THE CRIMINAL JUSTICE AND IMMIGRATION ACT 2008

Rudi Fortson

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INTRODUCTION

1. This handout summaries some of the measures enacted under Parts 3-6 of the CJAI2008. At first sight, many provisions of the CJIA2008 seem to be of limited importance but, when seen in the context of the schemes that they affect, the changes are significant.

Background and aims of the CJIA2008

2. The CJIA2008 is a wide ranging enactment comprising of 154 sections and 28 schedules. The Act received Royal Assent on the 8th May 2008. The Act creates offences that include the 'possession of an extreme pornographic image' (ss.63-71) and 'hatred on the grounds of sexual orientation' (s.74). The Act "clarifies" the defence of self-defence, and it abolishes the common law offences of blasphemy and blasphemous libel. Other amendments relate to the practice and procedure in connection with trials on indictment and appeals (e.g. the power of the CA(CD) to restrict or to dismiss appeals in 'change of law' cases following references by the CCRC, as well as amendments to the rules concerning prosecution appeals under ss.58-61 of the CJA2003.

3. A large number of provisions that had been included as part of the Criminal Justice and Immigration Bill, were removed. These include clauses relating to the creation of a 'Commissioner for Offender Management and Prisons' and the 'Northern Ireland Commissioner for Prison Complaints' (see Parts 4 and 5 of the Bill as it was printed in June and November 2007; and see *Hansard,* HL, col.954 (Feb 5, 2008).

4. Less surprising was the removal of amendments to the Street Offences Act 1959 concerning the offence of loitering or soliciting for purposes of prostitution,[1] and a clause to abolish suspended sentences for summary offences. Also removed from the Bill were amendments to the Criminal Appeal Act 1968, which (i) would have altered the test for allowing appeals, so that a conviction would not have been regarded as unsafe if the Court was of the opinion that there is no reasonable doubt about the appellant's guilt and, (ii) that the Court of Appeal (CD) would not be required to dismiss an appeal if the Court considered that it would seriously undermine the proper administration of justice to allow the conviction to stand.

5. A timeline regarding the history of the Bill's passage through Parliament, has been prepared (by the author of this paper) and it is available online: http://www.rudifortson4law.co.uk/legaltexts/Timeline_CJIA2008_R_Fortson.pdf

[1] Removed by March 2008.

Which sections are in force?

6. The bulk of the Act is now in force. As at 24 February 2009, six Commencement Orders have been made, the latest of which is S.I. 2009/140 made on the 29th January 2009.[2]

7. Commencement dates are set out in the table appended to this document: **Appendix C** (the table is not to be used for Court purposes: always refer to the source material). Note the transitional provisions that are set out in the relevant Statutory Instruments.[3]

Materials

8. *Explanatory Notes* relating to the CJIA 2008 were printed in June 2008.

9. Two informative Research Papers were printed during the Bill's passage through Parliament: see Research Paper 07/65 (9th August 2007) and Research Paper 07/93 (19th December 2007). For Parliamentary debates see: *Hansard*, HC, vol.462, col.180 (1stR); vol.464, col.59 (2R); 16 Oct 2007 to 25 Oct 2007 (Comm); *Hansard*, HC, vol.467, col.142 (Bill reintroduced: 1stR); vol.467, col.142 (2ndR); 20 Nov to 29 Nov 2007 (Comm); vol.470, col.325 (Rep); vol.470, col.478 (3rdR); *Hansard*, HL, vol.697, col.938 (1stR); vol.698, col.127 (2ndR); vol.698, col.953, (5 Feb to 12 Mar 2008 (Comm)); vol.700, col.568 (26 Mar 2008 to 23 Apr 2008 (Rep)); vol.701, col.245 (3R); HC, vol.475, col.527, HL, vol.701, col.564 (PP); HL, vol.701, col.669 (RA).

APPEALS

Section 42: change of law - power to dismiss appeals - CCRC references

10. This measure came into force on the 14th July 2008.

11. Section 42 of the CJIA 2008 (Part 3 of the Act) inserts new s.16C into the Criminal Appeal Act 1968.[4]

12. The object of s.42 is to give the Court of Appeal power to dismiss appeals against conviction, following a reference to that Court by the Criminal Cases Review Commission ("CCRC"), notwithstanding that there has been a change in the law since the date of the appellant's conviction.

13. The Court is not obliged to dismiss an appeal, merely that the court "may" do so if the only ground for allowing it would be that there has been a change in the law since the date of conviction.

14. Two situations need to be contrasted:

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2 See SI 2008/1466, SI 2008/1586, SI 2008/2712, SI 2008/2993. SI 2008/3260. SI 2009/140; and see SI 2008/1587 (transitional provisions).

3 http://www.opsi.gov.uk/si/si2009/uksi_20090140_en_1

4 Section 43 inserts a similar provision (new s.13A) into the Criminal Appeal (Northern Ireland) Act 1980.

(a) Defendants who have made (and who were entitled to make) an application for an extension of time within which to seek leave to appeal against conviction on the ground that the law has changed.

(b) A defendant's case is referred to the CA(CD) by the CCRC on the grounds that there has been a change in the law (applying s.13 of the Criminal Appeal Act 1995.[5]

15. In (a) above, D would only be granted leave to appeal, following a change in the law, IF a "substantial injustice" would be done to D, were leave to appeal to be refused.

16. In (b), cases that are referred to the CCRC to the CA(CD) do NOT require the leave of that Court to appeal against D's conviction. Prior to the enactment of s.42 CJIA2008, the Court was required to apply the law as it stood at the date of the appeal. The effect of s.42 is that the Court of Appeal may now dismiss an appeal against conviction (referred to it by the CCRC) notwithstanding a change in the law.

17. Section 42 of the CJIA 2008,[6] therefore puts appellants, whose cases have been referred to the Court by the CCRC, in the same position as appellants who have made (and who were entitled to make) an application for an extension of time within which to seek leave to appeal against conviction on the ground that the law has changed.

18. Section 42 was enacted having regard to the decision of the Court of Appeal in *Cottrell* [2007] EWCA Crim 2016, [2008] Crim. L.R. 50, which disapproved of the decision of the Divisional Court in *R. v Criminal Cases Review Commission* [2007] 1 Cr.App.R.30, [2007] Crim. L.R. 384. The latter case held that, when deciding whether to refer cases to the Court of Appeal on the grounds that the law has changed, the CCRC is not obliged to have regard to the 'finality policy' of the Court of Appeal. In *Cottrell*, the Court of Appeal highlighted the dilemma that 'change of law' cases present:

> "Those convicted on the basis of the old law assert that their convictions were based on an erroneous understanding of the criminal law and that they have therefore suffered an injustice. At the same time there is a continuing public imperative that so far as possible there should be finality and certainty in the administration of criminal justice. In reality, society can only operate on the basis that the courts administering the criminal justice system apply the law as it is. The law as it may later be declared or perceived to be is irrelevant. Change of law appeals create quite different problems to those which arise in the normal case where an individual was wrongly convicted on the basis of the law which applied at the date of conviction. These tensions are not confined to England and Wales" (para.42).

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5 Section 13 of the Criminal Appeal Act 1995 provides: "A reference of a conviction...shall not be made under...section 9...unless (a)the Commission consider that there is a real possibility that the conviction...would not be upheld were the reference to be made, (b)the Commission so consider - (i)…because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it...and (c)an appeal against the conviction...has been determined or leave to appeal against it has been refused."

6 And s.43, for the purposes of Northern Ireland.

19. In *Cottrell*, the Court of Appeal said (in effect) that the CCRC must have regard to the 'finality policy' of the Court of Appeal (Criminal Division) when an appeal is based on the grounds that the law has changed:

> "[I]t is a pre-condition to a reference that save in exceptional cases unless the defendant has unsuccessfully appealed against or made an unsuccessful application for leave to appeal against conviction, so that any remedy arising from his normal appeal rights is exhausted, he should first apply to the court. If he has not previously applied for leave to appeal, the court may refuse leave to appeal just because the application is out of time, and in change of law cases it will normally do so. If it does so, the legislative arrangements suggest again, that save in exceptional circumstances, the Commission should not refer cases on which this issue has already been addressed and decided adversely to the proposed appellant" (para.54).

20. The so-called "finality policy" is not inflexible, as a passage in the judgment of *Cottrell* demonstrates:

> "[I]t has for very many years, and still is, as Hughes LJ described it in *R v Ramzan and others* [2007] 1 CAR 150, the "very well established practice of this court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice would otherwise be done to the defendant". In short, the principle is that the defendant seeking leave to appeal out of time is generally expected to point to something more than the mere fact that the criminal law has changed, or been corrected, or developed. If the appeal is effectively based on a change of law, and nothing else, but the conviction was properly returned at the time, after a fair trial, it is unlikely that a substantial injustice occurred" (para.46, emphasis added).

21. It is arguable that s.42 was not needed given the decision of the Court in *Cottrell* (see the comments of Lord Lloyd of Berwick to that effect, *Hansard*, 27 Feb 2008: Column 689). However, s.42 goes further than merely saying that the CCRC must have regard to the Court's 'finality policy' – it empowers the CA(CD) to dismiss an appeal against a conviction that is referred to it by the CCRC. In any event, the Court in *Cottrell* said that it shared the views expressed in *R. (on the application of Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission* that the issues merited the attention of Parliament.

22. Both *Ramzan* and *Cottrell* have been the subject of detailed comment by Professor David Ormerod ([2007] Crim. L.R. 79; [2008] Crim. L.R. 50).

Section 44: Prosecution appeals

23. Section 44 came into force on the 14th July 2008, and amends s.61(5) CJA 2003: see **Appendix A**.

24. Part 9 of the CJA 2003 gives the prosecution a right of appeal in respect of rulings that: (a) fall within ss.58–61 of the CJA 2003 (at one time thought to apply to so-called 'terminating rulings'); and (b) 'evidentiary rulings' (ss.62–66). The latter set of provisions have not (as at February 2009) been brought into force.

25. The appeal must relate to a trial on indictment (regardless of the type of offence, or its gravity).

26. In respect of s.58 appeals, the prosecution may not inform the court that it intends to appeal *unless* it also informs the court that it agrees that the defendant should be acquitted of the offence to which the appeal relates in the event that *either* leave to appeal to the Court of Appeal is not obtained, *or* that the appeal is abandoned before it is determined by the Court of Appeal. This requirement has been described as the "acquittal agreement" (see *R. v Y* [2008] EWCA Crim 10, and *R. v R* [2008] EWCA Crim 370). Such an agreement is not a pre-condition for appeals under ss.62–66 of the CJA 2003.

27. Section 61(3) of the CJA 2003 states that, "where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence".

28. Even if the prosecution *succeeds* in its appeal, there can be circumstances in which a defendant may nevertheless be acquitted (see s.61(4)–(8)). It is in connection with s.61(4)–(8) of the CJA 2003 that s.44 of the CJIA 2008 is relevant.

29. In cases where a ruling is either reversed or varied, the Court Appeal may order the defendant to be retried (s.61(4)(a), or for the trial to be resumed if proceedings in the Crown Court have been adjourned (s.61(4)(b)), or order that the defendant be acquitted in relation to that offence (s.61(4)(c)).

30. However, s.61(4) takes subject to s.61(5) which (prior to the amendment made by s.44 of the CJIA 2008), stated that the Court of Appeal could not make an order under s.61(4)(a) or (b) *unless* it considered it *necessary in the interests of justice to do so*.

31. The effect of s.61(5), as originally drafted, seemed to 'weight' a *successful* appeal in favour of an acquittal *unless* it was in the interests of justice for the trial to be resumed, or for a retrial to be ordered. This may appear anomalous but it is arguable that s.61(5), as originally drafted, chimed with the recommendations of the Law Commission in Law Com.267(para.7.105) where the distinction between 'terminating' and 'non-terminating' rulings seemed to be clearly drawn (the former kind of rulings having the effect of bringing the proceedings to an end).

32. Section 44 of the CJIA 2008 amends s.61(5), so that it now reads, " … [but] the Court of Appeal may not make an order under subsection (4)(c) in respect of an offence unless it considers that the defendant could not receive a fair trial if an order were

made under subsection (4)(a) or (b)": see **Appendix A.**[7]

33. The outcome of a successful appeal is now weighted in favour of the trial being resumed, or a fresh trial being ordered, subject to the proviso stated in s.61(5).[8] Arguably, Parliament is doing no more than giving statutory force to that part of the decision of the Court of Appeal in *R v Y*, which held that "…[there] is also a residual power under s.61(4) and (5) for the Court of Appeal to order acquittal even if the appeal succeeds, but only if it is necessary in the interests of justice to do so". Given that the 'interests of justice' requirement applied only to s.61(4)(a) and (b) of the CJA 2003, and not to s.61(4)(c), it is arguable that the power to order an acquittal was more than merely "residual". However, the point disappears by virtue of s.44 of the 2008 Act.

34. On a wider note, the Court of Appeal appears to have construed ss.58-61 sufficiently widely to render ss.62-66 otiose. As a result, it is unlikely that ss.62-66 will ever be brought into force. However, for the purposes of ss.62-68 no 'acquittal agreement' is needed and the prosecution must obtain leave to appeal from either the judge or the Court of Appeal before it can appeal. That leave may be granted only if the relevant condition is met, namely, that the evidentiary ruling or rulings, 'significantly weakens the prosecution case': see s.63 CJA2003, and see the explanation given by the then Attorney General (*Hansard*, HL, Vol. 413, col.1787, 17 November 2003).

35. It is debatable whether Parliament intended that ss.58-61 should embrace evidential rulings that are not "terminating rulings" (in the sense that the Law Commission used that latter expression).[9] Paragraph 276 of the Explanatory Notes to the CJA 2003 describes s.58 of that Act as covering, "both rulings that are formally terminating and those that are de facto terminating in the sense that they are so fatal to the prosecution case that, in the absence of a right of appeal, the prosecution would offer no or no further evidence". The Explanatory Notes reflect the debates in Parliament, that described (what are now) ss.58–61, as provisions that apply to "terminating rulings".

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7 Thus, even if the prosecution succeeds on appeal, a retrial might not be ordered if, for example, the defendant is very ill.

8 According to *Research Paper 07/65*, the revised wording of s.61(5) of the CJA 2003 gives effect to the undertaking given by the Government in the July 2006 White Paper, *Rebalancing of the Criminal Justice System in Favour of the Law-Abiding Majority* to, "restrict the ability of those the courts agree are guilty to have their convictions quashed on a technicality" (para.2.15).

9 See the Law Commission Consultation Paper No.158 ("*Prosecution Appeals Against Judges' Rulings*"**)** in which the Law Commission said: "[1.14]…Some forms of prosecution appeals may result in greater accuracy of outcome, but at the *expense* of process aims. We therefore set ourselves the task of using this distinction to determine which possible forms of prosecution appeals are fair, or capable of being fair, and which are not. [1.15] In Part IV, we use this approach to draw a distinction between the fairness of appeals against rulings made by a judge which *terminate* a trial (either because their direct legal effect is to bring proceedings to a halt, or because the result of the ruling is that the prosecution is forced to throw in its hand), and those which do not. We provisionally conclude that appeals against terminating rulings *may* be fair, but that those against non-terminating rulings during the course of a trial are (generally) not", and see recommendations 25-31 of Law Com No.267 ("*Double Jeopardy And Prosecution Appeals*"**)**. More recently, in its Consultation Paper No.184 *(The High Court's Jurisdiction In Relation To Criminal Proceedings*), the Law Commission appears to be adhering to the view that terminating rulings are ones that will prove fatal to the prosecution case (see para.2.67; note that *Thompson and Hanson* is cited but the CP preceded the decision in *R v Y*).

36. In *R. v Y*, the Court said that the expression 'terminating ruling' appears "nowhere in the statute" and that it is no doubt the 'acquittal agreement' (s.58(8)), "which led to the use of the expression 'terminating ruling' during the consultation process preceding this part of the Act and its passage through Parliament" (para.20): and see *R. v O, J, and S* [2008] EWCA Crim 463. It is respectfully submitted that the history of the legislation is open to a contrary interpretation.

37. In contrast with the decision of the Court of Appeal in *R v Y*, the earlier decision of the Court of Appeal in *Thompson and Hanson* [2006] EWCA Crim 2849, [2007] 1 WLR 1123 supports the view that, "…it is only 'terminating' rulings that can be appealed under s.58 and, further, that for a ruling to be a 'terminating' ruling, it must be one that, if not reversed on appeal, would necessarily result in the defendant's acquittal" (para.2.65).

38. More recently, in *R. v LSA* [2008] EWCA Crim 1034, the Court of Appeal expressed itself less forcefully than it had in *R v Y,* but although the Parliamentary history of these provisions is open to debate, it is increasingly clear that the Court of Appeal's stance, namely, that ss.58-61 create a general right of appeal, seems certain to prevail: and note the Court of Appeal's decision in *RL and JF* [2008] EWCA Crim 1970: see also *R v B* [2009] EWCA Crim 99.

Section 47: Further amendments relating to appeals

39. Section 47 and schedule 8 of the CJIA2008, which came into force on the 14th July 2008, amend the Criminal Appeal Act 1968, the Criminal Appeal Act (Northern Ireland) Act 1980, as well as various other enactments in criminal cases.

40. The following changes should be noted:

    (a) *Time limit on grant of certificates of fitness for appeal:* ss.1, 11, 12, and 15 of the Criminal Appeal Act 1968 are amended by imposing a limit of 28 days on the power of a trial judge to certify a point as fit for appeal (see paras 2–5 of Sch.8 to the CJIA 2008).

    (b) *Powers of the court to substitute a different sentence:* (Sch.8 para.6): s.4 of the CAA1968 is amended to empower the Court of Appeal (CD) to sentence the appellant in respect of any offence for which he was sentenced in the court below, *provided* that he was sentenced in the proceedings in which he had also been sentenced in connection with the conviction for the offence that has been quashed by the Court of Appeal: see the Explanatory Notes (para.330).[10]

[10] "This has general application, but is particularly likely to be of use in cases in which a defendant has received an indeterminate sentence of imprisonment for public protection for an offence that was subsequently successfully appealed and was also convicted of another offence, the seriousness of which was reflected in the tariff for the indeterminate sentence rather than in a separate determinate sentence. Provided that the two sentences were originally passed on the same day, the new provision enables the Court of Appeal to re-sentence the defendant in respect of the other offence, even if it was on a separate indictment, whereas at present it can only do so if both offences were on the same indictment. For the purposes of s.4, sentences

(c) *Interim hospital orders*: paras 7 and 8 of Sch.8 to the CJIA 2008 significantly alter pre-existing arrangements for dealing with interim hospital orders made by the Court of Appeal (CD). New s.30A of the CAA1968 (inserted by para.8 of Sch.8 to the CJIA 2008) empowers the Court of Appeal (rather than the court below) to renew, or to terminate the order, or to deal with the offender in some other way, upon termination of the order. Where an offender absconded during the period of an interim hospital order, it will be the "court below" that deals with the offender once he can be brought before that court (see s.38(2) of the Criminal Appeal Act 1968). By para.9 of Sch.8, the powers of the Court of Appeal may be exercised by a single judge of the High Court, but only in relation to a hearing to renew an interim hospital order - which might be an application that is unopposed (see the Explanatory Notes para.333).

(d) *Evidence*: para.10 of Sch.8 of the CJIA 2008 amends s.23, CAA1968. The amendments empower the Court of Appeal (CD) to direct the attendance of witnesses, and to require the production of documents (or other items that are mentioned in s.23(1)(a) of the 1968 Act). The powers may also be exercised in respect of applications for leave to appeal: see para.336 of the Explanatory Notes.

(e) *Powers of the single judge (Sch.8 para.11)*: a single judge of the High Court may give leave to appeal in respect of decisions made at a preparatory hearing pursuant to s.9 of the Criminal Justice Act 1987 ("CJA 1987") or s.35 of the Criminal Procedure and Investigations Act 1996. Similar provision is made for the purposes of Northern Ireland. The object of Sch.8 para.12 is to enable a single judge to make directions, which cannot then be the subject of appeal to the full court.

(f) *Detention of defendant pending appeal to the Supreme Court*: Sch.8 para.13 is an important provision that is designed to ensure that, in cases where the Court of Appeal (CD) allowed an appeal in favour of a convicted person, but that decision is reversed on appeal to the House of Lords/Supreme Court, the offender can be ordered to serve out his or her sentence, "unless the Court of Appeal has made an explicit decision that it is in the interest of justice that the defendant should not be liable for further detention" (Explanatory Notes para.340).

(g) *Detention pending appeal from the High Court to the Supreme Court*: Sch.8 para.26 modifies the wording of s.5(1) of the Administration of Justice Act 1960, as well as inserting subs.(1A) to that section, and making various consequential amendments to subss.(3), (4), and (5) of s.5 of the 1960 Act. The effect of those amendments is to ensure that defendants are detained pending an appeal unless he or she is admitted to bail or, the court is of the opinion that it is in the interests of justice that the defendant ought not to be liable to be detained following the decision of the Supreme Court (see new s.5(1A), AJA1960).

(h) ** *Variations of sentence by the Crown Court*: Sch.8 paras 27 and 28 make important amendments to s.49 of the Judicature (Northern Ireland) Act 1978 and s.155 of

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which are passed on different days will, in effect, be treated as passed on the same day if the court in passing any one of them states that it is treating them as substantially one sentence."

the Power of the Criminal Court (Sentencing) Act 2000, by increasing the period - that practitioners tend to call "the slip rule" - from 28 days to 56 days, within which the Crown Court can vary, or rescind, a sentence. Regardless of whether or not other sentences are imposed following a joint trial, the period of 56 days runs from the date that the sentence in question was first imposed on the defendant. The object of the provision is to give more time within which sentencing errors can be corrected. The Government hopes that the number of cases brought before the Court of Appeal (Criminal Division) will be reduced (Explanatory Notes para.342). Paras.27(3) and 28(3) of Sch.8 to the CJIA 2008 amend the Acts of 1978 and 2000 (respectively) to prevent those Acts being used to interfere with a sentence that has been the subject of a decision by the Court of Appeal (CD). Although the periods under the Acts of 1978 and 2000 have been extended to 56 days, the period within which a defendant can apply for leave to appeal against sentence, has not been increased from 28 days. It would seem that this is not an anomaly: if an appeal against sentence has been lodged within 28 days, and then the sentence is corrected with 56 days, the appeal ought to be abandoned.

CRIMINAL LAW MATTERS

Section 48(1)(a): Youth Conditional Cautions

41. This provision came into force on the 1st February 2009 but only to a limited extent: see schd.9 para.1 and 3 (but only to the extent that it inserts s.66G and s.66H of the Crime and Disorder Act 1998), and para.4. The provisions which came into force, on that date, merely pave the way for YCC's to be given once other paragraphs of schd.9 of the CJIA 2008 come into force.

42. Since the enactment of the CJA2003, Adult Conditional Cautions (ACC) have been available for offenders aged 18 and over: note the *Conditional Cautioning Code of Practice* (S.I 2004/1683)) and the DPP's *Guidance on Conditional Cautioning*: see *Blackstone's Criminal Practice 2009* (D2.28-32). ACCs are not available for all offences: see the list set out in Annex A to the *Guidance on Conditional Cautioning*. An ACC may be imposed by the CPS – but not by the police – if the requirements of s.23 CJA 2003 are met (e.g. sufficient evidence that D committed the offence; D admits the offence, the conditions are explained to D, that D consents to an ACC). Conditions may be imposed for the purpose of facilitating the rehabilitation of the offender, and\or ensuring that the offender makes reparation for the offence (see s.22(3) CJA 2003).

43. Although s.48(1), CJIA 2008 refers to "children and young persons", the Government recognised that giving YCCs to 10–15-year-olds "will give rise to a different set of challenges", and that it wished to consult widely before extending the provisions of s.48 to that age group [*Hansard*, col.1289 (April 21, 2008), per Lord Hunt]. The Government will therefore take a "staged approach" to the implementation of s.48 of the CJIA 2008. In the first stage of implementation, a YCC will be available only to 16 and 17-year-olds. Section 48(2) of the CJIA 2008 provides that the Secretary of State may, by order, amend Sch.9 of the CJIA 2008 to

extend at the age of persons under 16 who may receive a YCC.

44. When s.48 and schd.9 of the CJIA2008 are fully in force, a YCC may be given by an "authorised person"[11] but only if the five requirements set out in s.66B of the CDA 1998 (Sch.9 para.3) are met. The conditions that may be attached to a YCC are those which aim to facilitate the rehabilitation of the offender, and/or ensure that the offender makes reparation for the offence, and/or to punish the offender.[12] There are restrictions on imposing a condition to pay a financial penalty as part of the YCC (see s.66C of the CDA 1998; Sch.9 para.3). Matters relating to an offender's failure to comply with a YCC, as well as restrictions on sentencing following a conviction of an offence committed by an offender who is subject to such a caution, are dealt with in ss.66E and 66F of the CDA 1998 (Sch.9 para.3). The Secretary of State must prepare a Code of Practice in relation to YCCs (s.66G;[13] Sch.9 para.3; see *Hansard*, HL, col.1289 (April 1, 2008); see also the Explanatory Notes paras 348–361).

Section 49: Rehabilitation of offenders (spent cautions)

45. This provision, and schedule 10, came into force on the 19th December 2008.

46. Schedule 10 of the CJIA 2008 amends the Rehabilitation of Offenders Act 1974 (England and Wales only) with the result that the 1974 Act applies to Adult Conditional Cautions, Youth Conditional Cautions, simple cautions, reprimands and final warnings, and cautions given in a jurisdiction outside of England and Wales. The word "caution", for the purposes of the 1974 Act, is defined by s.8A of that Act (inserted by Sch.10 para.3; and s.49 of the CJIA 2008).

47. The unauthorised disclosure of *spent cautions* is treated in a manner similar to the unauthorised disclosure of spent *convictions* by a "relevant person" (s.9A(1)(c) of the 1974 Act)[14], namely that it is an offence for a person to make such a disclosure otherwise than in the course of that person's duties. It is also an offence for a person to obtain information about cautions by way of fraud, dishonesty, or bribery (see s.9A(4) of the 1974 Act, inserted by Sch.9 para.4 of the CJIA 2008.

48. The rehabilitation period for *spent cautions* appears in Sch.2 para.1 of the 1974 Act (inserted by s.49 and Sch.10 para.6 of the CJIA 2008).

49. "Protection for spent cautions" is particularised in new Sch.2 to the 1974 Act (see Sch.10 para.6 of the CJIA 2008). According to the Explanatory Notes, "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" (para. 367). This statement appears to be based on para.3(3)(a) and (b) of Sch.2 to the 1974 Act (inserted by s.49; Sch.10 para.6 of the

11 See s.66A(7) of the CDA 1998 (inserted by s.48 and Sch.9 para.3 of the CJIA 2008).
12 Section 66A(3) of the CDA 1998; s.48 and Sch.9 para.3 of the CJIA 2008)
13 Section 66G is in force: see Appendix C to this handout.
14 Inserted by s.49 and Sch.10 para.4 of the CJIA 2008.

CJIA 2008).[15]

50. Exceptions to the protections afforded by the 1974 Act are dealt with at para.4 of Sch.2 to that Act.

Section 51: electronic monitoring imposed as a bail condition

51. This provision, and schedule 11, came into force on the 3rd November 2008.

52. Section 3(6) of the Bail Act 1976 makes provision for the granting of bail with requirements "as appear to the court to be necessary" and, they may be imposed for any, or all, of the purposes specified in subs.(6), for example, to secure that the person surrenders to custody.

53. In a letter dated May 5, 2006, written by Lord Justice Thomas to the judiciary ("*Bail and Proceedings in Absence*"), his lordship stated that there had been some doubt whether "tagging" (electronic monitoring) could be required as a condition of bail.[16] Lord Thomas added, "[I]t is now clear that tagging can be imposed as a condition of bail without specific legislative provision".

54. So far as the tagging of children and young persons is concerned, the Bail Act was amended by s.131 of the Criminal Justice and Police Act 2001, which inserted ss.3(6ZAA) and s.3AA into the 1976 Act. Those provisions restrict tagging, in order to monitor compliance with any bail conditions, to cases where: (a) the juvenile has attained the age of 12 years; and (b) the remaining conditions specified in s.3AA of the Bail Act, have been complied with.

55. Paragraph 2 of Sch.11 to the CJIA 2008 replaces s.3(6ZAA) of the Bail Act 1976, with a revised s.3(6ZAA). Revised s.3(6ZAA) now makes provision with respect to:
    (i) a "child or young person" (in respect of whom s.3AA of the Bail Act applies[17]), and
    (ii) "other persons" (i.e. those who have attained the age of 17 years, in respect of whom new s.3AB of the Bail Act applies): see para.4 of Sch.11 to the CJIA 2008.

56. *"Other persons" (s.3(6ZAA)*: In the case of a person aged 17 years or over, tagging has been available as a condition of bail - but only in support of a curfew condition (see Circular 25/2006, "*Electronic Monitoring on Bail for Adults*", para.5). Prior to the

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15 However, para.3(3)(a) of Sch.2 to the 1974 Act merely states that "the answer may be framed accordingly". Whether those words entitle a person to answer 'no' to the question whether he/she "has ever *committed* an offence" is debatable (consider *R. v Patel* [EWCA Crim 2689; [2007] Crim. L.R. 476, and read the commentary to that case by Professor David Ormerod).

16 Presumably, this was a reference to the absence of any statutory sanction for the tagging of persons as a general condition of bail having regard to their convention rights.

17 The only significant amendment that has been made to s.3AA (by para.3 of Sch.11 to the CJIA 2008) is the substituted wording of the third requirement (s.3AA(4)), which now reads, " … the court is satisfied that the necessary provision for dealing with the person concerned can be made under arrangements for the electronic monitoring of persons released on bail that are currently available in each local justice area which is a relevant area".

enactment of the CJIA 2008, the Bail Act had said nothing about the tagging of persons within this age group as a general condition of their bail. Section 51 and Sch.11 of the CJIA 2008 puts the imposition of an electronic monitoring requirement on an adult, *as a general condition of bail*, on a statutory footing. New s.3AB forbids the imposition of an electronic monitoring requirement unless: (i) the court is satisfied that without the electronic monitoring requirements the person would not be granted bail; (ii) the court is satisfied that the necessary provision for dealing with the person concerned can be made under arrangements for the electronic monitoring of persons released on bail that are currently available in each local justice area which is a relevant area; and (iii) that (if the person is aged 17) a youth offending team has informed the court that in its opinion the imposition of electronic monitoring requirements will be suitable in his case.

57. General provisions relating to electronic monitoring are set out in new s.3AC of the Bail Act 1976 (inserted by s.51 and Sch.11 para.4 of the CJIA 2008). These include a mandatory requirement of bail that a person is made responsible for the monitoring of the person who has been bailed (s.3AC(1) of the Bail Act 1976), being a person of a description specified in an order made by the Secretary of State.

58. Nothing in s.3, or s.3AA, or s.3AB of the Bail Act 1976 is to be taken as requiring the Secretary of State to ensure that arrangements are made for the electronic monitoring of persons released on bail (s.3AC(8) of the Bail Act 1976).

Section 54: Summary trials – proceeding in the accused's absence

59. This provision came into force on the 14th July 2008 and amends s.11 of the MCA 1980. Note *Research Paper* 07/93, p.21 for background information.

60. In the case of an accused aged *less than* 18 years of age, the Magistrates' Court continues to enjoy the general *discretion* that it had, pursuant to s.11(1) of the MCA 1980, to proceed in the absence of the accused (see new s.11(1)(a)). But – and this is the significant change - if the accused has attained the age of 18 years, a Magistrates' Court is *obliged* to proceed in the accused's absence *unless* it would be contrary to the interests of justice to do so (and subject to the provisions of s.11(2), (2A), (3) and (4): see new s.11(1)(b) of the MCA 1980).

61. Where proceedings have been instituted by way of summons (or requisition), the court shall not proceed in the absence of the accused unless it is proved to the court's satisfaction that either the summons or requisition was served within a reasonable time before the hearing or, that the accused appeared on a previous occasion to answer the charge: s.11(2) MCA 1980.

62. In *R. v Richmond Justices Ex parte Haines* [1991] Crim. L.R. 848, the Divisional Court held that for the purposes of s.11 of the MCA 1980, the court's discretion to proceed in the absence of the defendant must be exercised judiciously, with proper regard to the principle that a defendant is entitled to a fair trial, which must include a fair opportunity to be present to hear the evidence against him or her and to exercise the right to give evidence and to call witnesses. The ultimate test, said the court, is one of

fairness: and see *R. v Jones* [2003] 1 AC1; *R. v O'Hare* [2006] Crim. L.R. 950; *R. v John* [2007] EWCA Crim 1339; *R. v Boodhoo* [2007] EWCA Crim 14; [2007] Crim. L.R. 714; *R. v Charles* [2001] 2 Cr. App. R. 233; see also Ferguson, P. W., "*Trial In Absence And Waiver Of Human Rights*", [2002] Crim. L.R. 554.

63. New subs.(2A) of s.11 of the MCA 1980 (inserted into s.11 of the MCA 1980 by s.54(3) of the CJIA 2008) requires a Magistrates' Court not to proceed in the absence of the accused if it considers that there is an acceptable reason for the accused's failure to appear.

64. Note that s.54(6) of the CJIA 2008 inserts new subs.(6) into s.11 of the MCA 1980, which provides that a court is *not obliged* to enquire into the reason for the accused's absence when considering whether the court should proceed forthwith. The Explanatory Notes (para.397) suggest that the court should take account of facts known to it (e.g. severe weather) when deciding whether there is an acceptable reason for the accused's absence.

65. *Sentencing in the absence of the defendant*: s.54(6) of the CJIA 2008 inserts subs.(5) into s.11 of the MCA 1980. Where proceedings have been instituted by way of information, or by summons, or proceedings have been instituted by 'written charge',[18] the court must not impose a custodial sentence in the absence of the defendant (see s.11(3)), nor may it impose any disqualification on the defendant, "except on resumption of the hearing after an adjournment under section 10(3)" (see s.11(4)). Those restrictions do not apply in cases where the defendant was bailed to return to the court (see the Explanatory Notes, para.397).

Sections 55, 56, 59: specific powers

66. *Rights of audience and powers of Associate Prosecutors*: Section 55 of the CJIA 2008 (in force 14th July 2008) amends s.7A of the Prosecution of Offences Act 1985 that makes further provision with regard to powers, and rights of audience, of members of staff in the Crown Prosecution Service who are 'designated' by the Director of Public Prosecutions under s.7A of the 1985 Act. Such members of staff are often styled "Designated Caseworkers" — now called "Associate Prosecutors" (see Circular 2008/01, paras.56-62).

67. *Representation Orders (pre charge)*: Section 56 CJIA2008 makes provision for the grant of representation orders at the investigative stage of an offence (for example fraud) rather than at the point at which a person is charged with an offence. The Ministry of Justice accepts that much work is carried out, pre-charge, by a person's legal advisers in cases such as fraud. Pilot schemes, relating to the grant of representation orders pre-charge, will be undertaken by the Government.

68. *SFO pre-investigative powers*: Section 59 of the CJIA 2008 inserts s.2A into the CJA 1987, which extends the powers of the Director of the Serious Fraud Office ("SFO") under

[18] That is to say, "in cases other than where the defendant was bailed to appear before the court on a certain date": see para.397 of the *Explanatory Notes*.

s.2(2) of the CJA 1987.[19] These additional powers are exercisable only at the pre-investigative stage for the purpose of enabling the Director of the SFO to determine *whether to start an investigation* under s.1 of the CJA1987 in respect of conduct to which new s.2ACJA1987 applies, namely:[20]

a. any common law offence of bribery;
b. the offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (corruption in office); and
c. the offences under section 1 of the Prevention of Corruption Act 1906 (corrupt transactions with agents): see new s.2A(6) CJA1987.

Section 60: Contents of an accused's Defence Statement

69. This provision came into force on the 3rd November 2008. Note that the coming into force of s.60 of the 2008 Act is of no effect (a) in relation to offences into which a criminal investigation (within the meaning of s.1(4) of the CPIA1996) has begun in England and Wales, before 4th April 2005 or, in Northern Ireland, before 15th July 2005; *and* (b) in relation to a case to which Part 1 of the CPIA 1996 applies by virtue of s.1(1) or (2) of that Act before 3rd November 2008: see article 3 of S.I.2008 No. 2712.

70. Section 60 ratchets-up pre-trial defence disclosure through the medium of the "Defence Statement", sometimes known as the "Defence Case Statement" (a requirement introduced by the Criminal Procedure and Investigations Act 1996). It inserts para.(ca) into s.6A(1) of the 1996 Act: "*setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence*".

71. Pre-trial defence disclosure of an alibi has been a statutory requirement since 1967 (s.11 of the CJA 1967 is now superseded by the requirements of the CPIA 1996).

72. In his *Review of the Criminal Courts of England and Wales* (2001),[21] Lord Justice Auld did not recommend the imposition of statutory requirements beyond those originally enacted under the CPIA 1996, partly because "many would find them objectionable as going beyond definition of the issues", and partly because "they would be difficult to enforce" (para.180). Lord Justice Auld recommended that the original requirement to s.5 of the CPIA 1996 should be made more effective (Ch.10 para.183):

> "There are other and better avenues to making the defence statement requirement effective. Though even they are limited in this imperfect field of criminal litigation, with many defendants incapable or unwilling to co-operate with the system and whose hard pressed lawyers often have difficulty in obtaining instructions and, where publicly funded, are

[19] To "…require the person whose affairs are to be investigated…or any other person whom he has reason to believe has relevant information to *answer questions* or otherwise *furnish information* with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith"

[20] See also *Hansard*, col.747 (November 29, 2007), the Home Office Consultation Paper, "*Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials*" (December 2005) and, the Law Commission Consultation Paper No.185, "*Reforming Bribery*" (October 31, 2007).

[21] Ch.10 paras 115–197.

inadequately paid for preparatory work."

73. Practitioners will not be surprised to find that nothing is said, in the CJIA 2008, about funding the preparation of a Defence Statement (which is already a highly time-consuming piece of work).

74. Section 33(2) of the CJA 2003 amended the CPIA 1996 and imposed requirements on the defendant to:

(a) set out the *nature of the accused's defence*, including any particular defences on which he intends to rely;

(b) indicate the *matters of fact* on which he or she *takes issue* with the prosecution;

(c) set out, in the case of each such matter, *why he or she takes issue* with the prosecution; and

(d) *indicate any point of law* (including any point as to the admissibility of evidence or an abuse of process) which he or she wishes to take, and any authority on which he or she intends to rely for that purpose.

75. When s.33(2) of the CJA 2003 was examined by the House of Commons' Standing Committee, the question was asked whether s.6A(1)(b) CPIA 1996 would require the defence to provide a detailed pleading in respect of all disputed issues. The Government suggested that only the "main facts" would need to be set out in a Defence Statement and that s.6A(1)(b) did not impose a requirement on the defendant to rebut "point by point, everything in every witness statement" (*Hansard*, Standing Committee B, col.234 (January 9, 2003)). That statement remains true but, s.60 CJIA 2008 has the potential to require a defendant to set out his/her case in detail.

76. A defence statement is an important document in the context of triggering disclosure: consider *Mayers and others* [2008] EWCA Crim 1418 (noting the Criminal Evidence (Witness Anonymity) Act 2008) following the decision of the House of Lords in *R v Davis* [2008] 3WLR 125). In *Mayers*, the Court of Appeal said (in the context of the CE(WA)A 2008):

> "…the defence statement provided after 3 November 2008, which provides for broader identification by the defence of the issues, is a crucial document, which must help inform and focus the disclosure process. The disclosure process cannot be circumscribed by a minute analysis of the text of the defence statement, and some of the considerations identified in section 5…such as, for example, the possibility of collusion between intended anonymous witnesses, where there is more than one, should be specifically investigated and addressed in the context of disclosure, not least because the defence may be ignorant of material which could or would be included in the case statement if it was known to the defendant."

77. The content of a DCS may also ensure that a defence is one that can be left before a jury (e.g. duress, or necessity): consider *R v S and L* [2009] EWCA Crim 85.

78. Scenarios to consider:

(1) D's case is that he/she was physically unable to inflict an injury on V in the

manner alleged by the Crown. Is D required to plead that case? If did has medical evidence that gives *particulars* in support of that case, should those particulars also be pleaded?

(2) D is charged with shooting V. Gunshot residue (of the same chemical composition as residue found on V) is detected on clothing that was seized by police at D's home. D refuses to plead guilty, and declines to serve a DCS, but he seeks to put the prosecution to proof of its case. D's advocate attempts to explore whether there might have been cross-examination of exhibits. Given D's failure to comply with CPIA requirements in relation to the service of a DCS, can the advocate be prevented from doing so?

NEW OFFENCES

Sections 63-68: Possession of extreme pornographic images

79. These provisions came into force on the 26th January 2009: see SI2008/2993.

80. Sections 63 makes it an offence for a person "to be in possession of an extreme pornographic image": see **Appendix C** (where s.63 is set out in full).

81. Professor Ormerod has pointed out that the provisions have been heavily criticized, "not merely because they further restrict freedom of expression, but because they are not consistent with the stated policy aim", namely that, "[if] the concern is with extreme pornography leading to violent offending, it is strange that the offences are limited to possession of sexual but not violent imagery" (Smith & Hogan, *The Criminal Law*, 12th edn, p.1051).[22]

82. Section 63 does not apply to "excluded images", that is to say, images that form part of a series of images contained in a recording of the whole or part of a "classified work" (see s.64).[23]

83. There is no defence of acting in the public good but, there are two defences to the s.63 offence, namely, **s.65** (general defences, e.g. legitimate reason for being in possession), and **s.66** (participation in consensual acts).

84. The elements of the offence may be summarised as follows:

a. *"Extreme pornographic image"* is – unsurprisingly - an image that is both: (a) pornographic; and (b) extreme (s.63(2)). Each of those two elements is defined by s.63(3) and s.63(6) and (7).

b. *"Image"* - defined by s.63(8). The image can be either "moving or still", or it can be data that is "capable of conversion" into a moving or still image (s.63(8)(b)). The wording is similar to s.7(4)(b) of the Protection of

[22] See also "*Harmful Viewing*" (2007) 157 NLJ 170, and see the debates in Parliament (*Hansard*, HC, col.512, November 22, 2007; *Hansard*, HL, col.127, January 22, 2008; *Hansard*, HL, col.893, March 3, 2008; *Hansard*, HL, col.1348, April 21, 2008,; *Hansard*, HL, col.261, April 30, 2008).

[23] See s.64(7) for the meaning of a "classified work".

Children Act 1978 to the extent that it also employs the phrase "capable of conversion". But, for the purposes of s.63(8) CJIA2008 there is no requirement that D had made or created the image (consider *R. v Bowden* [2000] Crim. L.R. 381 (a decision in the context of s.1(1)(a) of the Protection of Children Act 1978).

c. *"Pornographic"*: By s.63(3) of the CJIA 2008, "an image is pornographic if it is of such a nature that it must *reasonably be assumed to have been produced solely, or principally, for the purpose of sexual arousal*".

   i. Arguably, the precise meaning of 'pornographic', for the purposes of s.63(3), is not likely to cause much difficulty because s.63 is directed against an "extreme image" within the meaning of s.63(6) and (7) of the CJIA 2008, i.e. an image that it is, "grossly offensive, disgusting, or otherwise of an obscene character".

   ii. The wording of s.63(3) suggests that fact-finders need not be *sure* that the image was produced solely or principally for the purpose of sexual arousal, merely that it is sufficient that the image may reasonably be assumed to have been produced for that purpose.

   iii. Context is all-important: e.g. where D produced a 'snapshot' image from a film, "solely or principally for the purpose of sexual arousal", the image might be adjudged pornographic even though the film, considered as a whole, is not pornographic (and consider s.64 of the CJIA 2008). Consider, for example, images of bestiality etc as "modern art" that are designed to shock but not to sexually arouse.

d. *"Extreme"*: An image is deemed to be "extreme" if two circumstances exist. First, the image must portray in an explicit and realistic way any of the acts specified in s.63(7) of the CJIA 2008. The acts that are specified in s.63(7) are: (a) an act which threatens a person's life, (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals, (c) an act which involves sexual interference with a human corpse, or (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real. Secondly, the image will be extreme if it is "grossly offensive, disgusting or otherwise of an obscene character" (see s.63(6)(b)).[24]

e. *"Possession"*: The following should be noted:

   i. It is not an element of the *actus reus* of the s.63 offence that D did anything to bring the image into existence (for example by downloading the data image, storing the data, or copying the data file from one location to another).

   ii. But for the defence that is set out in s.65(2)(c) of the CJIA 2008 (and which mirrors s.160(2)(c) of the CJA 1988), a person who opened an

[24] An amendment moved in the House of Lords to replace the words in s.63(6)(b) with the test of obscenity, as defined by s.1 of the Obscene Publications Act 1959, was disagreed to by their lordships (Hansard, HL, col.274 (April 30, 2008)).

unsolicited email that contained a data file, which was capable of being converted, and which contained an extreme pornographic image, would be in unlawful possession of it, even if his/her attempts to delete the file were ineffective.

iii. If the s.63(1) offence has a *mens rea* requirement, it is difficult to state with precision what that requirement entails. It is submitted that the cases of *R. v Jayson and Smith* [2003] 1 Cr.App.R.13, *R. v Porter* [2003] Crim. L.R. 381, and *R. v Bowden* [2001] QB 88, do not assist (being cases of "making" an image under s.1(1)(a) of the Protection of Children Act 1978, and where the statutory defence of lack of knowledge of the indecent nature of the photographs, does not apply (see s.1(4)(b)).[25] But consider cases decided in relation to s.160 of the CJA 1988: *R. v Collier* [2004] Crim. L.R. 1039, and *Atkins v DPP* [2000] 2 Cr. App. R. 248.[26]

iv. Presumably, D must know of the existence of the 'thing' (e.g. a data file/picture file/email) that was in his custody or under his control, even if he made a mistake as to its quality (consider *Warner v Metropolitan Police Commissioner*; [1969] 2 AC 256, and see *Atkins v DPP ante*.

v. Is it enough to show that D knew that he had *data* on his or her computer or, must the prosecution go further and prove that D knew that he had a least one *image* on his computer or, must it be proved that D knew that he had at least one '*pornographic image*' on his computer (leaving it to D to prove under s.65(2)(b) that he did not know, nor had any cause to suspect, that it was an 'extreme' pornographic image)?

vi. A defendant may share a computer with others. It is submitted that D is not in possession merely because he/she has the "*ability* to control" the use of a computer: consider *R v Kousar* [2009] EWCA Crim 139.

vii. Is it arguable that, for the purposes of s.63 CJIA2008, there might there be circumstances in which the fact of possession has to be determined on the basis that a computer is a "container"? Consider *R. v McNamara* (1988) 87 Cr. App. R. 246, and consider cases where an unsolicited and unwanted item has been added to those already under the defendant's control (e.g. *Irving* [1976] Crim. L.R. 642).

viii. Note that proceedings for an offence under s.63 may not be instituted in England and Wales except with the consent of the Director of Public Prosecutions (or Director of Public Prosecutions for Ireland) (see s.63(10) of the CJIA 2008).

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25 The courts have held that the act of "making" requires the prosecution to prove that the accused knew that the image was of the kind forbidden by the statute.

26 In *Atkins*, the Court held that the offence of possession under s.160 of the CJA 1988 is not committed unless the defendant knows that he has photographs in his possession. In *Collier*, it was noted that the defences in s.160(2)(a) and (c) of the CJA 1988 proceed on the assumption that the defendant is aware that the photograph is an *indecent* photograph *of a child.*

85. **General Defences to the s.63 offence**: there are three general defences:

a. That the person had a legitimate reason for being in possession of the image concerned: s.65(2)(a). This provision corresponds to s.1(4)(a) of the Protection of Children's Act 1978 and s.160(2)(a) of the CJA 1988. Whether the accused has a legitimate reason for being in possession of the image concerned is a question of fact (see *Atkins v Director of Public Prosecutions* [2000] 2 Cr.App.R.248.

b. That the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image: s.65(2)(b).

c. That the person (i) was sent the image concerned without any prior request having been made by or on behalf of the person, and (ii) did not keep it for an unreasonable time: s.65(2)(c). The defence is similar to s.160(2)(c) of the CJA 1988. For comments concerning the relationship between s.1 of the Protection of Children Act 1978 and s.160(2)(c) of the CJA 1988, see the commentary to *R. v Bowden* [2000] Crim. L.R. 381. See also *R v Collier* [2004] EWCA Crim 1411 (and the commentary to that case by Professor David Ormerod [2004] Crim. L.R.1039); see also Gillespie, A.A., "*Tinkering With Child Pornography*" [2004] Crim. L.R. 361, and Rowbottom, J., "*Obscenity Laws and The Internet*" [2006] Crim. L.R. 97; see also Smith and Hogan, *Criminal Law*, 12th edn, p.1051.

86. **Defence of participation in consensual acts**: s.66. The Government recognized that it would be anomalous "…if participants in perfectly lawful acts were to be at risk of prosecution for possession of images portraying those acts…in which no unlawful harm occurs…in respect of images which meet the very high threshold for the offence" (*Hansard*, HL, col.275, April 30, 2008, per Lord Hunt). The defence does not apply in connection with, "bestiality images or necrophilia images which involve a real corpse" (see also ss.66(1)(b), 63(7)(c), (d), 66(1)(b) and 66(2)(c).

87. **CPS guidance**: Guidance to Prosecutors (available on the internet) is instructive:

> "*Charging Practice*
>
> The Code for Crown Prosecutors advises prosecutors to select charges which reflect the seriousness of the offending; give the court adequate sentencing powers; and enable the case to be presented in a clear and simple way. When pleas are offered, Crown Prosecutors must bear in mind that in very limited circumstances people convicted of this offence can be made subject to notification requirements under part 2 of the Sexual Offences Act 2003. Offenders must be aged 18 or above and receive a sentence of two years imprisonment or more.
>
> *Choice of charge and acceptance of pleas*
>
> In cases where there is evidence that the suspect has published or distributed extreme pornographic images, prosecutors should charge the suspect with an offence contrary to the Obscene Publications Act, rather than the new offence of possession of extreme pornographic images. Where the extreme image is of a child; prosecutors should consider charging the suspect with either an offence contrary to the section 1 of the

> Protection of Children Act 1978 of making the image or possessing such images contrary to section 160 of the Criminal Justice Act 1988. Prosecutors should refer to the Legal Guidance on Indecent Photographs of Children. Possession of extreme pornographic images is an either way offence and the maximum penalty for possession of extreme pornographic images for an act which threatens a persons life; or an act which results in or is likely to result in serious injury on indictment is three years imprisonment. For possession of other extreme images the maximum penalty is two years imprisonment. Section 71 of the Act has increased the maximum penalty for the publication etc. of obscene articles from three to five years imprisonment. This increase in penalty does not apply to any offence committed before the 26 January 2009."

Section 74: Hatred on the grounds of sexual orientation

88. Section 74, and schedule 16, have yet to come into force.

89. Schedule 16 to the CJIA 2008 amends Part 3A of the Public Order Act 1986 ("POA 1986")[27] by amending the offences set out in s.29B–s.29G of that Part of the 1986 Act, to encompass hatred on the grounds of sexual orientation.

90. New s.29AB of the POA 1986[28] defines "hatred on the grounds of sexual orientation" as hatred against a group of persons, being persons "of the same sex, the opposite sex, or both". The amendments are therefore not confined to the protection of persons who are homosexual. The offence does not, however, extend to hatred on transgender grounds: see para.1.65, 5th Report, Joint Committee on Human Rights; and see para.2.18, 15th Report, Joint Committee on Human Rights.[29]

91. By virtue of amendments made to Part 3A of the POA 1986 by Schd.16 para.6 of the CJIA 2008, it is an offence:
    (a) for a person to use threatening words or behaviour, or to display any written material that is threatening, if he or she intends thereby to stir up hatred on the grounds of sexual orientation: s.29B of the POA 1986;
    (b) to publish or to distribute written material that is threatening with the aforementioned intent: s.29C of the POA 1986;

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27 Which was inserted by the Racial and Religious Hatred Act 2006.

28 See Sch.16 para.4 of the CJIA 2008.

29 "The state has positive duties to protect the human rights of all people within its borders (including, amongst other methods, through effective and enforceable criminal laws). We have not been provided with any of the material on which the Government relies, but have simply been informed of its interpretation of that evidence, which leads it to conclude that there is no need to extend the offence to cover transgendered people. We find it very hard to accept the Government's assertion, in the absence of evidence, that transgendered people are not subject to hate crime, being part of a similarly vulnerable group. We recommend that the Government conduct urgent research into the extent of hate crime experienced by transgendered people in order to ensure that it complies with its positive obligations to protect equally the rights of all members of society."

(c) to present or to direct the public performance of a play which involves the use of threatening words or behaviour, with the aforementioned intent: s.29D of the POA 1986;

(d) to distribute, show, or play, recorded visual images or sounds that are threatening and with the aforementioned intent: s.29E of the POA 1986;

(e) to include in a programme to be broadcast threatening visual images or sounds with the aforementioned intent: s.29F of the POA 1986;

(f) to possess inflammatory and threatening material, with the requisite intent: s.29G of the POA 1986.

92. Note, that (a)-(f) above, constitute discreet offences.

93. Schedule 16 para.14 of the CJIA 2008 adds s.29JA to the POA 1986 to make it clear that any discussion or criticism of sexual conduct, or practices, or the "urging of persons to refrain from or modify such conduct or practices" is not (of itself) to be taken to be either threatening, or intended to stir up hatred, on the grounds of sexual orientation.

94. In respect of each of the offences mentioned above, it must be proved that the accused *intended* to stir up hatred on the grounds of a person's sexual orientation.

95. The actions of the accused must be *threatening,* and not merely insulting or abusive (see the Explanatory Notes para. 498; see also Smith and Hogan, *Criminal Law*, 12th edn, p.1088.

SOME OTHER CRIMINAL LAW REFORMS

Section 76: Self-defence

96. Section 76 has been in force since the 14th July 2008. See the HO Circular 2008/01.

97. Section 76(9) of the CJIA 2008 makes it plain that s.76 is intended to clarify existing defences (see s.76(2))[30]. Section 76 confirms that a defendant is to be judged on the facts as he or she believed them to be (s.76(3)) *and*, that the defendant is entitled to rely on a mistaken belief, genuinely held, as regards the existence of any circumstance - regardless of whether or not it was a reasonable mistake for the accused to have made (s.76(4)).

98. Section 76(5) confirms the principle decided in *R. v O'Grady* that D may not rely on any mistaken belief attributable to intoxication that was voluntarily induced.

99. For a detailed discussion of the principles relating to self-defence, see Smith and Hogan, *Criminal Law*, 12th edn, pp.359–376.

[30] Section 76(2): The defences are (a) the common law defence of self-defence; and (b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c.58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c.18 (N.I.)) (use of force in prevention of crime or making arrest).

100. This section has been criticised for being a pointless exercise (see I. Dennis, "*A Pointless Exercise*" [2008] Crim. L.R. 507). There is force in that criticism. It was *largely* a pointless exercise. However, it is submitted that the boundaries of self-defence were not entirely clear prior to the enactment of s.76. For example, it was often said that the law permitted D to use such force as was reasonable, albeit in the circumstances as D believed them to be, regardless of whether D's belief was reasonable or not. Arguably, this differs slightly from the way that the defence was stated by Lord Morris in *Palmer v The Queen* [1971] AC 184 (emphasis added):

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but *may only do, what is reasonably necessary*. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was *wholly out of proportion to the necessities of the situation*. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary."

101. Thus, prior to the enactment of s.76 of the CJIA 2008, the law recognised that the concept of "reasonably necessary self-defence" was not be determined in purely objective terms (and consider the discussion in Williams, G., *Textbook of Criminal Law*, p.451). The extent to which the accused was to be subjectively assessed having regard to the facts as he or she believed them to be and, having regard to his or her physical and psychological characteristics, was not clearly defined by case law or by statute.

102. Section 76 preserves the pre-existing position that D is to be judged on his or her belief of the facts,[31] provided that it was a belief that D genuinely held. It appears that some have queried whether the use of the word "did", in s.76(4), suggests that D bears the burden of proving that he/she *did* hold a genuine belief. As Professor Ormerod has pointed out (see his commentary to *R v Drane,* Criminal Law Review) this is "an extremely tenuous argument". It is submitted, here, that the argument is non-existent. Section 76(4) merely provides that D's genuinely held belief of the existence of a material circumstance, is a precondition for that circumstance being taken into account by the court notwithstanding D's error. It does not say *how* D's state of mind is to established.

103. *No need for D to have held a 'reasonable belief'*: There have been various other criticisms of this provision. The Joint Committee on Human Rights [15th Report, 2007-08, paras. 2.21 to 2.35] was of the view that, what is now s.76 CJIA2008, might not be ECHR compliant because that provision does not require D to have a "reasonable belief" that the circumstance in question existed. In the House of Lords, the Earl of Onslow moved an amendment to add the word "reasonably" in s.76 (*Hansard*, 23 April 2008, col.1507). Lord Neill of Bladen (and Baroness Butler-Sloss) responded, powerfully, that the introduction of the word "reasonably" in s.76, would change the law and not merely clarify it (see s.76(9)) and, that if there is to be such a change, then the matter should be considered by the Law Commission. The amendment was

[31] See, for example, *Williams* (1984) 78 Cr.App.R.276; *Beckford* [1988] AC 130.

withdrawn.

104. <u>*No distinction between ordinary persons and state agents*</u>: The Joint Committee on Human Rights was particularly concerned "from a human rights perspective, by the fact that the provision in the Bill makes no distinction between acts of self-defence by an ordinary person under threat in their own home, and the use of lethal force by state agents such as trained police marksmen. The provision in the Bill applies not only to self-defence but also to the use of force in the prevention of crime or the effecting of arrests. This means that soldiers and police officers, who differ from ordinary citizens and householders in that they have been trained by the state to be expert in the use of lethal force and are likely to be better equipped to do so, are also not required to have any reasonable grounds for any honest and instinctive overreaction" [see 15th Report, 2007-08, para.2.28].

105. It is submitted that regard must also be had to s.76(4)(a), namely, that "the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it". There may be cases where D holds a genuine belief that is manifestly unreasonable – even irrational – but one can only speculate as to whether there have been such cases that have violated convention rights. In any event, s.76 was enacted amid widely publicised concerns that the law was not sufficiently weighted in favour of persons who act in defence of themselves, or their property, from burglars who might be violent. Public opinion seems to be in favour of the courts judging an accused's state of mind subjectively rather than on an objective (reasonable belief) basis (at least in relation to persons other than state agents).

Section 79: abolition of the offences of blasphemy and blasphemous libel

106. This provision has yet to come into force. It is dealt with in a single sentence in the Explanatory Notes (see Smith and Hogan, *Criminal Law*, 12th edn, p.1025) but it actually followed lengthy debates in both Houses of Parliament. Maria Eagle, the Parliamentary Under-Secretary of State for Justice pointed out that the last prosecution of an offence of blasphemy was in 1977, and that although the Government was receptive to calls for the abolition of the common law blasphemy offences, it wished to consult the Anglican Church before bringing forward proposals to do so (*Hansard*, HC, col.454 (January 9, 2008)).

107. A year earlier, a member of the *Christian Voice* had endeavoured bring a private prosecution for blasphemous libel in relation to the theatrical work "*Jerry Springer: the Opera*" but, formal steps to initiate a prosecution by way of summons were taken some six months after the end of the performances, which had run for a period of properly three years. The District Judge refused to issue the necessary summonses: a decision which the Administrative Court held to be correct on the facts of the case (see *R. v City of Westminster Magistrates' Court* [2007] EWHC 2785; see also *Whitehouse v Lemon* [1979] AC 617).

108. What is now s.79 was added to the Bill in the House of Lords on March 5, 2008 (*Hansard*, HL, col.1118; see also col.1147). The House of Commons agreed with that amendment on May 6, 2008 (Hansard, HC, col.667). Although there was cross-party

support for the measure, it did not enjoy unanimous approval (see, for example, the speech of Baroness O'Cathain: *Hansard*, HL, col.1129 (March 5, 2008)).

109. An attempt to repeal s.2 of the Ecclesiastical Courts Jurisdiction Act 1860 by way of an amendment moved in the House of Lords on April 23, 2008, was withdrawn (*Hansard*, HL, cols 1542, 1546).

Section 140: disclosing information about child sex offenders

110. This provision came into force on the 14th July 2008, and inserts two new sections, namely, ss.327A and 327B, into the CJA 2003: see **Appendix B**.

111. Note *MoJ Circular 2008/01*, paras.71-81. Regard must also be had to the '*MAPPA Guidance'*.

112. The amendments were made in the light the *Review of The Protection of Children From Sex Offenders* (Home Office, 2007)[32] that considered the extent to which to members of the public should be able to obtain personal information about offenders convicted of sex crimes against children.

113. In the UK, child sex offenders are managed under Multi-Agency Public Protection Arrangements ("MAPPA") that involves the cooperation of the police service, the prison service, and the probation service.

114. Offenders who are on the Sex Offenders' Register,[33] and who are not serving a custodial sentence, must provide details of their whereabouts to the police. A sex offender may also be subject to a *Sexual Offences Prevention Order* (see the Sexual Offences Act 2003, e.g. not to enter children playgrounds).[34]

115. The Review did not recommend the enactment of a proposal that came to be known as "Megan's Law" (introduced into US law in 1996) under which there is an obligation to keep a register of offenders convicted of sex crimes against children, and to make personal information about those offenders available (relatively freely) to members of the public (The Review, p.10). The Review concluded that greater use of controlled disclosure was necessary as being the best way forward (see also *Research Paper* 07/93).[35]

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32 The review of the arrangements for protecting children from sex offenders was commissioned by the Home Secretary in June 2006 (see p.10 of the Review).

33 Created under the Sex Offenders Act 1997.

34 Note that s.106 of the SOA2003 is amended by s.141 of the CJIA2008 (the amendment came into force on the 14th July 2008).

35 The Review recognised that a balance had to be struck between disclosure and ensuring that the information was used "solely for the purpose of child protection. It should not be used to facilitate vigilante activity, or to attack or harass offenders" (p.10). The Review recommended that greater use "should be made of controlled

116. New s.327A of the CJA2003 (inserted by s.140 of the CJIA 2008) imposes an obligation on the "responsible authority"[36] to consider whether information that is in the possession of that authority, ought to be disclosed to a particular member of the public about the "relevant previous convictions" of any child sex offender who is managed by it.

117. There is a presumption of disclosure (new s.327A(2) CJA2003) in the circumstances specified in s.327A(3) of the 2003 Act.

118. The presumption arises whether or not the person to whom the information is disclosed has requested it (s.327A(4) CJA2003).

119. Note the record-keeping requirements of new s.327A(8) of the CJA 2003.

Rudi Fortson

25 Bedford Row, London.
Visiting Professor of Law, Queen Mary, London.
www.rudifortson4law.co.uk

disclosure of information about child sex offenders to those who need to know, for example a single mother who might be sharing a home with a registered offender."

[36] Pursuant to s.325 of the CJA 2003, a duty is imposed on the police service, the prison service, and the probation service (acting within each regional area) to act jointly as a "responsible authority", and to establish arrangements for assessing and managing risks posed in the relevant area by "relevant sexual and violent offenders" (s.325(2)(a); see also s.327(1) CJA2003), and by other offenders in respect of whom the "responsible authority" consider may cause serious harm to the public (s.325(2)(b)). The duty extends to exchanging information (s.325(4)).

APPENDIX A: EXTRACTS FROM THE CJA2003

61 Determination of appeal by Court of Appeal

(1) On an appeal under section 58, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates.

(2) Subsections (3) to (5) apply where the appeal relates to a single ruling.

(3) Where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.

(4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following—

(a) order that proceedings for that offence may be resumed in the Crown Court,

(b) order that a fresh trial may take place in the Crown Court for that offence,

(c) order that the defendant in relation to that offence be acquitted of that offence.

(5) ~~But the Court of Appeal may not make an order under subsection (4)(a) or (b) in respect of an offence unless it considers it necessary in the interests of justice to do so.~~ [*But the Court of Appeal may not make an order under subsection (4)(c) in respect of an offence unless it considers that the defendant could not receive a fair trial if an order were made under subsection (4)(a) or (b)*][37].

(6) Subsections (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings.

(7) Where the Court of Appeal confirms the ruling that there is no case to answer, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.

(8) Where the Court of Appeal reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is the subject of the appeal, make any of the orders mentioned in subsection (4)(a) to (c) (but subject to subsection (5)).

[37] Inserted by s.44 CJIA 2008

APPENDIX B: EXTRACTS FROM THE CJIA 2008

63 Possession of extreme pornographic images

(1) It is an offence for a person to be in possession of an extreme pornographic image.
(2) An "extreme pornographic image" is an image which is both—
  (a) pornographic, and
  (b) an extreme image.
(3) An image is "pornographic" if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.
(4) Where (as found in the person's possession) an image forms part of a series of images, the question whether the image is of such a nature as is mentioned in subsection (3) is to be determined by reference to—
  (a) the image itself, and
  (b) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images.
(5) So, for example, where—
  (a) an image forms an integral part of a narrative constituted by a series of images, and
  (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal, the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself.
(6) An "extreme image" is an image which—
  (a) falls within subsection (7), and
  (b) is grossly offensive, disgusting or otherwise of an obscene character.
(7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following—
  (a) an act which threatens a person's life,
  (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
  (c) an act which involves sexual interference with a human corpse, or
  (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real.
(8) In this section "image" means—
  (a) a moving or still image (produced by any means); or
  (b) data (stored by any means) which is capable of conversion into an image within paragraph (a).
(9) In this section references to a part of the body include references to a part surgically constructed (in particular through gender reassignment surgery).
(10) Proceedings for an offence under this section may not be instituted—
  (a) in England and Wales, except by or with the consent of the Director of Public Prosecutions; or
  (b) in Northern Ireland, except by or with the consent of the Director of Public Prosecutions for Northern Ireland.

65 Defences: general

(1) Where a person is charged with an offence under section 63, it is a defence for the person to prove any of the matters mentioned in subsection (2).
(2) The matters are—
  (a) that the person had a legitimate reason for being in possession of the image concerned;
  (b) that the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image;
  (c) that the person—
    (i) was sent the image concerned without any prior request having been made by or on behalf of the person, and

(ii) did not keep it for an unreasonable time.

(3) In this section "extreme pornographic image" and "image" have the same meanings as in section 63.

66 Defence: participation in consensual acts

(1) This section applies where—
  (a) a person ("D") is charged with an offence under section 63, and
  (b) the offence relates to an image that portrays an act or acts within paragraphs (a) to (c) (but none within paragraph (d)) of subsection (7) of that section.

(2) It is a defence for D to prove—
  (a) that D directly participated in the act or any of the acts portrayed, and
  (b) that the act or acts did not involve the infliction of any non-consensual harm on any person, and
  (c) if the image portrays an act within section 63(7)(c), that what is portrayed as a human corpse was not in fact a corpse.

(3) For the purposes of this section harm inflicted on a person is "non-consensual" harm if—
  (a) the harm is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself; or
  (b) where the person can, in law, consent to it being so inflicted, the person does not in fact consent to it being so inflicted.

76 Reasonable force for purposes of self-defence etc.

(1) This section applies where in proceedings for an offence—
  (a) an issue arises as to whether a person charged with the offence ("D") is entitled to rely on a defence within subsection (2), and
  (b) the question arises whether the degree of force used by D against a person ("V") was reasonable in the circumstances.

(2) The defences are—
  (a) the common law defence of self-defence; and
  (b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—
  (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
  (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—
    (i) it was mistaken, or
    (ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—
  (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
  (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(9) This section is intended to clarify the operation of the existing defences mentioned in subsection (2).
(10) In this section—
(a) "legitimate purpose" means—
(i) the purpose of self-defence under the common law, or
(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);
(b) references to self-defence include acting in defence of another person; and
(c) references to the degree of force used are to the type and amount of force used.

140 Disclosure of information about convictions etc. of child sex offenders to members of the public

(1) After section 327 of the Criminal Justice Act 2003 (c. 44) insert—

327A Disclosure of information about convictions etc. of child sex offenders to members of the public

(1) The responsible authority for each area must, in the course of discharging its functions under arrangements established by it under section 325, consider whether to disclose information in its possession about the relevant previous convictions of any child sex offender managed by it to any particular member of the public.
(2) In the case mentioned in subsection (3) there is a presumption that the responsible authority should disclose information in its possession about the relevant previous convictions of the offender to the particular member of the public.
(3) The case is where the responsible authority for the area has reasonable cause to believe that—
(a) a child sex offender managed by it poses a risk in that or any other area of causing serious harm to any particular child or children or to children of any particular description, and
(b) the disclosure of information about the relevant previous convictions of the offender to the particular member of the public is necessary for the purpose of protecting the particular child or children, or the children of that description, from serious harm caused by the offender.
(4) The presumption under subsection (2) arises whether or not the person to whom the information is disclosed requests the disclosure.
(5) Where the responsible authority makes a disclosure under this section—
(a) it may disclose such information about the relevant previous convictions of the offender as it considers appropriate to disclose to the member of the public concerned, and
(b) it may impose conditions for preventing the member of the public concerned from disclosing the information to any other person.
(6) Any disclosure under this section must be made as soon as is reasonably practicable having regard to all the circumstances.
(7) The responsible authority for each area must compile and maintain a record about the decisions it makes in relation to the discharge of its functions under this section.
(8) The record must include the following information—
(a) the reasons for making a decision to disclose information under this section,
(b) the reasons for making a decision not to disclose information under this section, and
(c) the information which is disclosed under this section, any conditions imposed in relation to its further disclosure and the name and address of the person to whom it is disclosed.
(9) Nothing in this section requires or authorises the making of a disclosure which contravenes the Data Protection Act 1998.
(10) This section is not to be taken as affecting any power of any person to disclose any information about a child sex offender.

APPENDIX C: COMMENCEMENT DATES

Section	Date	SI	Subject matter
S.1			Youth Rehabilitation Order
S.2			Youth Rehabilitation Order
S.3			Youth Rehabilitation Order
S.4			Youth Rehabilitation Order
S.5			Youth Rehabilitation Order
S.6			Youth Rehabilitation Order
S.7			Youth Rehabilitation Order
S.8			Youth Rehabilitation Order
S.9			Purpose of juvenile sentencing
S.10	14-Jul-08	2008/1586	Effect of restriction on imposing community sentences
S.11(1)	14-Jul-08	2008/1586	Restriction on power to make a community order
S.12	14-Jul-08	2008/1586	Pre-sentence reports
S.13	14-Jul-08	2008/1586	Sentences of imprisonment for public protection; and see schd.5 of the CJIA 2008.
S.14	14-Jul-08	2008/1586	Sentences of detention for public protection
S.15	14-Jul-08	2008/1586	Extended sentences for certain violent or sexual offences: persons 18 or over.
S.16	14-Jul-08	2008/1586	Extended sentences for certain violent or sexual offences: persons under 18
S.17	14-Jul-08	2008/1586	The assessment of dangerousness
S.18	14-Jul-08	2008/1586	Further amendments relating to sentences for public protection
S.19			Indeterminate sentences (exceptionally serious cases)
S.20	14-Jul-08	2008/1586	Consecutive terms of imprisonment
S.21(1), (3) to (7)	03-Nov-08	2008/2712	Credit for period of remand on bail: terms of imprisonment and detention.
S.22	03-Nov-08	2008/2712	Credit for period of remand on bail: other cases
S.23	03-Nov-08	2008/2712	Credit for period of remand on bail: transitional provisions.
S.24	14-Jul-08	2008/1586	Minimum conditions for early release under s.246(1) of the CJA 2003.
S.25	14-Jul-08	2008/1586	Release on licence under Criminal Justice Act 2003 of prisoners serving extended sentences.
S.26 (part)	09-Jun-08	2008/1466	Release of certain long-term prisoners under the CJA 1991, save insofar as subs.(2) inserts subs.(1C) and (1D) into s.33 of the CJA 1991.
S.27	14-Jul-08	2008/1586	Application of s.35(1) of the CJA 1991 to prisoners liable to removal from the UK.
S.28	14-Jul-08	2008/1586	Release of fine defaulters and contemnors under Criminal Justice Act 1991
S.29 (part)	14-Jul-08	2008/1586	Release of prisoners after recall) save that subs.(2) inserts subs.(9) and (10) of s.255A of the CJA 2003.
S.30	14-Jul-08	2008/1586	Further review and release of prisoners after recall
S.31	14-Jul-08	2008/1586	Recall of life prisoners: abolition of requirement for recommendation by Parole Board.
S.32	14-Jul-08	2008/1586	Release of prisoners recalled following release under CJA 1991.
S.33(1), (3), (5), (6)	03-Nov-08	2008/2712	Removal under Criminal Justice Act 1991.
S.34(1), (3), (4)(a),	03-Nov-08	2008/2712	Removal under CJA 2003 -- "save insofar as subs. (6) provides that S.260(3A) of the Criminal Justice Act 2003 ceases to have effect"

Section	Date	SI	Subject matter
(5), (6), (8) and (9)			
S.35			Referral orders: referral conditions
S.36			Referral orders: power to revoke a referral order
S.37			Referral orders: extension of period for which young offender contract has effect.
S.38	14-Jul-08	2008/1586	Imposition of unpaid work requirement for breach of community order
S.39			Youth default orders
S.40	14-Jul-08	2008/1586	Power to impose attendance centre requirement on fine defaulter
S.41	03-Nov-08	2008/2712	Disclosure of information for enforcing fines
S.42	14-Jul-08	2008/1586	Power to dismiss certain appeals following references by the CCRC: England and Wales.
S.43	14-Jul-08	2008/1586	Power to dismiss certain appeals following references by the CCRC: Northern Ireland.
S.44	14-Jul-08	2008/1586	Determination of prosecution appeals: England and Wales
S.45	14-Jul-08	2008/1586	Determination of prosecution appeals: Northern Ireland
S.46(1), (3)	14-Jul-08	2008/1586	Review of sentence on reference by Attorney General
S.47	14-Jul-08	2008/1586	Further amendments relating to appeals in criminal cases and see Schd.8
S.48(1)(a)	01-Feb-09	2009/0140	The giving of youth conditional cautions: and see schd.9.
S.49	19-Dec-08	2008/3260	Protection for spent cautions under Rehabilitation of Offenders Act 1974
S.50	19-Dec-08	2008/3260	Criminal conviction certificates and criminal record certificates
S.51	03-Nov-08	2008/2712	Bail conditions: electronic monitoring
S.52	14-Jul-08	2008/1586	Bail for summary offences and certain other offences to be tried summarily.
S.53			Allocation of offences triable either way.
S.54	14-Jul-08	2008/1586	Trial or sentencing in absence of accused in magistrates' courts.
S.55	14-Jul-08	2008/1586	Extension of powers of non-legal staff
S.56	14-Jul-08	2008/1586	Provisional grant of right to representation
S.57	14-Jul-08	2008/1586	Disclosure of information to enable assessment of financial eligibility
S.58	14-Jul-08	2008/1586	Pilot schemes
S.59	14-Jul-08	2008/1586	SFO's pre-investigation powers in relation to bribery and corruption: foreign
S.60	03-Nov-08	2008/2712	Contents of an accused's defence statement
S.61	01-Dec-08	2008/2993	Compensation for miscarriages of justice
S.62			Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998
S.63	26-Jan-09	2008/2993	Possession of extreme pornographic images
S.64	26-Jan-09	2008/2993	Exclusion of classified films
S.65	26-Jan-09	2008/2993	Defences: general
S.66	26-Jan-09	2008/2993	Defence: participation in consensual acts
S.67	26-Jan-09	2008/2993	Penalties etc. for possession of extreme pornographic images
S.68	26-Jan-09	2008/2993	Special rules relating to providers of information society services
S.69			Indecent photographs of children: England and Wales
S.70			Indecent photographs of children: Northern Ireland
S.71	26-Jan-09	2008/2993	Maximum penalty for publication etc. of obscene articles
S.72	14-Jul-08	2008/1586	Offences committed outside the United Kingdom
S.73	14-Jul-08	2008/1586	Grooming and adoption
S.74			Hatred on the grounds of sexual orientation
S.75			Offences relating to the physical protection of nuclear material and

Section	Date	SI	Subject matter
			nuclear facilities
S.76	14-Jul-08	2008/1586	Reasonable force for purposes of self-defence
S.77			Power to alter penalty for unlawfully obtaining etc. personal data.
S.78			New defence for purposes of journalism and other special purposes
S.79			Abolition of common law offences of blasphemy and blasphemous libel
S.80			Financial Penalties: Requests to other member States: England and Wales
S.81			Financial Penalties: Procedure on issue of certificate: England and Wales
S.82			Financial Penalties: Requests to other member States: Northern Ireland
S.83			Financial Penalties: Procedure on issue of certificate: Northern Ireland
S.84			Requests from other member States: England and Wales
S.85			Procedure on receipt of certificate by designated officer
S.86			Modification of Magistrates' Courts Act 1980
S.87			Requests from other member States: Northern Ireland
S.88			Procedure on receipt of certificate by clerk of petty sessions
S.89			Modification of Magistrates' Courts (Northern Ireland) Order 1981
S.90			Transfer of certificates to central authority for Scotland
S.91			Financial Penalites: Recognition of financial penalties: general
S.92			Financial Penalites: Interpretation of S.s 80 to 91.
S.93	14-Jul-08	2008/1586	Delivery of prisoner to place abroad for purposes of transfer out of the United Kingdom.
S.94	14-Jul-08	2008/1586	Issue of warrant transferring responsibility for detention and release of an offender to or from the relevant Minister.
S.95	14-Jul-08	2008/1586	Powers to arrest and detain persons believed to fall within S. 4A(3) of Repatriation of Prisoners Act 1984.
S.96	14-Jul-08	2008/1586	Amendments relating to Scotland
S.97	14-Jul-08	2008/1586	Power to transfer functions under Crime (International Co-operation) Act 2003 in relation to direct taxation.
S.98			Violent offender orders
S.99			Violent offender orders: Qualifying offenders
S.100			Violent offender orders: Applications for violent offender orders
S.101			Violent offender orders: Making of violent offender orders
S.102			Violent offender orders: Provisions that orders may contain
S.103			Violent offender orders: Variation, renewal or discharge of violent offender orders
S.104			Violent offender orders: Interim violent offender orders
S.105			Violent offender orders: Notice of applications
S.106			Violent offender orders: Appeals
S.107			Violent offender orders: Offenders subject to notification requirements
S.108			Violent offender orders: Notification requirements: initial notification
S.109			Violent offender orders: Notification requirements: changes
S.110			Violent offender orders: Notification requirements: periodic notification
S.111			Violent offender orders: Notification requirements: travel outside United Kingdom
S.112			Violent offender orders: Method of notification and related matters
S.113			Violent offender orders: Offences

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S.114			Violent offender orders: Supply of information to Secretary of State etc.
S.115			Violent offender orders: Supply of information by Secretary of State etc.
S.116			Violent offender orders: Information about release or transfer
S.117			Violent offender orders: Interpretation of Part 7
S.118	01-Dec-08	2008/2993	Closure orders: premises associated with persistent disorder or nuisance
S.119(4)	01-Jan-09	2008/3260	Section 119(1) – which 2008/3260 does not bring into force – creates an offence of causing nuisance or disturbance on NHS premises: but s.119(4) merely provides definitions for the purposes of s.119.
S.120(5) and (6)	01-Jan-09	2008/3260	Power to remove person causing nuisance or disturbance
S.121(1) to (3), (5) and (6)	01-Jan-09	2008/3260	Guidance about the power to remove etc
S.122			Nuisance or disturbance on HSS premises
S.123	01-Feb-09	2009/0140	Review of anti-social behaviour orders
S.124	01-Feb-09	2009/0140	Individual support orders
S.125			Parenting contracts and parenting orders: local authorities
S.126(1)	14-Jul-08	2008/1586	Police misconduct and performance procedures) insofar as it relates to the provision specified in paragraph 47.
S.126(1)	03-Nov-08	2008/2712	Police misconduct and performance procedures, insofar as it relates to the provisions specified in paragraph 16.
S.126(1) and (3)	01-Dec-08	2008/2993	Police misconduct and performance procedures: re the entries specified in sub-paragraph (h);
S.127 (part)	03-Nov-08	2008/2712	Investigation of complaints of police misconduct insofar as it relates to the provisions specified in para.17.
(part)	01-Dec-08	2008/2993	Investigation of complaints of police misconduct etc. regarding the provisions specified in sub-paragraph (i).
S.128			Financial assistance under S. 57 of Police Act 1996
S.129	03-Nov-08	2008/2712	Inspection of police authorities
S.130			Special Immigration Status: Designation
S.131			Special Immigration Status: "Foreign criminal"
S.132			Special Immigration Status: Effect of designation
S.133			Special Immigration Status: Conditions
S.134			Special Immigration Status: Support
S.135			Special Immigration Status: Support: supplemental
S.136			Special Immigration Status: End of designation
S.137			Special Immigration Status: Interpretation: general
S.138			Industrial action by prison officers: Amendment of S. 127 of Criminal Justice and Public Order Act 1994
S.139			Industrial action by prison officers: Power to suspend the operation of S. 127 of Criminal Justice and Public
S.140	14-Jul-08	2008/1586	Disclosure of information re convictions etc. of child sex offenders to members of the public;
S.141	14-Jul-08	2008/1586	Sexual offences prevention orders: relevant sexual offences
S.142	14-Jul-08	2008/1586	Notification requirements: prescribed information
S.143			Persistent sales of tobacco to persons under 18
S.144			Power to require data controllers to pay monetary penalty
S.145			Amendments to armed forces legislation
S.146			Convention against human trafficking

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S.147			Orders, rules and regulations
S.148 (1) and (2)	09-Jun-08	2008/1466	Consequential etc. amendments and transitional and saving provision - insofar as they relate to the provisions specified in paragraphs (c) and (d) of SI 2008/1466.
S.148 (1) and (2)	14-Jul-08	2008/1586	S.s 148(1) and (2) insofar as they relate to the provisions specified in paragraphs 48, 49 and 50 respectively.
S.148(1)	15-Jul-08	2008/1586	So far as it relates to that paragraph paragraph 63 of Sched.26.
S.148(1)	03-Nov-08	2008/2712	Consequential amendments and transitional and saving provision -- insofar as it relates to the provisions specified in para.18.
S.148(2)	01-Dec-08	2008/2993	Consequential amendments and transitional and saving provisions) insofar as it relates to the provisions in sub-paragraph (j)
S.148 (1) and (2)	26-Jan-09	2008/2993	S. 148(1) and (2) (Consequential etc. amendments and transitional and saving provision) insofar as it relates to the provisions specified in paragraphs (j) and (k).
S.148(2)	19-Dec-08	2008/3260	Consequential amendments and transitional and saving provision) in so far as it relates to the entries in sub-para.(e)
S.148(2)	01-Feb-09	2009/0140	Consequential amendments and transitional and saving provisions, in so far as it relates to the provisions specified in paragraph (f)
S.149 (part)	14-Jul-08	2008/1586	Insofar as the provisions relate to the provisions specified in paragraphs 48, 49 and 50 respectively.
S.149 (para.19)	03-Nov-08	2008/2712	Repeals and revocations.
S.149 (part)	01-Dec-08	2008/2993	Repeals and revocations: re the entries in sub-paragraph (k)
S.150			Financial provisions
S.151			Effect of amendments to criminal justice provisions applied for purposes of service law
S.152			Extent
S.153			Commencement
S.154			Short title
Schd.1			Further provisions about youth rehabilitation orders
Schd.2			Breach, revocation or amendment of youth rehabilitation orders
Schd.3			Transfer of youth rehabilitation orders to Northern Ireland
Schd.4			Youth rehabilitation orders: consequential and related amendments
Schd.5	14-Jul-08	2008/1586	Offences specified re ss. 225(3A) and 227(2A) of the CJA 2003.
Schd.6	03-Nov-08	2008/2712	Credit for period of remand on bail: transitional provisions
Schd.7			Youth default orders: modification of provisions applying to youth rehabilitation orders
Schd.8	14-Jul-08	2008/1586	Appeals in criminal cases
Schd.9	01-Feb-09	2009/0140	Alternatives to prosecution for persons under 18; paragraph 1; paragraph 3 (but only to the extent that it inserts s.66G and s.66H of the Crime and Disorder Act 1998) and paragraph 4.
Schd.10	19-Dec-08	2008/3260	protection for spent cautions under Rehabilitation of Offenders Act 1974
Schd.11	03-Nov-08	2008/2712	Electronic monitoring of persons released on bail subject to conditions
Schd.12	14-Jul-08	2008/1586	Schedule 12 (Bail for summary offences and certain other offences to be tried summarily)
Schd. 13			Allocation of cases triable either way
Schd. 14	26-Jan-09	2008/2993	Special rules relating to providers of information society services
Schd.15	14-Jul-08	2008/1586	Sexual offences: grooming and adoption (to the extent not already in force).

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Schd.16			Hatred on the grounds of sexual orientation
Schd. 17			Offences relating to nuclear material and nuclear facilities
Schd.18			Penalties suitable for enforcement in England and Wales or Northern Ireland
Schd. 19			Grounds for refusal to enforce financial penalties
Schd. 20	01-Dec-08	2008/2993	Closure orders: premises associated with persistent disorder or nuisance
Schd. 21			Nuisance or disturbance on HSS premises
Schd.22 (para.6)	14-Jul-08	2008/1586	Police misconduct and performance procedures: Police Advisory Board.
Schd.22 (part)	03-Nov-08	2008/2712	Part 1 - Police misconduct and performance procedures - paras 1 and 2; paras, 3, 4, and 7 (making regulations); and para.8 (making rules).
Schd.22 (part)	01-Dec-08	2008/2993	Police misconduct and performance procedures: paras. 3, 4, 7 and 8 (to the extent not already in force); and paragraphs 5, 9, 11 and 17 to 21.
Schd.23 (part)	03-Nov-08	2008/2712	Investigation of complaints of police misconduct — paras. 1 to 3 and 12(1); and paras. 5, 12(4) and 19 (making regulations).
Schd.23 (part)	01-Dec-08	2008/2993	Investigation of complaints of police misconduct: paras. 4, 6 to 11; and paras. 13 to 18; and paras. 5, 12 and 19 (to the extent not already in force).
Schd.24	14-Jul-08	2008/1586	Regarding s.327A of the CJA 2003: meaning of "child sex offence".
Schd.25			Amendments to armed forces legislation
Schd.26 (part)	09-Jun-08	2008/1466	Minor and consequential amendments: see paras. 9, 12(1) and (3)(b) and 19(1) and (4) (Repatriation of Prisoners Act 1984; paras. 29(1), (2) and (5) (Criminal Justice Act 1991); paras. 31, 33(1) to (3) (Crime (Sentences) Act 1997); and paras. 40 and 45(a) (Powers of Criminal Courts (Sentencing) Act 2000).
Schd.26 (part)	14-Jul-08	2008/1586	(a) paragraphs 2(1), (2), (4), (5) and (6), 59, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75 and 76 (2003 CJA), (b) paragraph 3 (Prison Act 1952), (c) paragraph 4 (Criminal Justice Act 1961), (d) paragraph 6 (Northern Ireland), (e) paragraph 7 (Wildlife and Countryside Act 1981), (f) paragraph 8 (Mental Health Act 1983), (g) paras 10 -19 (Repatriation of Prisoners Act 1984) to the extent not already in force, (h) paragraph 21 (Criminal Justice Act 1987 (c.38)), (i) paragraphs 22 and 23 (Criminal Justice Act 1988 (c.33)), (j) paragraph 26 (Football Spectators Act 1989 (c.37)), (k) paragraph 27 (CJ(IC)A 1990), (l) paragraph 28 (Broadcasting Act 1990), (m) paragraph 30 (Scotland), (n) para.32 and, if not in force, para.33 (Crime (Sentences) Act 1997)), (o) paras. 41, 44, 45(b), 46, 47 and 48 (PCC(Sentencing) Act 2000), (p) paragraph 51 (Northern Ireland) (q) paragraph 52 (Crime (International Co-operation) Act 2000), (r) paras. 53, 56(1), (2)(a) and (4) and 57 (SOA 2003), (s) paragraph 78 (CJA 2003 (S.I. 2005/950)), (t) para. 80 (Natural Environment and Rural Communities Act 2006 (c.16)), (u) paragraph 81 (Police and Justice Act 2006 (c.48)).
Schd. 26 (para.63)	15-Jul-08	2008/1586	See s.148(1) of the CJIA 2008

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Schd.26 (part)	03-Nov-08	2008/2712	Minor and consequential amendments -- para. 5 (Children and Young Persons Act 1969; paras. 29(3), (4) , (6) and (7) (CJA 1991)
Schd.26 (para.58)	26-Jan-09	2008/2993	Minor and consequential amendments
Schd.27 (paras 8 and 9)	09-Jun-08	2008/1466	transitory, transitional and saving provisions
Schd.27 (part)	14-Jul-08	2008/1586	Transitory, transitional and saving provisions: paragraphs 6, 10 to 12, 13(2), 14 to 17, 21, 27, 30 and 38.
Schd.27 (part)	01-Dec-08	2008/2993	Paras. 22 and 35(1), (2)(a) and (3) --- transitory, transitional and saving provisions);
Schd.27 (part)	19-Dec-08	2008/3260	Paragraphs 19 and 20 of Schedule 27 (Consequential etc. amendments and transitional and saving provision).
Schd.27 (para.23 and 25)	26-Jan-09	2008/2993	Transitory, transitional and saving provisions.
Schd. 27 (paras 33 and 34)	01-Feb-09	2009/0140	Transitory, transitional and saving provisions.
Schd. 28 (part)	14-Jul-08	2008/1586	In **Part 2** (Sentencing), the entries relating to the— (a) Criminal Justice Act 1991 in ss. 45, 46(1) and 50(2), (b) Crime (Sentences) Act 1997; (c) 2003 Act, in ss.153(1), 224(3), 227(1)(a), 228, 229, 234, 247, 254(3) to (5), 256 and 305(4) (e), Schds. 16 and 17 and in para.4(5)(a) of Schedule 31, (d) Criminal Justice Act 2003 (S.I. 2005/950). In **Part 3** (Appeals), the entries relating to the— (a) 1968 Act, (b) Judicature (Northern Ireland) Act 1978, (c) Criminal Appeal (Northern Ireland) Act 1980, (d) Mental Health Act 1983e) Criminal Justice Act 1988, (f) Powers of Criminal Courts (Sentencing) Act 2000. In **Part 4** (Other criminal justice provisions), relating to the— (a) Magistrates' Courts Act 1980, S. 13(5), (b) Prosecution of Offences Act 1985, (c) Access to Justice Act 1999, (d) Sexual Offences Act 2003, (e) 2003 Act, S. 23A(7) to (9). In **Part 5** (Criminal law), the entry relating to the Sexual Offences Act 2003. All the entries in **Part 6** (International co-operation in relation to criminal justice matters). In **Part 8** (Policing), the entries relating to the Police Act 1996, in s.54(2), and the Police and Justice Act 2006, in s.49(1) and in Sched.1.
Schd. 28 (Parts 2 and 4)	03-Nov-08	2008/2712	Part 2 (Sentencing): -- Criminal Justice Act 1991, s.46A; Criminal Justice Act 2003, s.260(3) and (6); in Part 4 (Other criminal justice provisions), the Children and Young Persons Act 1969, s.23AA(4)(a); and the Bail Act 1976, s. 3AA(6) to (10) and (12).
Schd.28 (part)	01-Dec-08	2008/2993	Repeals and revocations -- s. 50(4) of, and para. 6 of Schd. 6 to, the Police Act 1996; Schd. 3 to the Police Reform Act 2002; and para. 119 of Schd. 21 to the Legal Services Act 2007.