

# Explanatory Notes to Criminal Justice And Immigration Act 2008

## 2008 Chapter 4

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*These notes refer to the Criminal Justice and Immigration Act 2008 (c.4) which received Royal Assent on 8 May 2008*

# CRIMINAL JUSTICE AND IMMIGRATION ACT 2008

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# EXPLANATORY NOTES

## INTRODUCTION

1. These explanatory notes relate to the Criminal Justice and Immigration Act 2008 which received Royal Assent on 8<sup>th</sup> May 2008. They have been prepared by the Ministry of Justice in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.
3. A glossary of abbreviations and terms used in these explanatory notes is contained in Annex A to the notes.

## SUMMARY

### **Part 1: Youth rehabilitation orders**

4. Part 1 (sections 1 to 8 and Schedules 1 to 4) introduces youth rehabilitation orders (YROs), a new generic community sentence for children and young people. It sets out the requirements that may be attached to a YRO, makes provision for their enforcement, revocation, amendment and transfer to Northern Ireland, and abolishes certain existing community sentences which are to be replaced by the YRO.

### **Part 2: Sentencing**

5. Section 9 sets out the purposes of sentencing in relation to young offenders.
6. Section 10 clarifies courts' sentencing powers to make it clear that a court is not required to impose a community sentence in cases where the offence is serious enough to justify such a sentence.
7. Section 11 restricts the community order to imprisonable offences only. This will apply to offenders aged 18 and over only. At present, the community order is available as a sentence for any offence, provided the individual offending being dealt with is serious enough to warrant a community sentence.
8. Section 12 amends section 158 of the Criminal Justice Act 2003 (the 2003 Act) so as to require that, in any case where a court is considering passing a custodial sentence in respect of a person under 18, the pre-sentence report must be in writing.
9. Sections 13 to 18 and 25 and Schedule 5 constitute a package of reforms to the public protection legislation set out in Chapter 5 of Part 12 of the 2003 Act. They achieve the following:

- Imposing a "seriousness threshold" on both indeterminate and extended sentences for public protection. The effect of the amendments is that such sentences may only be imposed where the offender would be required to serve at least two years in custody or (in the case of offenders over 18) where the offender has a previous conviction for one of a specified list of very serious offences.
- Removing the rebuttable presumption of risk (requirement for judges to conclude that the offender is dangerous) where there is a previous conviction for violent or sexual crime.
- Allowing courts greater discretion so that where all the conditions for an sentence of imprisonment for public protection are met (sexual/violent offence which carries penalty of 10 years or more; risk test; seriousness threshold passed) the court may impose a sentence of imprisonment for public protection, extended sentence or other sentence as it finds most appropriate in the case; where the conditions for an extended sentence but not a sentence of imprisonment for public protection are met (sexual/violent offence carrying penalty of less than 10 years; risk test; seriousness threshold passed) the court may impose an extended sentence or other sentence.
- Changing the structure of extended sentences so that offenders are automatically released on licence halfway through the custodial period, rather than release between this point and the end of the custodial term being at the Parole Board's discretion as previously.

10. Section 19 makes some changes to the method by which courts determine the tariff (that is, the minimum time that a person must spend in custody) when they are imposing a discretionary life sentence in a particularly serious case. The result, in such cases, is that courts are empowered to increase the period which will have to be served in prison before the offender becomes eligible for consideration for parole.

11. Section 20 ensures that courts can pass two or more consecutive intermittent custody or custody plus sentences. This section also amends the 2003 Act to clarify the position on imposing consecutive sentences on different occasions. If an offender has been released on licence after serving all the required custodial periods then a subsequent sentence may not be ordered to be served consecutively to the sentence from which he has been released.

12. Sections 21 to 23 and Schedule 6 enable the sentencing court to direct that time spent on bail under an electronically monitored curfew should be credited against a custodial sentence in a similar way to the manner in which remands in custody are credited. A person will receive credit at the rate of a half a day for every day spent subject to a qualifying electronically monitored curfew (that is a curfew of 9 hours a day or more).

13. Section 24 makes technical amendments to the provisions in the 2003 Act governing the period of time an offender must spend in custody before becoming eligible for the home detention curfew scheme.

14. Section 26 applies to prisoners who committed offences before 4 April 2005 and whose release is governed by Part 2 of the Criminal Justice Act 1991 (the 1991 Act). It changes the early release provisions for certain long term prisoners (those serving sentences of 4 years and over for an offence other than a sexual or violent offence specified in Schedule 15 of the 2003 Act) by placing a duty on the Secretary of State to release them automatically on licence at the halfway point in their sentence on a licence that will remain in force until the end of their sentence. This duty also applies to those prisoners serving sentences for the equivalent armed services offences. This brings all such prisoners in line with those subject to the release provisions of the 2003 Act.

15. Section 27 provides for the parole arrangements for foreign national prisoners liable to deportation sentenced under the 1991 Act to be brought into line with those applicable to other prisoners.

16. Section 28 aligns the release arrangements for fine defaulters and those in contempt of court who are serving custodial penalties under the provisions of the 1991 Act and who are released early on compassionate grounds. The intention is that their release arrangements replicate those for similar offenders sentenced under the 2003 Act.

17. Section 29 provides for non-dangerous offenders who are recalled to prison to be released again after a fixed period of 28 days (subject to certain exceptions). The role of the Parole Board is changed in such cases so that it no longer routinely reviews all recalls. It also provides for other offenders (except those serving extended sentences) to be released by the Secretary of State without referral to the Parole Board, if he considers that it is safe to do so. Prisoners serving extended sentences will, as now, be released only after a recommendation by the Parole Board.

18. Section 30 removes the requirement for the Parole Board, at each hearing, to fix a date for the next one. Instead, the Secretary of State will refer cases to the Parole Board. He must refer each case at least every twelve months, and may do so before then if he sees fit. The Board may make a recommendation to the Secretary of State that a person's case be referred to it.

19. Section 31 removes the rule that the Secretary of State may recall a life sentence prisoner only on the recommendation of the Parole Board (except in certain circumstances). Instead, the Secretary of State may recall such a person when he sees fit. This brings the arrangements for lifers into line with those for other prisoners released on licence.

20. Section 32 is intended to clarify the consequences of a recall for prisoners released on licence under the 1991 Act. The effect of this section is that the further release of such recalled prisoners will be governed by the 2003 Act rather than the 1991 Act. This means

that the new procedures governing the further release of prisoners after recall (contained in the amendments made by sections 29 and 30 of this Act) will apply to all prisoners recalled under section 254 of the 2003 Act, regardless of whether their initial release was under the 1991 Act or 2003 Act. All recalled prisoners may be held in prison until the end of their sentence unless released again on licence under the new procedures. If re-released on licence will remain on licence, the licence will remain in force until their sentence expires.

21. Sections 33 and 34 amend the criteria for the availability of the early removal scheme, under which offenders liable to be deported may be released from custody early. The sections also extend the scheme to other offenders if they show a settled intention of residing permanently outside the UK.

22. Section 35 extends the circumstances in which a court may make a referral order in respect of a young offender. The changes remove the restriction on making a referral order where the offender has previously been bound over or discharged, allow a referral order to be made on second conviction (where a referral order has not previously been made) and allow a second referral order to be made in exceptional circumstances where this has been recommended by an appropriate officer. Section 36 amends the Powers of Criminal Courts (Sentencing) Act 2000 (the 2000 Act) to provide a power for a court to revoke a referral order in the interests of justice on the recommendation of a youth offender panel. Section 37 amends the 2000 Act to allow a court to extend the period of a referral order by up to 3 months (subject to the overall maximum of 12 months) where a youth offender panel has recommended this in the interests of justice.

23. Section 38 empowers a court, when dealing with an offender for breach of a community order which did not originally contain an unpaid work requirement, to impose an unpaid work requirement requiring 20 hours or more such work to be performed.

24. Section 39 and Schedule 7 introduce youth default orders which will enable a court to impose an unpaid work requirement, curfew requirement or attendance centre requirement on a young offender in lieu of an unpaid fine.

25. Section 40 amends the provisions in the 2003 Act in relation to adult fine defaulters to restrict those provisions to those over 18 years and provide for an attendance centre requirement to be imposed on young adult (those aged under 25) fine defaulters, with the duration of the requirement being linked to the amount of the unpaid fine.

26. Section 41 affords the staff of Her Majesty's Courts Service (HMCS) access to benefit records held by the Department for Work and Pensions (DWP) for the purpose of fine enforcement.

### **Part 3: Appeals**

27. Section 42 inserts a new section, section 16C, into the Criminal Appeal Act 1968 (the 1968 Act). New section 16C applies only in cases where the Court of Appeal is

determining an appeal referred to it by the Criminal Cases Review Commission and the only ground for allowing the appeal is that there has been a development in the law since the date of conviction. In such cases it is open to the Court to dismiss the appeal if they would have refused an extension of time in which to seek leave to appeal (had the Court been considering an out of time application by the appellant rather than a reference by the CCRC). Section 43 makes equivalent provision for Northern Ireland.

28. Section 44 alters the test for ordering a retrial in England and Wales (or that the trial should resume) where the Court of Appeal allow a prosecution appeal against a terminating ruling. Section 45 makes similar provision for Northern Ireland.

29. Section 46 amends section 36 of the Criminal Justice Act 1998 to provide that where a life sentence or indeterminate sentence is referred to the Court of Appeal by the Attorney General on the grounds that it is unduly lenient, the Court may not, on re-sentencing, give the offender a discount in the new sentence to reflect the fact that he is going through the sentencing process for the second time. This is an extension of the prohibition which already applies to mandatory life sentences for murder.

30. Section 47 and Schedule 8 make alterations to eight aspects of the procedure governing criminal appeals in England and Wales and to seven aspects of the procedure in Northern Ireland. The changes are mainly amendments to the 1968 Act with corresponding amendments to the Criminal Appeal (Northern Ireland) Act 1980. The changes relate to the functioning of the Court of Appeal Criminal Division to resolve anomalies and minor difficulties in the existing provisions.

#### **Part 4: Other criminal justice provisions**

31. Section 48 and Schedule 9 extend the adult conditional caution scheme, provided for in Part 3 of the 2003 Act, to young offenders. The provisions allow for a caution with specific conditions attached to it to be given where there is sufficient evidence to charge a suspect with an offence which he or she admits, and the suspect agrees to the caution. It would be for the prosecutor to decide whether a conditional caution was appropriate, and in most cases for the police to administer it. If the suspect failed to comply with the conditions, he or she would be liable to be prosecuted for the offence. The Act provides for the publication of a Code of Practice for youth conditional cautions.

32. Section 49 and Schedule 10 amend the Rehabilitation of Offenders Act 1974 (the 1974 Act) to bring warnings, reprimands, simple cautions and conditional cautions within the ambit of that Act. Once such warnings and cautions become "spent" an ex-offender is not obliged to declare them, for example, when applying for a job (save in excepted circumstances). Section 50 makes consequential amendments to Part 5 of the Police Act 1997 (the 1997 Act) which provides the statutory framework for the Criminal Records Bureau (CRB).

33. Section 51 and Schedule 11 make provision in the Bail Act 1976 (the 1976 Act) for the electronic monitoring of compliance with bail conditions of defendants aged 17 or

over. Schedule 11 also amends the existing provision in the Bail Act 1976 for the electronic monitoring on bail of defendants aged under 17.

34. 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.

35. Section 53 and Schedule 13 amend Schedule 3 to the 2003 Act which revised the procedure to be followed by magistrates' courts in determining whether cases triable either way should be tried summarily or on indictment, and provides for the sending to the Crown Court of those cases which need to go there. The new procedures were designed to enable cases to be dealt with in the level of court which is appropriate to their seriousness, and to ensure that they reach that court as quickly as possible. The amendments to Schedule 3 restore the power of magistrates' courts to commit cases tried summarily to the Crown Court for sentence.

36. Section 54 creates a presumption that, if defendants fail to attend for trial without good cause, magistrates will use their powers to try them in their absence and sentence them if convicted.

37. Section 55 extends the range of hearings and proceedings in magistrates' courts where the Crown Prosecution Service (CPS) may be represented by a non-lawyer known as an Associate Prosecutor (formerly designated caseworker) rather than a Crown Prosecutor.

38. Sections 56 to 58 amend the criminal legal aid provisions in the Access to Justice Act 1999 to allow the right to representation to be applied for and granted provisionally before the point of charge; allow HMCS staff processing means tested applications to access Her Majesty's Revenue and Customs (HMRC) and DWP records for the purposes of assessing financial eligibility; and widen the powers to pilot schemes relating to the grant of legal aid.

39. Section 59 extends the existing powers of the Serious Fraud Office (SFO) in section 2 of the Criminal Justice Act 1987 to the vetting stage in any case involving bribery or corruption of overseas officials.

40. Section 60 amends the defence statement requirements in the Criminal Procedure and Investigations Act 1996 to require defendants to set out not only the factual matters on which they take issue with the prosecution but also particulars of any other factual matters on which they intend to rely. Section 11 of the 1996 Act is amended to provide for the usual sanctions (comment and inferences) to be available for breach of these requirements

41. Section 61 alters the scheme, provided for in section 133 of the Criminal Justice Act 1988 (the 1988 Act), for the award of compensation for miscarriages of justice. The changes impose a time limit for making applications for compensation, place upper limits

on the amount of compensation that may be awarded, restrict the compensation that may be paid for loss of earnings, and enable the Assessor to make deductions from the total level of compensation in the light of any contributory conduct or any previous convictions held by the applicant.

42. Section 62 repeals section 8 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 which requires the Secretary of State to lay before Parliament an annual report on the workings of that Act.

## **Part 5: Criminal law**

43. Sections 63 to 67 make it an offence to possess pornographic images that depict acts which threaten a person's life, acts which result in or are likely to result in serious injury to a person's anus, breasts or genitals, bestiality or necrophilia; they also provide for the exclusion of classified films etc. and set out defences and the penalties for the offence. Section 68 and Schedule 14 are intended to ensure that the operation of the extreme pornography offence is consistent with the UK's commitments under the E-Commerce Directive (Directive 2000/31/EC) with regard to services provided by the Internet industry.

44. Sections 69 and 70 extend the definition of an indecent photograph in the Protection of Children Act 1978 (and the equivalent Northern Ireland legislation) to include a tracing or other image derived from a photograph.

45. Section 71 increases the maximum penalty for publication of obscene material and for the possession of such material for gain under the Obscene Publications Act 1959.

46. Section 72 substitutes a new section 72 into the Sexual Offences Act 2003 which allows for the prosecution of sexual offences against children committed abroad. In respect of the prosecution of UK nationals, it removes the requirement that the act committed must have been illegal in the country where it took place. This requirement remains for the prosecution of UK residents. For both nationals and residents this section provides that extra-territorial jurisdiction will apply for the offences specified where they are committed against children under 18, whereas currently it applies only to offences against children under 16. This section will support signature and ratification of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Abuse.

47. Section 73 introduces Schedule 15 which amends the offence of meeting a child following sexual grooming. Currently it is an offence if, following two earlier communications, an adult over 18 travels to meet a child under 16, with the intention of committing a sexual offence against that child. As a result of the amendment made by this Schedule an offence will be committed by an adult who has arranged a meeting with a child following two earlier communications, when the child travels to meet the offender. It also makes it an offence for an adult over 18 to arrange a meeting with a child under 16, following two earlier communications, if he intends to commit a sexual offence

against that child during or after the meeting. Schedule 15 also amends the Sexual Offences Act 2003 and the Adoption Act 1976 as regards sexual offences and adoption.

48. Section 74 and Schedule 16 extend the offences of inciting hatred against people on religious grounds to cover hatred against people on grounds of sexual orientation.

49. Section 75 and Schedule 17 amend the Nuclear Material (Offences) Act 1983 (the 1983 Act) and the Customs and Excise Management Act 1979 in order to give effect to amendments made in 2005 to the Convention on the Physical Protection of Nuclear Material. The amendments made to the 1983 Act create a number of new criminal offences, including offences relating to damage to the environment and to the importation and exportation of nuclear material.

50. Section 76 clarifies the law on the use of force in self-defence or the prevention of crime.

51. Section 77 confers a power on the Secretary of State to make an order altering the maximum penalty for an offence under section 55 of the Data Protection Act 1998.

52. Section 78 inserts a new defence into section 55 of the Data Protection Act 1998. The defence applies when a person acts for journalistic, literary or artistic purposes with a view to the publication of journalistic, literary or artistic material and in the reasonable belief that their actions were justified as being in the public interest.

53. Section 79 abolishes the common law offences of blasphemy and blasphemous libel in England and Wales.

#### **Part 6: International co-operation in relation to criminal justice matters**

54. Sections 80 to 92 and Schedules 18 and 19 give effect to the European Council Framework Decision on the mutual recognition of financial penalties in England and Wales and Northern Ireland. Section 80 (or 82 in respect of Northern Ireland) provides for the submission by the Lord Chancellor to another member State of a certificate requesting enforcement of a financial penalty incurred by an offender who is normally resident or who has property or income in that other member State. Section 84 (or 87 in respect of Northern Ireland) provides for the receipt, by the Lord Chancellor, from another member State of like certificates requesting the enforcement of a financial penalty incurred by an offender in that other State who is normally resident or who has property or income in one of the jurisdictions in this country and for the transmission of such a certificate to a magistrates' court. Section 85 (or 88 in Northern Ireland) and Schedule 18 set out the procedure for a magistrates' court to validate such incoming requests and the grounds for refusal of such requests.

55. Sections 93 to 96 amend the Repatriation of Prisoners Act 1984 to enable the United Kingdom to ratify the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons. The Protocol provides for the transfer of prisoners

without their consent where the prisoner is to be deported at the end of the sentence or where a prisoner has fled from one jurisdiction to another in order to avoid imprisonment. Subject to the extension of section 44 of the Police and Justice Act 2006 to Scotland (section 96), sufficient legislation is already in place to deal with the transfer of those prisoners subject to deportation, but further legislation is required to deal with prisoners who have fled. Sections 94 and 95 create a procedure for the transfer of responsibility for the enforcement of a sentence of a prisoner who has fled from one jurisdiction to another. Section 93 extends the scope of the Repatriation of Prisoners Act 1984 to enable a British escort to deliver a prisoner to a point of arrival in the receiving country, extending the flexibility of the current arrangements.

56. Section 97 amends the Crime (International Co-operation) Act 2003 so that the Treasury may provide for functions conferred on the Secretary of State in relation to requests mutual legal assistance from overseas authorities may be exercisable instead by HMRC in relation to direct tax matters.

### **Part 7: Violent offender orders**

57. Part 7 (sections 98 to 117) makes provision for a new civil preventative order - the violent offender order (VOO). It sets out the qualifying offences which may trigger an application for a VOO; the procedure in respect of applications for and the making, variation, renewal or discharge of a VOO; provides an exhaustive list of the kinds of conditions which can be imposed as part of a violent offender order or interim violent offender order; makes provision for interim orders and appeals; provides for breach of an order or interim order to be a criminal offence throughout the United Kingdom; sets out requirements on persons subject to a VOO to notify the police of certain personal information and of changes to such information; provides for a failure to comply with the notification requirements to be a criminal offence throughout the United Kingdom; and provides for the police and others to provide information to the Secretary of State for the purposes of verifying the information supplied in pursuance of the notification requirements.