and admits to committing the offence.

205. *Subsection (2)* provides that a constable may not give a caution for an offence triable only on indictment unless there are exceptional circumstances and the Director of Public Prosecutions consents.

206. *Subsection (3)* provides that a constable may not give a caution for an offence that is triable either way and which is specified in an order ("specified either way offence") made by the Secretary of State (subject to the negative procedure) unless there are exceptional circumstances.

207. *Subsection (4)* provides that a constable may not give a caution for a summary or a non specified either-way offence (those offences not already restricted by *subsections (2) and (3)*) if the person has, in the two years before the commission of the current offence, received a caution (including a youth caution and youth conditional caution under the Crime and Disorder Act 1998 as well as an adult conditional caution) or conviction for a similar offence unless there are exceptional circumstances. The Secretary of State has the power to amend by order (subject to the affirmative procedure), the period of two years between the current offence and previous similar offence (*subsection (7)*).

208. Whether there are exceptional circumstances and whether a previous offence is similar to the current offence are not to be determined by a police officer below a rank specified by the Secretary of State by order (*subsection (5)*). A determination must be made in accordance with guidance issued by the Secretary of State (*subsection (6)*).

209. *Subsection (10)* provides that the restrictions on giving a caution under this section apply to an offence irrespective of whether it was committed before or after this section comes into force.

Section 18: Restrictions on use of cautions: supplementary

210. Section 18 sets out the different parliamentary procedures for the orders that the Secretary of State may make under section 17 and provides that an order must be made by statutory instrument.

211. *Subsection (5)* contains an amendment to section 37B(7) of the Police and Criminal Evidence Act 1984. That section is about the decision of the Director of Public Prosecutions as to whether a person should be charged or cautioned. Under section 38B(7), if the DPP decides that a person should be cautioned, but it proves not to be possible to give a caution, the person must be charged. The amendment contained in subsection (5) makes clear that section 17 is to be taken into account in determining whether a caution is possible or not.

Section 19: Alternatives to prosecution: rehabilitation of offenders in Scotland

212. Section 19 amends the Rehabilitation of Offenders Act 1974 in order to address a legal competence problem that was identified by the Scottish Government in relation to the exercise of enabling powers in Schedule 3 to the 1974 Act. The amendment allows the

Scottish Ministers to make an order under paragraph 6 of Schedule 3 and section 7(4) (as applied by paragraph 8 of Schedule 3) of the 1974 Act setting out exclusions, modifications and exceptions to the general rules in the 1974 Act concerning spent alternatives to prosecution in relation to reserved matters. Scottish Ministers already have the power to do this in relation to convictions (the powers to do so having been transferred to Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2003).

Offences involving ill-treatment or wilful neglect

Section 20: Ill-treatment or wilful neglect: care worker offence

213. Section 20 makes it an offence for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully neglect that individual. The offence will apply in England and Wales.

214. *Subsection (2)* establishes the penalties to which an individual found guilty of the offence will be subject. On conviction on indictment, the penalty is imprisonment for a maximum of 5 years, or a fine, or both. On summary conviction (subject to subsection (9)), the penalty is imprisonment for a maximum of 12 months, or a fine, or both.

215. *Subsection (3)* defines "care worker" for the purposes of this section, as an individual who is paid specifically to provide health care for adults or children other than health care that is excluded (see *subsection (5)* and Schedule 4), or to provide adult social care. "Care worker" also includes an individual who is paid specifically to supervise or manage individuals providing such care, and a director or equivalent of an organisation providing such care. The intention is to ensure that the individual offence can apply to any individual perpetrator, not just those on the "front line" of care provision. However, it will only apply where the individual supervisor, director, etc has themselves directly committed ill-treatment or wilful neglect. They will not commit the individual offence by virtue of the acts or omissions of others they supervise or manage.

216. *Subsection (4)* defines "paid work" for the purposes of this section, as work for which an individual is paid, or is entitled to be paid, other than: a) payment in respect of reasonable expenses; b) payments to foster parents in respect of their work as a foster parent; c) a social security benefit; and d) a payment under arrangements under section 2 of the Employment and Training Act 1973 (to assist people to select, train for, obtain and retain employment)

217. The purpose of limiting the offence to those performing 'paid work', as defined, is to ensure that informal arrangements, such as unpaid family carers and friends, are not captured by the offence. The intention is also to exclude from the definition situations where an individual works as an unpaid volunteer, but receives, for example, reimbursement of travel costs to get to and from the place where they volunteer. Similarly, this exclusion would also cover an informal family carer who occasionally receives a contribution from the person they care for towards the personal costs they incur in providing that care. Such reimbursement is not to be treated as amounting to paid work. Payments received by foster parents specifically in respect of their work as foster parents, are also to be disregarded for the purposes of this section. The intention is also to exclude from the definition of paid work any social security benefit for which, for example, claimants are required to undertake unpaid work as a condition of receiving that benefit. So, for example, an individual working in an adult care home as part of the Department for Work and Pensions' "Work Programme" will not be treated as being in paid work.

218. *Subsection (5)* defines "health care" for the purposes of this offence. The definition includes services provided as part of the protection or improvement of public health, for example smoking cessation support, and is also intended to capture services, such as cosmetic surgery, that are not necessarily directly related to a medical condition. This

subsection also introduces Schedule 4, which defines "excluded health care" for the purposes of this section.

219. *Subsection (6)* defines "social care" for the purposes of this offence.

220. *Subsection (7)* specifies that where health care or adult social care is provided incidentally to a person's main duties, this should be disregarded for the purposes of the offence. So, for example, a prison officer who, as a "good Samaritan" act, assists a prisoner in adjusting a hearing aid, could be perceived as providing practical assistance within the definition of social care. However, the intention is that such activity would not fall within the scope of the offence. In this example, the prison officer would have provided the assistance (albeit in the course of performing their duties) incidentally to their custodial duties, not by virtue of being a care worker. The same principles would apply to, for example, police officers and office workers in similar circumstances.

221. *Subsection (8)* defines the terms "adult" and "child" - an individual is to be considered to be an adult once they have attained the age of 18 years. It also defines the phrase "foster parent" for the purposes of *subsection (4)*.

222. *Subsection (9)* makes provision for the maximum permitted sentence which can be imposed under *subsection (2)(b)* to be contingent on whether section 154(1) of the Criminal Justice Act 2003 has come into force at the time an offence under this section is committed. Where an offence under this section has been committed prior to section 154(1) coming into force the maximum sentence on summary conviction will be 6 months. .

223. *Subsection (10)* makes provision for the maximum level of any fine imposed under *subsection (2)(b)* to be contingent on whether section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has come into force at the time an offence under this section is committed.

Schedule 4: Ill-treatment or wilful neglect by care worker: excluded health care

224. Schedule 4 sets out a range of children's services and settings in which health care is to be treated as excluded health care for the purposes of section 20 (ill-treatment or wilful neglect: care worker offence). The Government's view is that there already exist sufficient safeguards in respect of children in these services and settings so that adequate protections are in place. For adults in these settings and services, the likelihood of them needing health care from someone who would meet the definition of "care worker" is very small, and the risk of them suffering ill-treatment or wilful neglect from such a care worker smaller still.

225. *Paragraph 1(1)* defines "excluded health care" for the purposes of the offence established in section 20. The scope of the exclusion covers health care provided in:

— all educational institutions listed in *paragraph 3*, including Academies, free schools, boarding schools, pupil referral units, and sixth form colleges;

— other premises while they, or a part of them, are being used for an education or childcare purpose described in *paragraph 2*, including early years or later years provision, childminding or day care;

— all children's homes and residential family centres.

226. *Sub-paragraph (2)* provides that health care provided on part of the premises of an educational institution listed in *paragraph 3* is not to be treated as excluded health care if, at the time it is provided, that part of the premises is being used for purposes other than purposes connected with the operation of the premises or an education or childcare purpose. For example, health care provided in a school hall while the hall is being used for a school assembly would be excluded health care, while health care provided in the

hall while it is being used as a venue by a community group, such as a keep fit club or charity event, would not.

227. *Sub-paragraph (3)* provides that health care provided at the premises of a hospital where education is provided is not to be treated as excluded health care.

228. *Paragraph 2* specifies the activities that are to be treated as an education or childcare purpose in respect of *paragraph 1(1)(d) and 1(2)(b).* For example, where a church hall is used to provide early years care as described in sub-paragraph (d) during the week, but also for parties, wedding receptions, community group meetings etc, in the evenings or at the weekend, only health care provided at the church hall while it is being used for the provision of early years care will be excluded health care. Health care provided at any other time, or on a part of the premises used for something other than the education or childcare purpose, will be subject to the care worker offence.

229. *Paragraph 3*defines the meaning of "educational institutions" in this Schedule. They include

— nursery, primary, and secondary schools, both maintained and independent;

— Academies and free schools;

— pupil referral units;

— sixth form colleges and special post-16 education institutions.

230. *Paragraph 4* defines various words and phrases for the purposes of this Schedule.

Section 21: Ill-treatment or wilful neglect: care provider offence

231. *Subsection (1)* provides for a care provider to commit an offence if:

— an individual employed or otherwise engaged by the care provider ill-treats or wilfully neglects someone to whom they are providing health care or adult social care and to whom the care provider owes a relevant duty of care; and

— the way in which the care provider manages or organises its activities amounts to a gross breach of that duty of care; and

— if that breach had not occurred, the ill-treatment or wilful neglect would not have happened, or would have been less likely to happen.

232. The overall approach to this offence is modelled, insofar as is practicable, on that of the offence of corporate manslaughter/homicide established in the Corporate Manslaughter and Corporate Homicide Act 2007 ("CMCHA 2007"). The intention is to resolve the difficulties associated with proving to the required level for a criminal offence the element of wilfulness on the part of an organisation. The CMCHA 2007 removed the necessity of identifying a single individual within the organisation's senior management structure of sufficient seniority to be acting as the "directing mind" of the organisation, and then proving that this individual behaved wilfully, such that the organisation as a whole can be considered to be guilty of the offence. Instead, the CMCHA 2007 focussed on the way an organisation managed or organised its activities, and on the duty of care that the organisation owed towards the victim. This section takes the same approach in respect of whether an organisation has conducted its affairs in a way that amounts to a gross breach of a duty of care owed towards someone who has been a victim of ill-treatment or wilful neglect by the care provider's employee or another individual engaged by it.

233. *Subsection (2)* defines "care provider" for the purposes of this section as a body corporate or unincorporated association which provides or arranges for the provision of health care (other than excluded health care) or adult social care, or an individual who provides such care and employs or otherwise makes arrangements with other persons

to assist in providing that care. The intention is to ensure that the definition covers not just provider organisations such as hospitals (whether NHS or privately run) and companies, but also partnerships such as GP practices, and sole traders such as single-handed GP practices.

234. *Subsection (3)* sets out the circumstances in which an individual is to be considered as part of a care provider's arrangements for the purposes of *subsection (1)*, specifying that the individual will be providing, or supervising or managing others providing, health care or social care as part of such care provided or arranged for by the care provider.

235. *Subsection (4)* defines "relevant duty of care" for the purposes of this section, as a duty owed under the law of negligence, or a duty that would be so owed were it not for legislative provisions which impose alternative liability in place of liability owed under the law of negligence. However, the duty will apply for the purposes of this offence only to the extent that it arises in connection with providing or arranging for the provision of health care or social care.

236. *Subsection (5)* makes it clear that the application of the offence, which requires a gross breach of a duty of care by the care provider to be shown, is not affected by common law rules precluding liability in the law of negligence where people are jointly engaged in a criminal enterprise or because a person has accepted a risk of harm. The intention is to avoid the possibility that, if it could be shown that the grounds for the care provider offence could otherwise be made out, a care provider could escape prosecution by relying on some illegality on the part of the victim, or an argument that the victim had somehow consented to the risk of harm when consenting to the care or treatment. For example, this provision ensures that a care home provider could not rely on an argument that a resident, in not objecting to being cared for by a particular care worker who had a history of poor behaviour, was somehow consenting to the risk if that care worker subsequently ill-treated or wilfully neglected them.

237. *Subsection (6)* clarifies the meaning of a "gross" breach of a duty of care by a care provider, as being where the care provider's conduct falls far below what could reasonably be expected in the circumstances.

238. *Subsection (7)* makes provision similar to that in section 20(7). For the purposes of this section, where the provision, or making of arrangements for the provision, of health or social care is incidental to the carrying out of other activities, it is to be disregarded for the purposes of the care provider offence. For example, a prison that makes arrangements for one of its prison officers to accompany a prisoner, who has suddenly fallen ill, to hospital would not be treated as a care provider, because the arrangements made are merely incidental to the organisation's primary custodial activities.

239. *Subsection (8)* excludes from the meaning of providing or making arrangements for the provision of health care, cases where a care provider organisation is merely making direct payments to an individual, under specified legislation, for that individual to use to purchase their own health care or social care services.

240. *Subsection (9)* defines certain words and phrases used in this section.

Section 22: Care provider offence: excluded care providers

241. Section 22 makes provision for certain types of organisation to be excluded from the meaning of "care provider" for the purposes of section 21.

242. *Subsection (1)* provides for local authorities in England to be excluded care providers when performing certain functions, including when providing health care as part of an integrated package of services in the exercise of its functions in respect of children's social care and when exercising its social services functions in relation to children.

243. *Subsection (2) and (3)* provides for organisations which have entered into arrangements with a local authority in England to exercise functions similar to those covered by *subsection (1)* to be excluded to the extent that they are carrying out those functions.

244. *Subsection (4) and (5)* makes provision for local authorities in Wales, and organisations that have entered into arrangements with a local authority in Wales to exercise functions on its behalf, to be excluded care providers to the same extent as those in England.

245. *Subsection (6)* makes provision for registered adoptions societies or registered adoption support agencies to be excluded care providers when providing adoption support services.

246. *Subsections (7) and (8)* define "local authority" and "child", "registered adoption society" and "registered adoption support agency" respectively for the purposes of this section.

Section 23: Care provider offence: penalties

247. Section 23 makes provision for the penalties that can be imposed by the courts in respect of a care provider that has been convicted of the offence established in section 21. The offence will be triable either way, that is in either a magistrate's court or the Crown Court.

248. *Subsection (1)* provides for the court to impose a fine, irrespective of which court the case has been tried in.

249. *Subsection (2)* provides for a court to make remedial orders and/or publicity orders, either instead of or as well as imposing a fine. This approach again mirrors that adopted by the CMCHA 2007. There is a precedent for providing for such orders in relation to health and social care in section 93 of the Care Act 2014, which makes provision for both remedial orders and publicity orders as penalties available to the court where an organisation has been convicted of the offence of providing false or misleading information.

250. *Subsection (3)* defines a "remedial order" as an order requiring the care provider to take specific steps to remedy any or all of the following:

a. the breach of the care provider's relevant duty of care;

b. any matter the court considers to have resulted from the breach and to be connected with the ill-treatment or wilful neglect;

c. any deficiencies in the care provider's management or organisational policies, its systems or its practices of which the breach appears to be an indication.

251. The intention is to make provision to oblige a care provider, against which such an order has been made, to take action to put right the specified management or organisational failures so that the offence cannot be repeated.

252. *Subsection (4)* defines a "publicity order" as an order requiring the care provider to take specific steps to publicise the following:

a. the fact that the care provider has been convicted of the offence;

b. the particulars of the offence, i.e. what the care provider did, or failed to do, that resulted in the conviction;

c. the amount of any fine imposed on the care provider by the court;

d. the terms of any remedial order made by the court against the care provider.

253. The intention here is to make provision to oblige a care provider to make public the fact that it has been convicted of the offence, and the penalties imposed on it as a result.

A publicity order is intended to make it impossible for a care provider to avoid being open and honest about a conviction for this offence.

254. *Subsection (5)* makes further provision about remedial orders, specifying that they can only be made if the prosecuting authorities make a specific application to the court, which must include the terms of the proposed order. In addition, when deciding on the terms of the order, the court must take into account any representations made or evidence submitted to it as to what those terms should be. Finally, any remedial order must include a time period within which the actions specified in the order must be completed. These requirements mean that a remedial order will always be tailored to the particular circumstances of the case, and will ensure that necessary actions to put right the failures identified are completed timeously.

255. *Subsection (6)* provides that a publicity order must include a time period within which the actions specified in the order must be completed. This is to ensure that the care provider complies with the provisions of the publicity order within a reasonable period.

256. *Subsection (7)* provides that failure to comply with the terms of either a remedial order or publicity order is itself an offence, punishable by the imposition of a fine. The objective is to ensure that the care provider complies with any remedial order or publicity order, or risk further legal action against it.

257. *Subsection (8)* provides for the maximum amount of a fine that can be imposed under *subsections (1)* and *(7)* to be contingent on whether section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has come into force at the time of the offence. If not, the references in those subsections to the sanction of a fine on summary conviction are to be taken as references to a fine not exceeding the statutory maximum.

Section 24: Care provider offence: application to unincorporated associations

258. Section 24 makes provision to ensure that the offence of ill-treatment or wilful neglect caused by a care provider can be properly applied to unincorporated associations, such as general practice or dentistry partnerships.

259. *Subsection (1)* provides that for the purposes of sections 21 and 23 an unincorporated association is to be taken as owing whatever duties of care it would owe if it were a body corporate.

260. *Subsection (2)* further provides that any prosecution under sections 21 or 23 brought against an unincorporated association must be brought in the name of the association, not in the name of any of its individual members.

261. *Subsection (3)* specifies that in any such prosecution the rules of court concerning the service of documents should be applied in respect of the unincorporated association as if it were a body corporate.

262. *Subsection (4)* provides that in proceedings under sections 21 or 23 against an unincorporated association, the legislative provisions listed in paragraphs (a) and (b) are to be applied as they would be applied to a body corporate.

263. *Subsection (5)* requires that any fine imposed on an unincorporated association convicted under sections 21 or 23 must be paid from the funds of the association, i.e. not by any individual member of it.

Section 25: Care provider: liability for ancillary and other offences

264. *Subsection (1)* expressly excludes secondary liability for the new ill-treatment or wilful neglect: care provider offence. It means that an individual cannot be convicted of aiding, abetting, counselling or procuring the commission of the care provider offence, or of encouraging or assisting in the commission of that offence. The intention here is to ensure that the care provider offence focuses on the behaviours and actions (or failures

to act) by the care provider organisation as a whole, rather than creating a route for the focus to be diverted towards a single individual within the care provider's management hierarchy. This does not though affect an individual's direct liability for the ill-treatment or wilful neglect: care worker offence.

265. *Subsections (2) to (5)* clarify that a conviction for the care provider offence would not preclude a care provider being convicted under legislation creating an offence relating to health care or social care, or a health and safety offence, on the same facts if this were in the interests of justice. It would therefore also be possible to convict an individual on a secondary basis for such an offence under such legislation under provisions such as sections 91 and 92 of the Health and Social Care Act 2008, or section 37 of the Health and Safety at Work etc. Act 1974. This does not impose any new liabilities on individuals but ensures that existing liabilities are not reduced as an unintended consequence of the new care provider offence.

Offences involving police or prison officers

Section 26: Corrupt or other improper exercise of police powers and privileges

266. Section 26 makes it an offence for a police officer and certain other persons to exercise improperly the powers and privileges of a constable. It supplements the existing common law offence of misconduct in public office.

267. *Subsection (1)* provides that a police constable (defined in *subsection (3)*) commits an offence if he or she exercises the powers and privileges of a constable improperly and the officer knows or ought to know that it is improper.

268. *Subsection (2)* provides that a person guilty of the offence is liable on conviction on indictment to a sentence imprisonment of 14 years or a fine, or both.

269. *Subsection (3)* sets out the categories of officer who are a police constable for the purpose of *subsection (1)*. These include a constable of a police force in England and Wales and certain other forces (for example, the British Transport Police Force), a special constable of a police force or the British Transport Police Force, and National Crime Agency officers designated with the powers and privileges of a constable.

270. *Subsection (4)* provides that a police constable exercises the powers and privileges of a constable improperly if the exercise of a power or privilege is for the purpose of achieving a benefit to the officer, or a benefit or detriment for another person, and that a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment. *Subsection (9)* defines "benefit" or "detriment" as meaning any benefit or detriment, whether or not in money and whether or not permanent.

271. *Subsections (5)* to *(7)* define further what is meant by the improper exercise of a power or privilege for the purpose of the offence. They refer to cases in which there is a failure to exercise a power or privilege, or there is a threat to exercise a power or privilege or to fail to do so, in each case for the purpose of achieving a benefit or detriment (defined in *subsection (9)*) and in any of these cases a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment.

272. *Subsection (8)* provides that the offence relates to acts or omissions anywhere in the United Kingdom or in UK waters (defined in *subsection (9)* as meaning the sea and other waters within the seaward limits of the United Kingdom's territorial sea). *Subsection (10)* provides that references for the purpose of this offence to exercising or not exercising the powers and privileges of a constable include performing or not performing the duties of a constable. *Subsection (11)* provides that this offence does not affect what constitutes the common law offence of misconduct in public offence in England and Wales or Northern Ireland.

Section 27: Term of imprisonment for murder of police or prison officer

273. Section 27 amends Schedule 21 to the Criminal Justice Act 2003, which sets out the principles to which section 269 of that Act requires the court to have regard when assessing the seriousness of all cases of murder, in order to determine the appropriate minimum term to be imposed in relation to mandatory life sentences. Paragraph 4 of Schedule 21 deals with the exceptionally serious cases in which the court should normally start by considering a whole life term, and provides a number of examples of cases that should normally fall into this category. This section puts the murder of a police or prison officer in the course of his or her duty into this category; previously it was dealt with in paragraph 5 of Schedule 21 as the type of case where the normal starting point would be a minimum term of 30 years.

274. *Subsection (4)* applies the amendment to those cases where the offence was committed on or after the date of commencement.

Repeat offences involving offensive weapons

Section 28: Minimum sentence for repeat offences involving offensive weapons

275. Section 28 puts in place a minimum custodial sentence for a second (or further) conviction in England and Wales for possession of a knife or offensive weapon. A previous conviction for threatening with a knife or offensive weapon also counts as a 'first strike'. The minimum custodial term set out by this section is 6 months imprisonment for those aged 18 or over when convicted of the second offence, and a four month Detention and Training Order for those aged 16 or over but under 18 when convicted of the second offence, unless there are particular circumstances which would make it unjust to impose such a sentence.

Schedule 5: Minimum sentence for repeat offences involving offensive weapons: consequential amendments

276. Schedule 5 contains necessary minor and consequential amendments as a result of section 28. *Paragraph 1* of the Schedule amends section 37(1A) of the Mental Health Act 1983 to enable the court to impose a hospital order instead of a minimum sentence. *Paragraph 2* amends section 36(2)(b) of the Criminal Justice Act 1988 to enable the Attorney General to make a reference where the court has failed to impose the minimum sentence (an application to have an unduly lenient sentence revisited). *Paragraph 12* of the Schedule amends section 144 of the Criminal Justice Act 2003 to allow a court, where a person pleads guilty to a relevant offence in circumstances in which the new minimum sentence would apply, to reduce the sentence of imprisonment it would otherwise have passed; but it may not reduce it to below 80% of the appropriate custodial sentence in the case of those aged 18 or over when convicted. Other consequential amendments are made to the Powers of the Criminal Courts (Sentencing) Act 2000, the Criminal Justice Act 2003 and the Coroners and Justice Act 2009.

Driving offences

Section 29: Offences committed by disqualified drivers

277. Section 29 makes the offence of causing death by driving while disqualified an indictable only offence and increases the maximum penalty for such conduct to 10 years' imprisonment. It also creates an offence of causing serious injury by driving while disqualified - an either way offence with a maximum penalty of 4 years' imprisonment.

278. *Subsection (1)* adds new sections 3ZC and 3ZD to the Road Traffic Act 1988. Section 3ZC creates a separate offence of causing death by driving while disqualified (previously an offence under section 3ZB). Section 3ZD creates a new offence of causing serious injury by driving while disqualified.

279. In both new sections, the requirement that death or serious injury must be caused by driving means that for a person to be convicted of these offences there must be something open to proper criticism in the way in which he or she was driving which contributed more than minimally to the death or serious injury (as per *R v Hughes* [2013] UKSC 5).

280. *Subsection (2)* amends Part 1 of Schedule 2 to the Road Traffic Offenders Act 1988 which specifies how offences in the Road Traffic Act 1988 will be tried, what the maximum penalties will be upon conviction and whether the offence requires disqualification and endorsements on the licence.

281. A person charged with an offence under section 3ZC will be tried on indictment in the Crown Court and, if convicted, will be liable to a maximum custodial sentence of 10 years' imprisonment or an unlimited fine or both.

282. A person charged with an offence under section 3ZD may either be tried summarily in the magistrates' court or on indictment in the Crown Court.

283. If tried summarily in England and Wales, the maximum penalty on conviction is 6 months' imprisonment or a fine not exceeding the statutory maximum or both (see *subsection (3)*). But the maximum custodial sentence will rise to 12 months when section 154(1) of the Criminal Justice Act 2003 is commenced and the maximum fine that may be imposed will become unlimited when section 85 of the Legal Aid, Sentencing and Offenders Act 2012 is commenced.

284. If tried summarily in Scotland, the maximum penalty is 12 months or the statutory maximum or both.

285. If tried on indictment, the maximum penalty is 4 years' imprisonment or an unlimited fine or both.

286. A conviction for an offence under section 3ZC or 3ZD will also lead to a mandatory period of disqualification and an obligatory endorsement of between 3 and 11 points on the licence.

287. *Subsection (4)* introduces Schedule 6 which contains further amendments relating to the offences under section 3ZC and 3ZD.

288. *Subsection (5)* provides that the new provisions in section 3ZC and 3ZD will only apply to offences which are committed on or after the date of commencement.

Schedule 6: Offences committed by disqualified drivers: further amendments

289. Schedule 6 contains amendments relating to the offences of causing death or serious injury by disqualified driving under sections 3ZC and 3ZD of the Road Traffic Act 1988 (RTA 1988) respectively.

290. *Paragraph 1* alters the current offence of causing death by driving when unlicensed, disqualified or uninsured under section 3ZB of the RTA 1988 by omitting references to disqualified drivers. Disqualified drivers who cause death or serious injury will now commit the new offences in sections 3ZC and 3ZD of the RTA 1988.

291. *Paragraph 2* introduces amendments to the Road Traffic Offenders Act 1988 (RTOA 1988), which are explained in more detail below.

292. *Paragraph 3(1)* introduces amendments to section 24 of the RTOA 1988 which deals with alternative verdicts.

293. *Paragraph 3(2)* amends section 24(A2) to provide that where a person is found not guilty of a manslaughter charge in connection with driving and the allegations amount to or include an allegation of either of the offences under section 3ZC or 3ZD of the RTA

1988 then the defendant may be convicted of either of those offences as an alternative to manslaughter.

294. *Paragraph 3(3)*provides that where defendants are prosecuted for offences under sections 3ZC or 3ZD of the RTA 1988 and the charges against them cannot be proved, they will still be liable to conviction for the offence of driving while disqualified under section 103(1)(b) of the RTA 1988.

295. *Paragraphs 4 and 5* ensure that the disqualification and retest provisions in sections 34 and 36 of the RTOA 1988 will apply to offenders convicted of offences under sections 3ZC and 3ZD of the RTA 1988. This means that offenders convicted of causing death or serious injury by disqualified driving will be banned from driving for at least two years and required to pass an appropriate driving test before their qualifications can be reinstated.

296. *Paragraphs 6 and 7* add sections 3ZC and 3ZD of the RTA 1988 to the list of offences in section 45 and 45A of the RTOA 1988 to which a four-year endorsement period applies.

297. *Paragraph 8*adds sections 3ZC and 3ZD of the RTA 1988 to the list of offences in Schedule 1 of the RTOA 1988 . That Schedule is concerned with procedural points linked to the prosecution of offenders, including the need for the prosecution to provide evidence as to who was driving the vehicle at the time the offence was committed. *Paragraph 9* makes consequential amendments which are necessary in the light of the amendment to the offence in section 3ZB of the RTA 1988.

298. *Paragraph 10* adds the offences in sections 3ZC and 3ZD of the RTA 1988 to paragraph 3 of Schedule 3 to the Crime (International Co-operation) Act 2003. Where a non-UK national is convicted of one of the offences in this Schedule, the UK must inform the authorities in the state in which the offender is normally resident.

299. *Paragraph 11* adds section 3ZC of the RTA 1988 to Part 1 of Schedule 15 to the Criminal Justice Act 2003, thereby making it a specified violent offence for the purposes of Chapter 5 of Part 12 of the Criminal Justice Act 2003. Schedule 15 is a list of specified violent and sexual offences which are subject to the dangerous offenders sentencing scheme. Schedule 15 is relevant for the purposes of: eligibility for an extended determinate sentence (imposed under section 226A or 226B of the Criminal Justice Act 2003); and the duty to impose a life sentence (imposed under section 225 or 226 of the Criminal Justice Act 2003 and corresponding provision in the Armed Forces Act 2006) where the offence carries a maximum sentence of life imprisonment and the court considers that there is a significant risk to the public of serious harm from further such offences.

300. *Paragraph 12* adds section 3ZC of the RTA 1988 to the list of offences in Schedule 1 to the Coroners and Justice Act 2009. That Schedule lists offences classed as 'homicide offences' for the purposes of the Act. A coroner must suspend an investigation when a prosecuting authority requests them to do so on the ground that a person may be charged with a 'homicide offence' involving the death of the deceased.

Section 30: Extension of disqualification from driving where custodial sentence also imposed

301. Section 30 amends section 35A of the Road Traffic Offenders Act 1988 and section 147A of the Powers of Criminal Courts (Sentencing) Act 2000 which require a court, when sentencing an offender to immediate custody and imposing a driving ban, to extend the driving ban to take account of the period the offender will spend in custody. The provisions about that extension of the driving ban were inserted by Schedule 16 to the Coroners and Justice Act 2009 and were designed to avoid a driving ban expiring, or being significantly diminished, during the period in which the offender is in custody.

302. Section 30 omits the requirement for the court, when setting the extension period to be added onto a driving ban, to take account of the sentence imposed by the court reduced

by deducted time spent on remand. For the purpose of setting the length of the extension period and therefore the length of the driving ban as a whole, the court only has to have regard to the type and length of sentence it has imposed and not the sentence as adjusted once time spent on remand is deducted.

Section 31: Mutual recognition of driving disqualification in UK and Republic of Ireland

303. Section 31 gives effect to a proposed new bilateral agreement between the UK and the Republic of Ireland ("RoI") which will permit mutual recognition of driving disqualifications between the two states. Section 31 amends Chapter 1 of Part 3 of the Crime (International Co-operation) Act 2003 ("CICA 2003"). That Chapter was enacted to implement the European Convention on Driving Disqualifications 1998 ("the Convention"). The RoI and the UK are the only signatories to the Convention and so it has been commenced only in relation to mutual recognition of driving disqualifications between the UK and the RoI.

304. *Subsection (2)* of this section amends the heading of Chapter 1 of Part 3 of the CICA 2003 to read "Mutual recognition of driving disqualification in the UK and Republic of Ireland".

305. *Subsection (3)* amends the duty on the UK in section 54 of the CICA 2003 to give notice of a driving disqualification to the authorities in the RoI where a disqualification has been imposed on an offender in the UK. New section 54(1)(aa) of that Act provides that the obligation arises only if the offender is resident in the RoI, or if the offender is not normally resident in the RoI but holds an RoI driving licence. The disqualification would only be notified to the RoI where it related to a qualifying UK road traffic offence as set out in Schedule 3 to the CICA 2003 (Great Britain offences) or in new Schedule 3A to that Act (Northern Ireland offences) (inserted by Schedule 7).

306. *Subsection (4)* amends section 56(1) of the CICA 2003 to require the UK to recognise a driving disqualification if an offender is disqualified in the RoI following conviction for a qualifying road traffic offence as set out in the new Schedule 3B to that Act (inserted by Schedule 7). The obligation to recognise the disqualification would only arise where the offender is normally resident in the UK, or is not normally resident in the UK but holds a Great Britain or Northern Ireland licence.

307. *Subsection (5)* inserts a new section after section 71 of the CICA 2003 to define the term "the specified agreement on driving disqualifications". This agreement can only be an agreement between the UK and the RoI to mutually recognise driving disqualifications imposed in either state.

Schedule 7: Mutual recognition of driving disqualification in UK and Republic of Ireland

308. Schedule 7 makes a number of changes to the terminology used in the CICA 2003 to reflect the move from the Convention to the proposed bilateral agreement between the UK and the RoI.

309. *Paragraph 2* of this Schedule amends the provisions in section 54 of the CICA 2003 relating to the minimum period a disqualification must be imposed for in relation to an offence in Part 2 of Schedules 3 and new Schedule 3A to that Act before the UK is required to notify the RoI. The minimum period is generally 6 months, unless a period of less than 6 months where this has been set out in regulations by the Secretary of State or the Department of the Environment in Northern Ireland ("the Department").

310. Sub-paragraph (4) provides that where an extension period is imposed under any of the legislative provisions listed, this will not be counted when calculating whether the period of disqualification is less than the minimum period.

311. Sub-paragraph (5) gives the Secretary of State and the Department the power to amend the list of offences set out in Schedule 3 and the new Schedule 3A of the CICA 2003 respectively by regulations (subject to the affirmative procedure – see *paragraph 14*).

312. *Paragraph 5(2)* amends section 56(2) of the CICA 2003 to set out when the driving disqualification condition is met. The condition is met either when the offender is disqualified for an offence set out in Part 1 of the new Schedule 3B to the CICA 2003 or when the offender is disqualified from driving for an offence described in Part 2 of that Schedule for not less than the minimum period.

313. *Paragraph 5(4)* provides that the "minimum period" is the period of less than 6 months specified by the Secretary of State in regulations or where no such period has been specified, 6 months.

314. *Paragraph 5(6)* amends section 56(6) of the CICA 2003, which provides that section 57 does not apply if the relevant proceedings were brought later than the time at which summary proceedings could have been brought for any corresponding offence under the law of the part of the UK in which the offender is normally resident. It replaces the reference to the part of the UK in which the offender is normally resident with a reference to "the relevant part of the UK". *Paragraph 5(7)* inserts a new subsection (6A) in section 56 which defines the relevant part of the UK in relation to both offenders who were normally resident in the UK when convicted and offenders who were not, but who hold a Great Britain or Northern Ireland licence.

315. *Paragraph 5(9)* amends the power in section 56(8) of the CICA 2003 allowing the Secretary of State or the Department to make regulations about when offences under the law of a part of the UK correspond to an offence under the law in RoI for the purposes of section 56(6).

316. *Paragraph 5(10)* confers power on the Secretary of State to amend the list of offences set out in the new Schedule 3B to the CICA 2003 by regulations (subject to the affirmative procedure – see*paragraph 14*).

317. *Paragraphs 11 and 12* amend sections 68 and 69 respectively to reflect the extension of section 57 to those who hold a licence in Great Britain or Northern Ireland but are not normally resident there.

318. *Paragraph 14* provides for the affirmative procedure to apply when the Secretary of State makes regulations to amend the offences listed in Schedule 3 or new Schedule 3B to CICA or to specify an agreement under section 71A of the CICA 2003.

319. *Paragraph 15* provides that regulations made by the Department to amend the offences listed in new Schedule 3A to the CICA 2003 are subject to the approval of the Northern Ireland Assembly.

320. *Paragraph 18* sets out the definition of "normally resident" by reference to article 12 of Directive 2006/126/EC of the European Parliament and of the Council of 20th December 2006 on driving licences.

321. *Paragraphs 19 and 20* amend Schedule 3 and insert new Schedule 3A to the CICA 2003 to set out the offences for which driving disqualifications are recognised for the purposes of section 54. Schedule 3 contains offences under the law of England and Wales and Scotland and new Schedule 3A contains offences under the law of Northern Ireland. New Schedule 3A lists two offences that do not currently appear in Schedule 3: causing death or grievous bodily injury by careless or inconsiderate driving (Article 11A of the Road Traffic (Northern Ireland) Order 1995) and causing death or grievous bodily injury by driving: unlicensed, disqualified or uninsured drivers (Article 12B of that Order).

322. *Paragraph 21* inserts a new Schedule 3B to the CICA 2003 which sets out the offences under the law of the RoI for which driving disqualifications are recognised for the purposes of section 56.

323. *Paragraph 22* removes an amendment which was made in paragraph 93 of Schedule 21 to the Coroners and Justice Act 2009, which is superseded by the amendment made by paragraph 2(4) of the new Schedule.

324. *Paragraph 23* defines a transitional period which runs from 1 December 2014 until the date when the amendments made in this Act are in force and the new bilateral agreement enters into force.

325. *Paragraph 24* prevents the Secretary of State and the Department from having to comply with sections 55, 57 and 70(3) of the CICA 2003 during the transitional period, i.e. when there is no international agreement on mutual recognition of driving disqualifications between the UK and the ROI.

326. *Paragraph 25* of this Schedule provides that paragraphs 23 and 24 are to be treated as having come into force on 1 December 2014, i.e. at the beginning of the transitional period.

327. *Paragraph 26* states that once the transitional period ends, the Secretary of State and the Department would only be required to comply with sections 55, 57 and 70(3) in relation to offences committed after the end of the transitional period.

328. *Paragraph 27* states that none of the amendments to the CICA 2003 in this Act would affect the application of that Act to a case where a notice has already been given to an offender under section 57 of that Act before 1 December 2014.

Section 32: Sending letters etc with intent to cause distress or anxiety

329. This section amends section 1 of the Malicious Communications Act 1988 ("the 1988 Act") which makes it an offence to send certain articles with intent to cause distress or anxiety. *Subsection (1)* substitutes new subsection (4) of the 1988 Act which will allow prosecutions for this offence to be dealt with either in the magistrates' court, or in the Crown Court.

330. New subsection (4)(a) provides that the new maximum penalty for the offence when tried on indictment is two years' imprisonment, or a fine, or both. New subsection (4)(b) provides that the penalty on summary conviction is a term of imprisonment not exceeding 12 months or a fine or both. However new subsections (5) and (6) (also inserted by *subsection (1)*) contain transitional provisions which provide, respectively for that reference to 12 months to be read as a reference to 6 months until section 154(1) of the Criminal Justice Act 2003 comes into force and for the reference to a fine to be read as a fine not exceeding the statutory maximum until section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force.

331. *Subsection (2)* makes it clear that the changes to section 1 of the 1988 Act only apply to offences committed on or after the day on which section 32 comes into force

Offences involving intent to cause distress etc

Section 33: Disclosing private sexual photographs and films with intent to cause distress

332. Section 33 creates a new offence of disclosing private sexual photographs and films with intent to cause distress.

333. *Subsection (1)* provides that this offence is committed if the disclosure was made without the consent of an individual ("the victim") who appears in the photograph or film, and with the intention of causing that victim distress. *Subsection (8)* makes it clear

that the defendant is not to be taken to have the required intention merely because the distress naturally followed from the disclosure.

334. Subsection (1) is subject to *subsection (2)* which provides that the offence is not committed if the photograph or film was only disclosed to the victim.

335. *Subsections (3), (4) and (5)* set out the defences which apply to the offence. The burden of proving, under *subsection (3),* a reasonable belief that the disclosure was necessary to prevent, detect or investigate crime is on the defendant.

336. However where the defendant provides sufficient evidence to raise an issue in respect to the matters set out in *subsections (4) and (5)* it will be for the prosecution to disprove those matters beyond all reasonable doubt in order to secure a conviction.

337. The defence in *subsection (4)* applies to those directly engaged in journalism and to their sources because the defence applies both to disclosure in the course of publication of journalistic material and to disclosure with a view to such publication. In either case the defendant needs to show that he or she reasonably believed that there was, in all the circumstances, a public interest in the publication in question. *Subsection (7)(b)* defines "publication" as disclosure to the public at large or to a section of the public.

338. The defence in *subsection (5)* applies where the defendant could show that he or she reasonably believed that the photograph or film in question had previously been disclosed for reward; for example the defendant might have a reasonable belief that the photograph or film had previously been published on a commercial basis because he or she had seen it in a magazine. The previous disclosure for reward could have been made either by the victim of the offence or by another person. In addition the defendant needs to show that he or she had no reason to believe that this previous disclosure for reward was made without the consent of the victim of the offence. For example, the defence would fail if the prosecution proved that the victim had told the defendant that they did not consent to the previous disclosure for reward.

339. *Subsection (7)(a)* clarifies that, for the purposes of the offence, "consent" to the disclosure of the photograph or film (whether on the occasion to which the offence relates or on a previous occasion for commercial reward) could be general consent covering the disclosure of the material or specific consent to the particular disclosure in question.

340. *Subsection (9)* provides that the offence of disclosing a private sexual photograph or film with intent to cause distress is triable either way and can therefore be tried in either a magistrates' court or the Crown Court. On conviction of indictment the maximum term of imprisonment is 2 years. The maximum term of imprisonment on summary conviction is 6 months until section 154(1) of the Criminal Justice Act 2003 comes into force, at which point it will be 12 months (*subsection (11)*). Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will remove the limit on fines that can be imposed in the magistrates' court. However, until it comes into force, any fine imposed on summary conviction of the new offence must not exceed the statutory maximum *(subsection (12)).*

Schedule 8: Disclosing private sexual photographs or films: providers of information society services

341. Schedule 8 addresses the position of providers of information society services in respect of the new offence under section 33.

342. *Paragraph 1* of the new Schedule extends liability to a service provider established in England and Wales (an "E&W service provider") in respect of a photograph or film which is disclosed in a European Economic Area state other than the UK.

343. Sub-paragraph (2) of paragraph 1 makes clear that section 33 applies to an E&W service provider who discloses a photograph or film in the course of providing information society services in a European Economic Area state that is not the UK.

344. Sub-paragraph (3) of paragraph 1 provides for proceedings in respect of an offence under section 33 to be dealt with in any place in England and Wales as if it had been committed in that place.

345. *Paragraph 2* of the new Schedule restricts when proceedings may be instituted against a service provider established in a European Economic Area state other than the United Kingdom (a "non-UK service provider").

346. Sub-paragraphs (2) to (4) of paragraph 2 set out the derogation conditions that must be satisfied for proceedings against a non-UK service provider to be instituted. These are where proceedings are necessary for the purposes of the pursuit of public policy, an information society service prejudices or presents a serious or grave risk of prejudice to the pursuit of public policy and is proportionate to the pursuit of public policy.

347. *Paragraph 3* of the new Schedule sets out exceptions for mere conduits.

348. Sub-paragraphs (1) to (3) of paragraph 3 set out when a service provider is not capable of being guilty of an offence under section 33. The circumstances are where the information society service provided consists of the provision of access to a communication network or the transmission in a communication network of information provided by a recipient of the service. In such circumstances the service provider is not capable of being guilty of an offence if it does not initiate the transmission, select the recipient of the transmission or select or modify the information contained in the transmission.

349. Sub-paragraph (4) of paragraph 3 sets out that if a service provider stores the information for longer than is reasonably necessary for the transmission it is capable of being guilty of an offence.

350. *Paragraph 4* of the new Schedule sets out exceptions for caching.

351. Sub-paragraph (1) of paragraph 4 sets out that paragraph 4 applies where an information society service consists of the transmission in a communication network of information provided by a recipient of the service.

352. Sub-paragraphs (2) to (4) of paragraph 4 set out the circumstances in which a service provider is not capable of being guilty of an offence under section 33 in respect of the automatic, intermediate and temporary storing of information. The circumstances are where: the storage of information is solely for the purpose of making more efficient the onward transmission of information to other recipients of the service at their request; and the service provider does not modify the information, complies with any conditions attached to having access to the information and expeditiously removes the information or disables access to it. The service provider should expeditiously remove the information where it obtains actual knowledge that the information at the initial source of the transmission has been removed from the network, access to the information has been disabled or a court or administrative authority has ordered its removal or disablement.

353. *Paragraph 5* of the new Schedule sets out an exception for hosting.

354. Sub-paragraphs (1) to (4) of paragraph 5 set out the circumstances in which a service provider is not guilty of an offence under section 33 where in the course of providing an information society service it stores information provided by a recipient of the service. These circumstances apply where the recipient of the service is not acting under the authority or control of the service provider. The service provider must have no actual knowledge when the information was provided that it consisted of or included a private sexual photograph or film, that it was provided without the consent of an individual who

appears in the photograph or film, or that the disclosure of the photograph or film was with the intention of causing distress to that individual. The service provider must, on obtaining such knowledge, expeditiously remove the information or disable access to it.

355. *Paragraph 6* of the new Schedule defines "disclose", "photograph or film", "recipient", "information society services", "service provider", and when a service provider is established in England and Wales or a European Economic Area state.

Section 34: Meaning of "disclose" and "photograph or film"

356. Section 34 defines the terms "disclose" and "photograph or film" for the purposes of the offence in section 33.

357. By virtue of *subsections (2) and (3)* a disclosure takes place where a defendant, by any means, gives or shows the photograph or film to another person or makes it available to another person irrespective of whether the material in question had previously been disclosed to that person and whether or not the disclosure was for reward. Disclosure therefore includes electronic disclosure of a photograph or film, for example by posting it on a website or e-mailing to someone. It also includes the disclosure of a physical document, for example by giving a printed photograph to another person or displaying it in a place where other people would see it.

358. *Subsection (4*) defines "photograph or film". *Subsection (4)(a)* makes clear that the offence applies only to material which appears to be, or to contain, a photographed or filmed image. A photographed or filmed image is a still or moving image (or part of an image) originally captured by photography or by the making of a film recording (*subsections (6) and (7)*). For example, an image, even if derived from a photograph, which has been digitally altered to look entirely like a drawing would not satisfy the test. But if a drawing had a photographed image or part of a photographed image transposed onto it, it would do so.

359. Where an image appears wholly or partly photographic, it will only fall within the terms of the offence if it is in fact derived wholly or partly from one or more photographed or filmed images (as to which see *subsection (4)(b)* and *subsections (6) and (7)*, discussed above). The offence therefore does not apply if the disclosed material looks like a photograph but does not in fact contain any photographic element (for example because it had been generated entirely by computer).

360. By virtue of *subsection (5)* an image is still considered to be a photograph or film for the purpose of the offence if it satisfied the requirement in subsection (4)(b), even if the original photograph or film recording has been altered in any way (for instance by being digitally enhanced). However, this is subject to *subsections (4) and (5)* of section 35.

361. *Subsection (8)* makes clear that references to a photograph or film include a negative version of a still or moving image that is a photograph or film and stored data that can be converted into such a still or moving image – for instance data stored on a hard drive or disc.

Section 35: Meaning of "private" and "sexual"

362. Section 35 explains the meaning of "private" and "sexual" for the purposes of the offence created by section 33.

363. The effect of *subsection (2)* is to exclude from the ambit of the offence a photograph or film that shows something that is of a kind ordinarily seen in public. This means that a photograph or film of something sexual (such as people kissing) would not fall within the ambit of the offence if what was shown was the kind of thing that might ordinarily take place in public.

364. The effect of s*ubsection (3)(a)* is to provide that a disclosure of a photograph or film which shows all or part of an individual's exposed genitals or pubic area would be considered sexual for the purposes of the offence in section 33.

365. Where a photograph or film does not show such an image it would still, by virtue of *subsection (3)(b)*, be considered sexual if a reasonable person would regard it as such because what is shown is by its nature sexual.

366. Where what is shown is not by its nature sexual, *subsection (3)(c)* provides that a photograph or film is nevertheless to be considered sexual where a reasonable person would regard the content of the photograph or film when taken as a whole as sexual. For example, a photograph of someone wearing their underwear is not necessarily sexual, but a reasonable person might consider it to be so if the content of the picture, including for example what else was (or was not) shown or the manner in which the person was posing, would lead a reasonable person to consider it as such.

367. *Subsections (4) and (5)* set out the circumstances in which a photograph or film which contains content which is private or sexual is not to be considered private and sexual for the purposes of the offence created by section 33.

368. Those provisions apply (*subsection (4)*) where a photograph or film has been altered in any way (for example by manipulating a part of the image using a computer programme) or where the photograph or film combines a photographed or filmed image with either another such image (for example where two photographs have been spliced together) or another kind of image (for example where a photograph of individuals has been superimposed on a wholly computer generated picture).

369. An image of that kind is not private and sexual if:

- no part of the photograph or film in question originated from a photographed or filmed image that was itself private and sexual;
- the photograph or film is only private or sexual because the photographed or filmed element has been altered or combined with other material (for example, where a non-sexual photograph or film recording has been altered to make it private and sexual, or where it has been placed next to another image in a way which made the image as a whole appear to be private and sexual);
- the victim of the offence only appeared as part of, or with, whatever made the photograph or film private and sexual because the photograph or film in question has been created in one of the ways set out in paragraph 368 above (for example, where a non-sexual photograph of a person has been merged with a sexual photograph that did not originally feature that person).

Offences involving sexual grooming or pornographic images

Section 36: Meeting a child following sexual grooming etc

370. Section 36 amends the "grooming" offence under section 15 of the Sexual Offences Act 2003. The offence currently applies to a person who communicates with a child on at least two occasions, and who subsequently meets or arranges to meet that child in order to commit a sexual offence. This section reduces the number of occasions on which the defendant must initially meet or communicate with the child, so that a single meeting or communication will suffice.

Section 37: Possession of pornographic images of rape and assault by penetration

371. This section amends the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 ("the 2008 Act") to cover the possession of extreme pornographic images that depict non-consensual sexual penetration. These amendments

will form part of the law of England and Wales and Northern Ireland (like section 63 of the 2008 Act) but change the law only for England and Wales.

372. The section inserts a new subsection (7A) into section 63 of the 2008 Act which contains two additional categories of prohibited material: an image which portrays, in an explicit and realistic way - a) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, and (b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else. The new category of prohibited material will include any image of that nature, irrespective of whether the act is real or simulated (or staged) or whether a person has come into possession of that image from an electronic source or otherwise.

373. *Subsection (3)* applies a defence to possession of an image that portrays an act within subsection (7A), alongside existing defences to the section 63 offence, to a person who is a participant in the image, as well as the possessor, where he or she can prove that, despite any appearance to the contrary, consent was given (freely and by someone who had capacity).

374. *Subsection (4)* provides that a person found guilty of an offence of possessing images coming within the ambit of new subsection (7A) will be liable to a maximum sentence of imprisonment of three years, or a fine, or both.

375. *Subsection (5)* amends Schedule 14 to the 2008 Act to incorporate the extended definition of an extreme pornographic image in England and Wales. Schedule 14's purpose is to ensure compliance with the UK's obligations under the EU E-Commerce Directive.[1] Paragraph 1 of the Schedule extends liability for the section 63 offence to internet service providers established in England and Wales or Northern Ireland who possess an extreme pornographic image in an EEA state other than the UK. This is subject to the exemptions in paragraphs 3 to 5 of the Schedule for where they are acting as mere conduits for the material or are caching or hosting it. For internet service providers established in England and Wales who possess an image in an EEA state other than the UK the extended definition of an extreme pornographic image will apply in determining whether they have committed an offence.

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1 Directive on electronic commerce – http://eur-lex.europa.eu/legal-content/EN/ALL/;jsessionid=x2sqTHRbRPFFkp3XwTmXgDgNhRGvC48MVt14LbBjN13fwZf9phyt!1849227980?uri=CELEX:32000L0031