

CRIMINAL JUSTICE AND IMMIGRATION ACT 2008

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Schedule 9: Alternatives to prosecution for offenders under 18

New section 66H of the 1998 Act: Interpretation

360. New section 66H defines various terms used in Chapter 1 of Part 4 of the 1998 Act, as amended.
361. *Paragraph 4* of Schedule 9 amends section 114 of the 1998 Act to specify the appropriate parliamentary procedure for each of the new order-making powers conferred by new sections 66A, 66C, 66G and 66H.

Section 49 and Schedule 10: Protection for spent cautions under the Rehabilitation of Offenders Act 1974

362. *Section 49* introduces Schedule 10 which amends the 1974 Act so as to provide protection of spent cautions.
363. The 1974 Act supports the rehabilitation into society of reformed offenders. Under the Act, following a certain period of time (which varies according to the severity of the sentence passed), all convictions (except those resulting in prison sentences of over 30 months) are regarded as “spent”. As a result the offender is regarded as rehabilitated. For most purposes the Act treats a rehabilitated person as if he or she had never committed an offence and, as such, they are not obliged to declare them, for example, when applying for a job. There are certain exceptions, including where an ex-offender is applying for certain positions or jobs, such as those involving work with vulnerable adults or children.
364. The 1974 Act currently applies only to convictions. Schedule 10 amends the 1974 Act so as to apply its provisions, with appropriate modifications, to adult and youth conditional cautions, other cautions (for example, “simple” cautions issued by the police), reprimands and warnings given to children and young people, and cautions given in a jurisdiction outside England and Wales (see the definition of a caution in new section 8A(2) of the 1974 Act inserted by *paragraph 3* of Schedule 10).
365. *Paragraph 4* of Schedule 10 inserts new section 9A into the 1974 Act; this makes provision in respect of the unauthorised disclosure of spent cautions (mirroring the provisions in section 9 of the 1974 Act relating to the unauthorised disclosure of spent convictions). New section 9A makes it an offence for a relevant person (that is, someone who in the course of his official duties has access to caution information) to disclose caution information otherwise than in the course of his or her duties or for any person to obtain caution information through fraud, dishonesty or bribery. New section 9A(5)

enables the Secretary of State, by order (subject to the affirmative resolution procedure), to except specified classes of disclosure from the ambit of the offence. A similar order-making power is contained in section 9(5) of the 1974 Act, although the power has not been exercised.

366. *Paragraph 6* of Schedule 10 inserts a new Schedule 2 into the 1974 Act. Paragraph 1 of new Schedule 2 sets out the rehabilitation period for spent cautions. In the case of “simple” police cautions, reprimands and warnings, and cautions given in a jurisdiction outside England and Wales, the caution becomes spent at the time it is given. In the case of adult and youth conditional cautions the caution becomes spent after three months. This rehabilitation period for a conditional caution is extended where the offender is subsequently prosecuted and convicted for the offence in respect of which the conditional caution was given. In such cases the rehabilitation period for the caution is extended so that it is the same as the rehabilitation period for the offence.
367. Paragraph 3 of new Schedule 2 to the 1974 Act sets out the protection afforded to persons relating to their spent cautions and the ancillary circumstances in relation to such cautions (this term is defined in paragraph 2 of new Schedule 2 and includes the offence in respect of which the caution was given and any proceedings in relation to that offence). As a result of the protections afforded, no one may ask a question in civil proceedings that might lead to the disclosure of a spent caution and any person with a spent caution applying for a job can truthfully answer “no” if asked if he or she has ever been cautioned. Failure to disclose a spent caution may not be taken as grounds for dismissing a person from employment. Under new paragraph 4 of Schedule 2 the Secretary of State may, by order (subject to the affirmative resolution procedure), specify exceptions to the protections afforded under paragraph 3. It is expected that such exceptions will be similar to those specified in the [Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975 \(SI 1975/1023\)](#), as amended, which, amongst other things, sets out kinds of employment, such as working with children and vulnerable adults, where spent cautions must still be disclosed.
368. Paragraph 5 of new Schedule 2 to the 1974 Act ensures that the protections afforded by paragraph 3 do not affect the operation of the caution itself (for example, if the conditions attached to a conditional cautions apply for a period longer than 3 months) or the operation of any enactment, for example section 65 of the Crime and Disorder Act 1998 which prevents the police from giving a child or young person more than 2 warnings and/or reprimands.
369. Paragraph 6 of new Schedule 2 to the 1974 Act applies, with modifications, section 7 of the 1974 Act which places limitations on the effect of rehabilitation under the Act.

Section 50: Criminal conviction certificates and criminal record certificates

370. *Section 50* makes amendments to Part 5 of the Police Act 1997 (the 1997 Act) consequential upon bringing cautions within the ambit of the 1974 Act. Part 5 of the 1997 Act provides the statutory framework for the disclosure of criminal records (under the aegis (in England and Wales) of the Criminal Records Bureau (CRB)) for employment and other purposes. *Subsection (2)* amends section 112 of the 1997 Act so that details of any unspent conditional caution would appear on a criminal conviction certificate (known as a CRB “Basic Disclosure”). *Subsection (3)* amends section 113A(6) of the 1997 Act so that details of spent cautions are included on criminal record certificates (CRB “Standard Disclosures”) and enhanced criminal record certificates (CRB “Enhanced Disclosures”).

Section 51: Bail conditions: electronic monitoring

371. *Section 51* introduces Schedule 11. *Paragraph 1* of the Schedule introduces the amendments to the Bail Act 1976 that follow.

372. *Paragraph 2* of Schedule 11 extends section 3(6ZAA) of the 1976 Act to clarify the court's power to impose electronic monitoring of compliance with bail conditions on defendants aged 17 and over. It also adds a new subsection (6ZAB) to define electronic monitoring requirements.
373. *Paragraph 3* of Schedule 11 amends section 3AA of the 1976 Act, which sets out the conditions that must be satisfied before a court can order electronic monitoring of children and young persons, to make clear that it applies only to that age group, to reflect that electronic monitoring is now available across England and Wales and to remove some general provisions, which are transferred to a new section 3AC.
374. *Paragraph 4* of Schedule 11 inserts two new sections into the 1976 Act.
375. New section 3AB, which corresponds to the amended section 3AA, sets out the conditions that must be satisfied before a court can order electronic monitoring of those who are 17 or over. These are that:
- without the imposition of an electronic monitoring requirement, the defendant would not be granted bail;
 - the court is satisfied that the necessary provision for electronic monitoring can be made for the defendant; and
 - in the case of those aged 17 the local youth offending team has advised the court that electronic monitoring is suitable in the particular case.
376. New section 3AC is a general provision which deals with the arrangements for electronic monitoring and the associated powers of the Secretary of State. It gives the Secretary of State the power to make an order designating certain individuals as responsible officers for the supervision of electronic monitoring. It also requires the court to appoint a responsible officer in each case where it orders electronic monitoring. In addition, the Secretary of State may make rules regulating electronic monitoring and the functions of responsible officers.
377. *Paragraph 5* of Schedule 26 makes some consequential amendments to section 23AA of the Children & Young Persons Act 1969, which provides for the electronic monitoring of those remanded into local authority accommodation.

Section 52 and Schedule 12: Bail for summary offences and certain other offences to be tried summarily

378. *Section 52* and Schedule 12 amend the 1976 Act to restrict the grounds on which a person charged with an imprisonable summary offence or a relevant low-level criminal damage offence may be refused bail.
379. Schedule 1 to the 1976 Act sets out the grounds on which a court may refuse bail in criminal proceedings (the "exceptions to the right to bail"): Part 1 of Schedule 1 currently applies where a defendant is accused or convicted of an imprisonable offence; Part 2 applies to non-imprisonable offences and has a more restricted list of exceptions than Part 1. Schedule 12 will disapply Part 1 for certain defendants, and instead insert and apply a new Part 1A. New Part 1A will include the four exceptions to the right to bail that are in Part 2 as well as four further exceptions, two of which derive from Part 1.
380. *Paragraph 2* of Schedule 12 amends section 3(6D)(a) of the 1976 Act so that the conditions of bail specified in that provision (which apply to persons for whom there is drug test evidence of a Class A drug and who are required to undergo a relevant assessment or participate in a follow-up) will still apply to defendants within new Part 1A.
381. *Paragraphs 3 to 5* of Schedule 12 insert a new section 9A into the 1976 Act and amend Part 1 of Schedule 1 to prescribe which defendants will fall within new Part 1A, which

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is inserted by *paragraph 6*. Part 1A will apply to a defendant charged with imprisonable offences that are -

- a) summary offences, or
- b) offences listed in Schedule 2 to the Magistrates' Courts Act 1980 (certain offences involving criminal damage), where the value involved is less than the relevant sum (currently £5000).

382. For offences listed in Schedule 2 to the Magistrates' Courts Act 1980 (criminal damage, related offences, and certain forms of aggravated vehicle-taking), a defendant over 18 will fall within new Part 1A if, under the procedure in section 22 of the Magistrates' Courts Act 1980 (for determining mode of trial), the court has decided it is clear that the value involved does not exceed £5000. New section 9A provides for a court to take the same decision in relation to defendants under 18, for the purposes of applying the 1976 Act.

383. Paragraph 1 of new Part 1A establishes which defendants fall within the new Part, and paragraphs 2 to 9 prescribe eight exceptions to the right to bail. Where an exception applies, the court need not grant bail to the defendant, but still has a discretion to do so which will be exercised having regard to all the circumstances of the case. The exceptions are as follows:

- a) Paragraph 2 applies if, having been granted bail previously, the defendant has failed to surrender to custody and the court believes that, if released on bail, he would do so again.
- b) Paragraph 3 applies if the defendant was on bail in criminal proceedings on the date of the offence and the court believes that, if released, he would commit an offence on bail.
- c) Paragraph 4 applies if there are substantial grounds to believe that, if released on bail, the defendant would commit an offence by engaging in conduct that would be likely to cause physical or mental injury, or fear of such injury.
- d) Paragraph 5 applies if the court is satisfied the defendant should be kept in custody for his own protection or, if a child or young person, for his own welfare.
- e) Paragraph 6 applies if the defendant is in custody under the sentence of a court or officer under the Armed Forces Act 2006.
- f) Paragraph 7 applies if, having been released on bail in proceedings for the same offence, the defendant was arrested under section 7 of the Bail Act (liability to arrest for absconding or breaking conditions of bail) and the court believes that, if released, he would:
 - fail to surrender to custody;
 - commit an offence while on bail,
 - interfere with witnesses or
 - otherwise obstruct the course of justice.
- g) Paragraph 8 applies if it has not been practicable to obtain enough information to take decisions required by Part 1A due to lack of time since the proceedings began.
- h) Paragraph 9 applies paragraphs 6A to 6C of Part 1 (exception applicable to drug users in certain areas) to defendants falling within Part 1A.

Section 53 and Schedule 13: Allocation of offences triable either way etc.

384. **Section 53** introduces Schedule 13, which amends Schedule 3 to the 2003 Act.

385. Schedule 3 to the 2003 Act amends a number of Acts so as to provide a new scheme for determining the appropriate venue for either way cases together with a common mechanism, based on section 51 of the 1998 Act, for moving appropriate cases from the magistrates' court to the Crown Court.
386. The amendments made by Schedule 3 to the 2003 Act achieve this through, firstly, a revised procedure (called allocation) for deciding whether a case that is triable either way should be heard in the magistrates' court or in the Crown Court; secondly, abolition of committal and transfer proceedings and the substitution of a sending procedure like that already used to get indictable-only cases to the Crown Court; and, thirdly, abolition of the general power, contained in section 3 of the 2000 Act, to commit for sentence, except on a guilty plea "before venue" or where an indefinite or extended sentence is required. Under the scheme, the general power of committal for sentence is abolished for cases that magistrates decide to hear.
387. Most of the provisions of Schedule 3 to the 2003 Act are not yet in force.
388. The principal amendment in Schedule 13, which is made by *paragraph 7*, is to preserve the general power of a magistrates' court to commit to the Crown Court for sentence an offender whom it has convicted after a summary trial, if it considers that a Crown Court sentence should be available. Paragraph 22 of Schedule 3 to the 2003 Act provided for this general power under section 3 of the 2000 Act to be replaced with a more limited power. As set out above, this limited the power to commit for sentence to cases where a defendant enters a guilty plea "before venue" (that is, before the court has made an allocation decision) to a serious either way offence which is beyond the magistrates' powers of punishment. Paragraph 22 has not been brought into force and *paragraph 7* of Schedule 13 to the Act removes it from Schedule 3 (so that the general power in section 3 of the 2000 Act will be preserved).
389. Although the general power to commit for sentence is preserved, *paragraph 8* of Schedule 13 amends Schedule 3 to the 2003 Act to make amendments of section 3 of the 2000 Act. The most important of these is the repeal of subsection (2)(b). This subsection refers to the longer than commensurate sentence for violent and sexual offences in section 80 of the 2000 Act. As that section has now been repealed (subject to savings) and replaced by the dangerousness provisions in Chapter 5 of Part 12 of the 2003 Act, it is appropriate to repeal section 3(2)(b).
390. *Paragraph 3* modifies the warning about the possibility of committal for sentence that is to be given to a defendant offered summary trial under section 20(2) of the Magistrates' Courts Act 1980. Under that section, as substituted by paragraph 6 of Schedule 3 to the 2003 Act, the court must explain to the defendant that the case appears suitable for summary trial, that he can consent to be tried summarily or choose to be tried on indictment; and, in the case of a specified offence, if he consents to be tried summarily and is convicted, he may be committed to the Crown Court for sentence if he qualifies for a sentence of imprisonment for public protection or an extended sentence. The modified warning makes clear that the possibility of committal to the Crown Court for sentence also exists if the magistrates' court considers that a Crown Court sentence should be available (because the magistrates' sentencing powers are inadequate). The amendment made by paragraph 3 is in consequence of the restoration of the general power to commit for sentence (as discussed in the preceding paragraphs).
391. The remaining paragraphs make minor amendments to Schedule 3 to the 2003 Act.

Section 54: Trial or sentencing in absence of accused in magistrates' courts

392. **Section 54** amends section 11 of the Magistrates' Courts Act 1980, which makes provision for the circumstances in which a magistrates' court may proceed in the absence of the defendant.

393. *Subsection (2)* amends subsection (1) of section 11 of the Magistrates' Courts Act 1980. The present subsection (1) provides that, where at the time and place appointed for trial or adjourned trial the prosecutor appears but the accused does not, the court has a discretion to proceed in the accused's absence. New subsection (1)(b) provides that in those circumstances, where the accused is 18 or over, the court must proceed with a trial in the absence of the accused unless it would be contrary to the interests of justice. Where the accused is under 18, the court's discretion to proceed in absence is unchanged (new subsection (1)(a)).
394. *Subsection (3)* inserts a new subsection (2A) into section 11 of the Magistrates' Courts Act 1980. This provides that the court may not proceed if it considers that there is an acceptable reason for the accused's absence.
395. *Subsection (4)* amends subsections (3) and (4) of section 11 the Magistrates' Courts Act 1980 to reflect the fact that they now only apply to proceedings specified in subsection (5) of that section.
396. *Subsection (5)* inserts into section 11 of the Magistrates' Courts Act 1980 a new subsection (3A) which provides that, where a court does impose a custodial sentence in the offender's absence, the person must be brought before the court before being taken to prison to start serving the sentence.
397. *Subsection (6)* inserts three new subsections into section 11 of the Magistrates' Courts Act 1980: (5), (6) and (7).
- New subsection (5) provides that the two limits on magistrates' courts' powers that are specified in subsections (3) and (4) apply where proceedings have been issued either by written charge and requisition or by way of an information followed by issue of a summons (i.e. in cases other than where the defendant was bailed to appear before the court on a certain date). In those cases, the court cannot pass a custodial sentence in the defendant's absence, and cannot impose any disqualification unless they have already adjourned. Where a defendant was bailed to return to the court, those restrictions do not apply.
 - New subsection (6) makes clear that the court is not required to enquire into the reason for an accused's absence before deciding whether to proceed in his absence, although it is intended that the court should take account of facts known to it (eg about the effect of severe weather on public transport) in deciding whether an acceptable reason for the accused's absence exists.
 - New subsection (7) requires the court to state in open court its reasons for not proceeding in absence where the accused is 18 or over.

Section 55: Extension of powers of non-legal staff

398. This section amends section 7A of the Prosecution of Offences Act 1985, which sets out the powers and rights of audience of a Crown Prosecutor which a member of staff of the CPS who is not a Crown Prosecutor may have if he or she is designated under that section by the Director of Public Prosecutions.
399. The effect of the amendments made by *subsections (2) and (4)* is that members of staff designated under section 7A will, in addition to their existing powers, be able to: (a) conduct trials of non-imprisonable summary offences in magistrates' courts, (b) conduct proceedings in magistrates' courts (other than trials) in relation to certain offences previously excluded from their remit (for example, an offence triable only on indictment or one for which the accused has elected to be tried by jury, or the court has found that it should be so tried), (c) conduct applications or other proceedings relating to "preventative civil orders", and (d) conduct certain proceedings assigned to the Director of Public Prosecutions by the Attorney General under section 3(2)(g) of the Prosecution of Offences Act 1985 (these include proceedings on an application under section 2 of the Dogs Act 1871).

400. *Subsection (3)* amends subsection (5) of section 7A to make consequential changes to the definition of “bail in criminal proceedings” and to define preventative civil orders. These include restraining orders, parenting orders and other civil orders which follow criminal proceedings (such as ASBOs, drinking banning orders and football banning orders). The new subsection (5A) reproduces the existing definition of “trial” for the purposes of the section.
401. *Subsection (5)* inserts new subsections (8), (9) and (10) into section 7A. Subsections (8) and (9) provide that from 1 May 2011 Associate Prosecutors (formerly known as Designated Caseworkers) will cease to be exempt from the regulatory framework for persons who engage in legal activities provided for in the Legal Services Act 2007. Subsection (10) is included in case consequential amendments are required to the Legal Services Act 2007 to ensure that Associate Prosecutors can properly be catered for within the regulatory framework provided for by that Act. An order-making power (subject to the affirmative procedure) would enable appropriate modifications to be made to the 2007 Act, and if necessary other enactments (including section 7A), to this end.
402. Subsection (5) also inserts new subsections (11) and (12) into section 7A. Associate Prosecutors’ trial remit is limited through subsection (2) to non-imprisonable summary offences. The inclusion of subsections (11) and (12) provides a power that would allow the restriction on conducting proceedings in respect of imprisonable summary offences to be lifted by order (subject to affirmative procedure).
403. *Subsection (6)* amends section 15 of the Prosecution of Offences Act 1985 so as to enable designated members of staff to undertake binding over proceedings in the magistrates’ court.

Criminal Legal Aid

404. [Sections 12 to 18](#) of, and [Schedule 3](#) to, the Access to Justice Act 1999 (the 1999 Act), as amended by the Criminal Defence Service Act 2006, deal with the Criminal Defence Service. Under section 12 of the Access to Justice Act, the Legal Services Commission (the LSC) is required to set up the Criminal Defence Service to secure that people involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require. Broadly speaking, advice and assistance is available for the investigation stage and representation for proceedings.
405. [Section 14](#) and [Schedule 3](#) deal with representation in criminal proceedings. “Representation” is defined in section 26. It covers the preparation of a case and advocacy at any hearing. Paragraph 1(1) of [Schedule 3](#) says that a right to representation for the purposes of any kind of criminal proceedings before a court may be granted to an individual such as is mentioned in relation to that kind of proceedings in section 12(2). The grant of a right to representation is subject to a test of the interests of justice (paragraph 5(1) of [Schedule 3](#)). Paragraph 5(2) sets out factors to be considered in deciding what the interests of justice consist of.
406. [Schedule 3](#) was amended by the Criminal Defence Service Act 2006 to add regulation-making powers to provide for the transfer of the responsibility for granting rights to representation from the courts to the LSC and the re-introduction of a test of financial eligibility (paragraphs 2A and 3B of [Schedule 3](#)). These powers were exercised, in relation to criminal proceedings in magistrates’ courts, in the [Criminal Defence Service \(Representation Orders and Consequential Amendments\) Regulations 2006 \(S.I. 2006/2493\)](#) and the [Criminal Defence Service \(Financial Eligibility\) Regulations 2006 \(S.I. 2006/2492\)](#). Applications for representation orders are handled by Her Majesty’s Courts Service on behalf of the LSC.

Section 56: Provisional grant of right of representation

407. This section amends Part 1 of and Schedule 3 to the 1999 Act to allow for the provisional grant of a right to representation in prescribed circumstances.
408. *Subsection (6)* inserts a new paragraph 1A into Schedule 3. This provides for regulations (subject to the affirmative resolution procedure) to set out circumstances in which a right to representation may be provisionally granted to individuals involved in an investigation which may result in criminal proceedings, for the purpose of those proceedings. Regulations may make provision about the stage of an investigation at which the right may be provisionally granted, and the circumstances in which any provisional grant ceases to be provisional and becomes a full grant, or where it is to be withdrawn.
409. *Subsection (2)* amends section 14(1) and *subsection (3)* amends section 15(1) of the 1999 Act so as to refer to provisional grants.
410. *Subsection (4)* makes regulations under new paragraph 1A subject to the affirmative resolution procedure.
411. *Subsection (5)* adds to the definition of “proceedings” for the purposes of the definition of “representation” in section 26 of the 1999 Act.
412. *Subsection (7)* amends paragraph 2A of Schedule 3 to provide that any provisional grant of a right to representation under regulations made under new paragraph 1A is to be made by the Legal Services Commission.
413. *Subsections (8) and (9)* make consequential amendments to paragraphs 3A(1) and 3B of Schedule 3 so as to refer to provisional grants.
414. *Subsection (10)* amends Schedule 3 and provides that the right of appeal set out in paragraph 4 does not apply in relation to any right granted under new paragraph 1A.
415. *Subsection (11)* makes consequential amendments to paragraph 5 of Schedule 3 so as to refer to provisional grants and inserts a new sub-paragraph (2A) which defines “proceedings” for the purposes of any provisional grant.

Section 57: Disclosure of information to enable assessment of financial eligibility

416. This section amends the 1999 Act to allow the relevant authority to request and receive information from the Secretary of State (in practice the Secretary of State for Work and Pensions) and HMRC for purposes relating to the assessment of a person’s financial eligibility for legal aid, and places certain restrictions on the disclosure of that information.
417. *Subsection (2)* amends section 25(9) of the 1999 Act, making regulations under new paragraphs 6 of Schedule 3 subject to the affirmative resolution procedure.
418. *Subsection (3)* inserts new paragraphs 6 to 8 of Schedule 3. New paragraph 6 provides that the relevant authority may make an information request to the DWP or HMRC for the purpose of making a decision about a person’s financial eligibility for legal aid in accordance with paragraph 3B(1) and (2) or regulations under paragraph 3B(3) of Schedule 3. It further sets out the categories of information which may be requested (with a power to add further such categories by regulations subject to the affirmative resolution procedure). New paragraph 7 provides that a person to whom information is disclosed under paragraph 6 may disclose that information where necessary or expedient for those purposes. Except in these circumstances, or in accordance with any enactment or order of a court, or if information has already been lawfully disclosed to the public, any disclosure is an offence. A person guilty of this offence is liable on conviction on indictment to imprisonment for up to two years, a fine or both, or on summary conviction, to imprisonment for no more than twelve months, a fine not exceeding the statutory maximum (£5,000) or both. New paragraph 8 defines “benefit

status”, “the Commissioners” and “information” for the purposes of new paragraphs 6 and 7.

Section 58: Pilot schemes

419. This section inserts a new section 18A into the 1999 Act to provide for a power to pilot schemes under secondary legislation concerning the Criminal Defence Service.
420. *Subsection (2)* removes subsection (5) of section 17A, a provision about a specific kind of pilot scheme.
421. *Subsection (3)* inserts a new section 18A. This provides that any instruments under sections 12 to 15, 17, 17A or 22(5) or paragraphs 1A to 5 of Schedule 3 may be made so as to have effect only for a specified period of up to twelve months, unless the Lord Chancellor extends this period where necessary to ensure the effective operation of a scheme or to coordinate it with another relevant pilot scheme, for up to eighteen months. The Lord Chancellor may further extend this period in order to cover any gap between the end of the pilot and full implementation. Any pilot scheme may apply in relation to one or more areas, type of court, type of offence or class of person.
422. *Subsection (4)* inserts a new subsection (9B) into section 25, and provides that any instrument under new section 18A will be subject to the affirmative resolution procedure.

Section 59: SFO’s pre-investigation powers in relation to bribery and corruption: foreign officers etc.

423. **Section 59** inserts a new section 2A into the Criminal Justice Act 1987. Section 2 of the Criminal Justice Act 1987 grants the Director of the Serious Fraud Office (SFO) powers to require a person to answer questions, provide information or produce documents for the purposes of an investigation.
424. The new subsection 2A(1) extends these powers to allow their use where the Director believes certain offences may have taken place and is considering whether to start an investigation.
425. The new subsection 2A(2) ensures that the investigatory powers under section 2(2) and 2(3) Criminal Justice Act 1987 can only be exercised against an individual during the pre-investigative stage where the Director of the SFO considers it expedient to do so.
426. The new subsection 2A(3) provides adaptations to secure that section 2 works properly during the pre-investigation stage.
427. The new subsection 2A(4) extends the offence under s.2(16) so that (among other things) it covers the destruction of documents which a person knows or suspects are relevant to the making of a determination whether to start a formal investigation.
428. New subsection 2A(5) limits the circumstances under which the pre-investigative powers can be used to where the suspected conduct would constitute a corruption offence under section 108 of the Anti-terrorism, Crime and Security Act 2001 (bribery and corruption: foreign officers etc). New subsection 2A(6) defines corruption offence.
429. *Subsection (3)* ensures that the investigative powers set out in the new section 2A apply in Northern Ireland and Scotland, in addition to England and Wales.

Section 60: Contents of an accused’s defence statement

430. **Section 60** amends the defence disclosure regime in Part I of the Criminal Procedure and Investigations Act 1996 so that an accused’s defence statement will, in addition to the existing requirements, also have to set out particulars of any matters of fact on which he intends to rely in his defence.

431. *Subsection (1)* amends section 6A of the 1996 Act to add this new requirement to the list of matters to be included in a defence statement. *Subsection (2)* amends section 11(2)(f) (ii) of the 1996 Act so that the sanctions for failure to comply with the defence statement requirements (comment by the court or another party and the drawing of inferences by the court or jury) will apply.

Section 61: Compensation for miscarriages of justice

432. **Section 61** amends the current provision for compensating victims of miscarriages of justice in section 133 of the 1988 Act.
433. Section 133(1) of the 1988 Act sets out the test which the Secretary of State applies in determining whether there is a right to compensation in a particular case. Section 133(1) is not amended by this Act.
434. Currently there is no time limit for making an application to the Secretary of State for compensation in respect of a miscarriage of justice. This means that applications can be received in respect of convictions that were quashed many years ago.
435. *Subsection (3)* amends section 133(2) of the 1988 Act to impose a time limit of two years within which an application under that section must be made. The two-year period begins with the date on which the conviction of the applicant was reversed or the date on which he was granted a pardon.
436. *Subsection (3)* also inserts a new section 133(2A) into the 1988 Act. This allows an application made outside the new time limit to be treated as made within the time limit if the Secretary of State considers that there are exceptional circumstances which justify doing so. For example, the Secretary of State might regard the applicant being incapacitated for all or almost all of the two-year period as an exceptional circumstance. However it is not anticipated that the Secretary of State would regard the applicant being unaware of the right to apply for compensation as an exceptional circumstance.
437. Compensation can only be paid to those who have been pardoned or whose convictions have been “reversed”. Section 133(5) of the 1988 Act currently provides that a conviction has been “reversed” if it has been quashed, either on an appeal out of time or following one of several types of reference. *Subsection (5)* inserts two new subsections (5A) and (5B) into section 133 of the 1988 Act. The new subsection (5A) amends the definition of “reversed” for the purposes of section 133 in cases in which the conviction has been quashed but a retrial has been ordered. In such a case the conviction will now only be “reversed” when the person is acquitted of all offences at retrial (or when the prosecution indicates that it has decided not to proceed with a retrial). In such a case, it is the occurrence of one of these two events that will trigger the right to apply for compensation and the two-year time period within which an application should be made. The new subsection (5B) provides that references to a retrial in new subsection (5A) include proceedings in a magistrates’ court following remission of a case from the Crown Court.
438. If the Secretary of State decides that there is a right to compensation under section 133(1), the amount of compensation is assessed by an assessor.
439. *Subsections (4) and (7)* replace the existing section 133(4A) of the 1988 Act, which currently makes provision about the assessment of the amount of compensation, with new sections 133A and 133B. Currently:
- There is no limit on the amount of compensation payable in respect of a miscarriage of justice. In determining the amount to be paid, the assessor uses principles analogous to those governing the assessment of damages for civil wrongs. Assessments are, as far as possible, intended to put the applicant back to the financial position he or she would have been in but for the miscarriage of justice.

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- Section 133(4A) of the 1988 Act requires the assessor, when assessing the element of an award attributable to suffering, harm to reputation or similar damage (i.e. non-pecuniary loss), to take account of: (a) the seriousness of the offence and the severity of the punishment suffered by the applicant as a result of the conviction; (b) the conduct of the investigation and prosecution of the offence; and (c) other convictions of the applicant and any punishment resulting from them.
 - The Note for Guidance sent to successful applicants states that the assessor may also make a deduction from the non-pecuniary loss element of an award to take account of conduct of the applicant which could be construed as contributing to the miscarriage of justice.
 - As contributory conduct and other convictions and punishments were not taken into account in assessing the pecuniary element of an award, significant levels of awards could be made to applicants who have other serious convictions or who had contributed to the occurrence of the miscarriage of justice.
440. The new section 133A(2) preserves the effect of the existing section 133(4A)(a) and (4A)(b) of the 1988 Act (as to which, see the second bullet point in the paragraph above).
441. Section 133A(3) provides that the assessor may make deductions from the overall award, not just from the non-pecuniary element, by reason of any conduct of the applicant which appears to the assessor to have caused or contributed to the conviction and by reason of other convictions of the applicant and any resulting punishments.
442. Section 133A(4) allows the assessor to make only a nominal award if he considers there to be exceptional circumstances which justify doing so. This might be the result, for example, in cases in which the applicant's own conduct contributed very significantly to the conviction, and/or the applicant has either a lengthy criminal record or has been convicted of particularly serious offences (whether before or after the miscarriage of justice in respect of which the claim is being made).
443. Section 133A(5) introduces overall limits on the amount of compensation payable in respect of a particular miscarriage of justice. The limit is £1,000,000 where the new section 133B applies (in summary, this is where the applicant has been in detention for more than 10 years as a result of the conviction) and £500,000 in all other cases. No compensation will be payable for pecuniary or non-pecuniary loss in excess of the relevant limit.
444. Section 133A(6) introduces a limit on the amount of compensation payable in respect of each year of an applicant's lost earnings or earnings capacity. That limit is one and a half times the median annual gross earnings according to the latest figures published by the Office for National Statistics at the time of the assessment (rather than at the time the loss was suffered). Applicants, no matter what their actual or projected level of earnings, will not be compensated for any losses of earnings or earnings capacity at a rate higher than the limit. The same limit applies in respect of claims made by victims of violent crime to the Criminal Injuries Compensation Authority.
445. Section 133A(7) and (8) enables the overall compensation limit (as set by section 133A(5)) and the earnings compensation limit (as set by section 133A(6)) to be amended by the Secretary of State by order (subject to the affirmative procedure).
446. Section 133B defines when the higher overall compensation limit applies. The higher limit applies where the applicant has been in "qualifying detention" for at least 10 years at the time the conviction is reversed or the pardon is given. Qualifying detention includes, for example: time spent in prison or in a young offenders institution as a result of the sentence passed for the conviction which was subsequently quashed; time spent detained in a hospital under mental health legislation as a result of the conviction (ignoring, for these purposes, other conditions for such detention such as those relating

to the person's health); and time spent on remand for the offence or for another offence where the charge was founded on the same facts or evidence.

447. However, a period will not count toward the 10-year threshold if during that period the applicant was in both "qualifying detention" and "excluded concurrent detention". Excluded concurrent detention is defined in the section, and includes, for example, periods in which the applicant was serving a concurrent sentence for a second conviction which has not been quashed (and has not resulted in a pardon). Note that in circumstances where the second conviction has been quashed but the person has been convicted at retrial and again sentenced to detention, the sentence imposed at retrial runs from the time when a like sentence passed at the original trial would have begun (see the 1968 Act, Schedule 2). Therefore, pre-retrial detention can be "excluded concurrent detention" if the retrial results in a conviction and sentence of detention.
448. *Subsection (8)* amends section 172 of the 1988 Act to extend the new sections 133A and 133B to Northern Ireland as well as England and Wales.
449. *Paragraph 22* of Schedule 27 sets out some transitional provisions dealing with the application of the new measures in section 61. Paragraph 22(1) provides that the two-year time limit introduced by section 61(3) will only apply to applications for compensation made in relation to convictions reversed or pardons given on or after the date on which section 61 comes into force (the commencement date).
450. As a result of paragraph 22(2), the provisions for the assessment of compensation in the new sections 133A and 133B will apply in relation to applications made on or after the commencement date, and also to applications made before the commencement date but in respect of which the Secretary of State has not, before that date, determined whether there is a right to compensation.
451. *Paragraph 22(3)* and (4) provide that the changes to the definition of "reversed" introduced by section 61(5) apply to any conviction quashed on an appeal out of time (whether before or after the commencement date) if an application for compensation in relation to that conviction has not been made before the commencement date.
452. *Paragraph 22(5)* and (6) apply a time limit to applications for compensation in relation to convictions reversed and pardons given before the commencement date. Such applications must be made within the two years beginning with the commencement date. Applications made outside this time limit can be treated as made within the time limit if the Secretary of State considers that there are exceptional circumstances which justify doing so.

Section 62: Annual report on the Criminal Justice (Terrorism and Conspiracy) Act 1998

453. *Section 62* repeals section 8 of the Criminal Justice (Terrorism and Conspiracy) Act 1998, which requires a report on the working of that Act to be laid before both Houses of Parliament at least annually.