These notes refer to the Offender Management Act 2007 (c.21)
which received Royal Assent on 26 July 2007

OFFENDER MANAGEMENT ACT 2007

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Offender Management Act. They have been prepared by the Ministry of Justice in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. Where a Section or part of a Section does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. Under the current legislation the statutory duty to make arrangements for the provision of probation services rests exclusively with the local probation board. Probation services cannot currently be provided by any other organisation unless sub-contracted directly by probation boards themselves. This Act will transfer to the Secretary of State the statutory duty to make arrangements to provide probation services, so enabling him to commission services from providers in the public, private and voluntary sector. It will establish probation trusts, as public sector providers with whom he may make such arrangements.

4. The Secretary of State will not commission everything directly: commissioning will be a national, regional and local activity, with providers of probation services also acting as commissioners where appropriate. The Secretary of State may contract only with a probation trust or other public body for the giving of assistance to courts, unless this restriction is lifted by means of an order subject to affirmative resolution.

5. The Act also:

- enables information to be shared between relevant bodies and persons for offender management purposes;
- removes some of the inconsistencies between the powers of staff in public and private custodial institutions;
- reforms existing offences of bringing articles into prison and taking articles out of prison;
- removes the requirement for the appointment of a prison medical officer;
- Changes the name of "Boards of Visitors" to "Independent Monitoring Boards" and removes the requirement for two magistrates to be members of a Board;
- makes technical amendments to enable more efficient management of juvenile offenders sentenced to custody; and
- introduces polygraph testing of sex offenders on licence from a sentence of imprisonment of 12 months or more.

TERRITORIAL EXTENT

6. The Act generally applies to England and Wales only. Some repeals and consequential amendments also extend to Scotland and Northern Ireland, as does the power in Section 38 to make consequential amendments.

THE ACT

7. The Act is in four Parts.

Part 1 – New arrangements for the provision of probation services

8. Sections 1 to 15 make new arrangements for the provision of probation services. They give to the Secretary of State the responsibility to ensure the provision of probation services and enable him to contract with others to do this. The sections also abolish local probation boards and allow the establishment of probation trusts with whom he may contract.

9. Section 14 makes it clear that the Secretary of State, bodies dealing with offender management and other entities with an interest in offender management may share information in accordance with the framework established by that section. Under the section, information sharing may take place so long as it is necessary or expedient for the purposes of effective management of offenders.

10. Section 15 provides a power to repeal Section 4.

Part 2 – Prisons

11. Sections 16 to 20 remove some of the differences in the ways in which contracted-out prisons operate by giving their directors and prisoner custody officers powers comparable to those which governors and prison officers in directly-managed prisons already possess. These sections also make equivalent provision in Secure Training Centres, where appropriate. Sections 21 to 24 reforms of assisting a prisoner to escape and the existing offence of bringing proscribed articles into a prison, taking proscribed articles out of prison and create a new offence of taking photographic images inside a prison. Section 25 removes the requirement for prisons to have a medical officer. Section 26 Changes the name of "Boards of Visitors" to "Independent Monitoring Boards" and removes the requirement for two magistrates to be members of a Board. Section 27 clarifies who may be authorised to undertake limited searches of prisoners in contracted-out prisons.

Part 3 – Other provisions about the Management of Offenders

12. Sections 28 to 30 provide for polygraph testing of offenders released on licence from a sentence of imprisonment of 12 months or more which was imposed for a specified sexual offence, describe the conditions under which polygraph testing may take place and prohibit the use of evidence obtained from polygraph testing in criminal proceedings in which the offender is the defendant.

13. Section 31 amends section 202 of the Criminal Justice Act 2003 to allow the Secretary of State to accredit programmes for the purposes of programme requirements.

14. Section 32 amends section 41 of the Crime and Disorder Act 1998 to allow the Secretary of State to ask the Youth Justice Board to assist him in the exercise of certain functions and it also provides that the Secretary of State may restrict the way in which the Youth Justice Board exercises certain functions.

15. Section 33 amends the arrangements for early release from the custodial part of the Detention and Training Order.

16. Section 34 widens the category of accommodation in which a period of detention and training may be served.

17. Section 35 extends the provisions of the Criminal Justice and Public Order Act 1994 with regard to the authority for transporting detained young persons between relevant premises.

COMMENTARY ON SECTIONS

PART 1: PROBATION SERVICES

Section 1: Meaning of "the probation purposes"

18. This Section sets out various purposes that govern the probation services that are to be provided under Part 1.

19. *Subsection (1)* defines "the probation purposes." It broadly replicates the existing provisions in the Criminal Justice and Court Services Act 2000 ("the 2000 Act"), as supplemented by the Local Probation Boards (Miscellaneous Provisions) Regulations 2001 (S.I. 2001/786) and as amended to reflect provisions on conditional cautions in the Criminal Justice Act 2003.

20. *Subsection (2)* adds further detail to the general purposes and is also based on the 2000 Act as amended. *Subsection (2)(b)* is new and puts beyond doubt that the provisions also cover the work which providers of probation services do in relation to offenders in prison.

21. *Subsection (3)* clarifies that the probation purposes include the supervision and rehabilitation of persons convicted of an offence outside England and Wales who are serving all or part of their sentence in England and Wales.

22. *Subsection (4)* defines the terms "authorised person", "conditional caution", "community order", "suspended sentence order" and "victim" which are used in this section.

23. *Subsection (5)* enables the Secretary of State to extend these purposes by regulations which, by virtue of section 36, will be subject to the negative resolution procedure.

Section 2: Responsibility for ensuring the provision of probation services

24. This Section sets out the functions of the Secretary of State.

25. *Subsection (1)* states that it is the function of the Secretary of State to ensure that sufficient provision is made for probation purposes (as described in the previous Section) and for probation functions of the Secretary of State in other legislation. Similar functions to those set out in this section currently rest with local probation boards under section 5 of the 2000 Act.

26. *Subsection (2)* states that the Secretary of State is to discharge his function in relation to any probation provision by making arrangements under Section 3. Those arrangements will normally involve the making of contracts with a provider of services, but there is also the possibility of non-contractual arrangements or of the services being provided by the Secretary of State directly.

27. *Subsection (3)* requires the Secretary of State to have regard to aims in the exercise of his probation functions under subsections (1) and (2).

28. *Subsection (4)* sets out those aims, which replicate the ones currently set out in section 2(2) of the 2000 Act.

29. *Subsection (5)* makes clear that the Secretary of State does not need to take action under this Section if he is satisfied that adequate provision will be made under other arrangements.

Section 3: Power to make arrangements for the provision of probation services

30. This Section gives details of how the Secretary of State will make arrangements for the provision of probation services.

31. *Subsection (1)* states that this section applies to any probation provision which the Secretary of State considers should be made under section 2(1).

32. *Subsection (2)* states that the Secretary of State may make contractual or other arrangements with any other person for the making of probation provision. In most cases, it is envisaged that arrangements will be made under contract but this subsection does allow for other possibilities.

33. *Subsection (3)* clarifies that contractual or other arrangements may require or authorise the other party to:

- co-operate with other providers of probation services or persons concerned with crime prevention or reduction or with assisting victims;
- designate individuals as officers of a provider of probation services (subsequently defined in Section 9); and
- sub-contract with third parties.

34. *Subsection (4)* makes clear that the Secretary of State may make arrangements under Section 3(2) to delegate the performance of statutory functions.

35. *Subsection (5)* enables the Secretary of State, if he considers it appropriate, to provide probation services himself, and makes clear that he may use prison staff for this purpose. In most cases, it is anticipated that the Secretary of State will make arrangements with others to deliver probation services but this makes it possible for prison staff, for example, to deliver probation services in the community. This could be helpful in terms of bridging the gap between custody and the community.

36. *Subsection (6)* defines providers of probation purposes as either the person with whom the Secretary of State makes arrangements or the Secretary of State, where he makes provision through members of his staff.

37. *Subsection (7)* places a duty on the Secretary of State in carrying out his functions under subsection (2). It requires him to have regard to the need to take reasonable steps to avoid (so far as practicable) the risk that the provision of probation services might be adversely affected by any potential conflict of interest between the provider's obligations and the financial interests of the provider.

Section 4: Restrictions on certain arrangements under section 3

38. Section 4 places a restriction on the ability of the Secretary of State to make contractual or other arrangements under section 3(2).

39. *Subsection (1)* states that contractual or other arrangements relating to restricted probation provision may be made only with a probation trust or other public body.

40. *Subsection (2)* defines restricted probation provision as the giving of assistance to courts in determining the appropriate sentence to pass, or making any other decision, in respect of a person charged with or convicted of an offence.

Section 5: Power to establish probation trusts

41. This Section gives details of the Secretary of State's power to establish probation trusts.

42. *Subsection (1)* states that the Secretary of State may, by order (subject to negative resolution):

- establish a trust for purposes specified in the order;
- alter the name or purposes of a probation trust; or
- dissolve a probation trust.

43. *Subsection (2)* specifies that the purposes of a probation trust must consist of, or include, the making or performance of contracts by the trusts with the Secretary of State in line with Section 3(2).

44. *Subsection (3)(a)* specifies that the purposes may also enable the trust to enter into contracts with parties other than the Secretary of State for the provision of probation services. In practice, it is envisaged that the majority of a trust's activity will be under contract to commissioners acting on behalf of the Secretary of State, but this subsection allows trusts the flexibility to enter into contracts with others, including other probation trusts, where appropriate, provided that the activity concerned is part of their core purposes.

45. *Subsection (3)(b)* specifies that these contracts may also cover probation-related activities in relation to service courts.

46. *Subsection (3)(c)* provides that the purposes of a probation trust may also include any other purposes specified in regulations made by the Secretary of State. Any such regulations are subject to the affirmative procedure by virtue of section 36(3)(a).

47. *Subsection (4)* clarifies that the purposes set out in the order may be expressed in more specific terms than those used in *subsection (2) and (3).*

48. *Subsection (5)* clarifies that a trust may carry out activities relating to contracts, including before and after contracts are agreed. This enables it to bid for and negotiate contracts in the first place and to carry out any activities necessary to wind up its business after a contract has expired.

Section 6: Power to make grants for probation purposes

49. This Section enables the Secretary of State to make payments (other than under the contractual or other arrangements referred to in Section 3) to a trust or any other person for probation purposes (as defined in section 1). It is envisaged that contractual or other arrangements will be the main source of probation funding but this section allows for situations where this may not be appropriate.

50. *Subsection (2)* makes clear that the Secretary of State may attach conditions to such payments.

Section 7: National standards for the management of offenders

51. This Section requires the Secretary of State to continue to publish national standards for the management of offenders.

52. *Subsection (2)* makes clear that these national standards may include standards relating to the management of offenders in custody.

53. *Subsection (3)* requires the Secretary of State, in making contractual or other arrangements, to have regard to the need to secure, so far as practicable, that national standards have the same effect in relation to every provider of probation services.

Section 8: Annual plans

54. Section 8 sets out the requirements for annual plans.

55. *Subsection (1)* requires the Secretary of State, at least once a year, to consult Welsh Ministers and such other person as he thinks fit about the probation provision to be made the following year. It is envisaged that the other persons consulted will include stakeholders at regional and local level, such as sentencers, providers of probation services, providers of custodial services, other criminal justice agencies, local authorities and bodies involved in the provision of services which contribute to the reduction of re-offending.

56. *Subsection (2)* requires the Secretary of State, before the end of each year, to publish an annual plan for the following year setting out how he proposes to ensure that sufficient probation provision is made.

57. *Subsection (3)* requires the Secretary of State to have regard to the plan in discharging his functions.

58. *Subsection (4)* states that arrangements made by the Secretary of State with a probation trust shall require the trust to publish its own annual plan.

59. *Subsection (5)* states that arrangements with a provider other than a trust may also require that provider to publish an annual plan if the Secretary of State thinks fit.

60. *Subsection (6)* defines "annual plan" and "specified activities" and *subsection (7)* defines a "year".

Section 9: Officers of providers of probation services

61. Existing legislation (e.g. section 2(1)(b) of the 2000 Act) refers to "officers of local probation boards". As local probation boards are abolished, a new term is needed. This Section sets out provisions relating to "officers of providers of probation services".

62. *Subsection (1)* defines an "officer of a provider of probation services" as an individual who is for the time being authorised to carry out the functions of an officer of a particular provider of probation services.

63. Under *subsections (2) and (3)* an individual may be authorised as an officer of a provider of probation services by the Secretary of State or (where the provider is not the Secretary of State) by a provider of probation services who has been authorised to do so.

Section 10: National framework for qualifications of officers

64. This section sets out provisions relating to a national framework for qualifications of officers.

65. *Subsection (1*) states that the Secretary of State may publish guidelines about any qualifications, experience or training required to perform the work of an officer of a provider of probation services.

66. *Subsection (2)*states that the Secretary of State must publish guidelines in relation to work involving the supervision of offenders and other work requiring direct contact with offenders, including offenders held in custody.

67. *Subsection (3)* makes clear that guidelines may make different provision for different purposes.

68. *Subsection (4)* requires the Secretary of State, in making contractual or other arrangements, to have regard to the need to secure, so far as practicable, that guidelines have the same effect in relation to every provider of probation services.

Section 11: Abolition of local probation boards and transfers of property etc and staff

69. *Subsection (1)* provides for the abolition of local probation boards constituted under section 4 of the 2000 Act.

70. *Subsection (2)* gives effect to Schedule 2 which contains provisions relating to transfers of property etc or staff in connection with the abolition of local probation boards or the implementation or termination of arrangements under section 3.

Section 12: The inspectorate

71. This Section makes consequential amendments to the provisions establishing Her Majesty's Inspectorate of the National Probation Service to reflect the fact that the National Probation Service will cease to exist when the local probation boards are abolished and that the inspectorate will in future need to inspect a range of providers of probation services.

72. *Subsection (1)* renames Her Majesty's Inspectorate of the National Probation Service for England and Wales "Her Majesty's Inspectorate of Probation for England and Wales", and renames its Chief Inspector "Her Majesty's Chief Inspector of Probation for England and Wales".

73. *Subsection (3*)(a) amends section 7 of the 2000 Act to include the inspection of the provision of probation services under section 3. *Subsection (3)(b)* makes an amendment to allow the Secretary of State to give further directions related to the probation purposes referred to in section 1 and to confer further functions on the inspectorate as a result.

Section 13: Approved premises

74. This Section sets out provisions relating to approved premises. It is closely based on existing provision made by section 9 of the 2000 Act.

75. *Subsection (1)* is based on section 9(1) of the 2000 Act. It enables the Secretary of State to approve premises for the purposes of providing accommodation for persons on bail or for the supervision or rehabilitation of offenders.

76. *Subsection (2)* enables the Secretary of State to make regulations concerning approved premises. This subsection re-enacts section 9(3) of the 2000 Act, under which the Criminal Justice and Court Services Act 2000 (Approved Premises) Regulations 2001 (S.I.2001/850) were made. These Regulations are expected to remain in force following the repeal of section 9 of the 2000 Act and the bringing into force of this section.

77. *Subsection (3)* enables the Secretary of State to make payments in relation to the operation of approved premises. The Secretary of State may also make payments in relation to the construction, enlargement or improvement of premises, if they are approved premises already or if the works are being carried out with a view to their being approved as such.

78. *Subsection (4)* makes clear that the Secretary of State may attach conditions to any payment made under *subsection (3).*

79. *Subsection (5)* clarifies that *subsection (3)* does not prevent the Secretary of State from using his powers under sections 2 to 6 to commission new premises and the running of them.

80. *Subsection (6)* clarifies that references in other enactments to an approved bail hostel or approved probation hostel are to be read as a reference to approved premises. This replicates *subsection (2)* of the 2000 Act.

81. *Subsection (7)* makes a consequential amendment to paragraph 2(7) of Schedule 2 to the Private Security Industry Act 2001 to make clear that those involved in the management of approved premises, who may need to determine who has access to those premises, are not caught by the licensing requirements which apply to those who undertake "manned guarding" activity within the meaning of that Act.

Section 14: Disclosure for offender management purposes

82. This Section clarifies the powers of certain bodies to share data for any purpose mentioned in *subsection (4).*

83. *Subsections (1) and (2)* list the entities who are able to benefit from the power to share data.

84. *Subsection (3)* provides the power to share data but only if the disclosure is necessary or expedient for purposes mentioned in *subsection (4).* This subsection enables the bodies listed in *subsection (1)* to share data with one another. It also enables disclosure between those bodies and the bodies listed in *subsection (2).* The Section does not authorise disclosures between bodies listed in *subsection (2)*. However, there may be powers outside this Act that authorise these.

85. *Subsection (4)* specifies the purposes for which disclosures are permitted by the Section. These include the probation purposes (see Section 1), the performance of functions of the Secretary of State, other persons to whom Section 14 applies and persons listed in subsection (2), provided the functions relate to prisons or prisoners or for other purposes connected with the management of offenders.

86. *Subsection (5)* expands upon the meaning of functions, prisons, and prisoners, and confirms that young offender institutions and secure training centres, together with those persons detained within them, are treated as prisons or prisoners respectively for the purposes of this clause.

87. *Subsection (6)* confirms that the power to exchange information by virtue of this Section does not affect any existing power to share data that exists independently of the Section (e.g. section 34 of the Serious Organised Crime and Police Act 2005 (c.15)) and that any such exchange is subject to existing safeguards regarding the sharing of data.

88. *Subsection (7)* creates a power for the Secretary of State to amend any passed enactment in the current or previous sessions, which would otherwise prevent the sharing of data permitted

by this Section. Section 36 provides that this order making power is subject to the affirmative resolution procedure.

89. *Subsection (9)* defines relevant contractor for the purposes of *subsection (2)* and confirms that those contracted to provide prison, young offender institution, secure training centre and related escort services are within the ambit of the Section.

90. *Subsection (10)* defines "enactment" for the purposes of *subsection (6)* so as to include any subordinate legislation within the meaning of the Interpretation Act 1978.

Section 15: Powers to repeal section 4

91. Section 15 provides a power for the Secretary of State to repeal section 4 by order which (by virtue of section 36(3)(c)) will be subject to affirmative resolution.

PART 2: PRISONS

Section 16: Power of search in contracted out prisons and secure training centres

92. *Subsection (1)* amends section 86(2) of the 1991 Act which prevents prisoner custody officers performing custodial duties at a contracted-out prison from conducting anything more than a "rub-down" search of a visitor. The amendment removes this restriction and allows a prisoner custody officer to require a visitor he wishes to search to remove an item of clothing which is not only an outer coat, jacket or gloves. However, the amendment makes clear that a prisoner custody officer shall not be able to require that an intimate search (within the meaning of section 164(5) of the Customs and Excise Management Act 1979) is carried out. This subsection also amends section 86 by clarifying that the power to search will be exercised in line with relevant Prison Rules and Young Offender Institution Rules.

93. *Subsection (2),* amends section 9 of the Criminal Justice and Public Order Act 1994 by removing an equivalent restriction placed upon a custody officer at a secure training centre and expands his power to search in line with *subsection (1). Subsection (2)(a)* provides that the power to search will be exercised in accordance with relevant Secure Training Centre Rules.

Section 17: Power of detention in contracted out prisons and secure training centres

94. *Subsection (1)* amends the Criminal Justice Act 1991 ("the 1991 Act") by inserting a new section 86A. This gives a prisoner custody officer the power to require a visitor to wait with him where that officer believes the visitor has committed an offence under sections 39 to 40D of the Prison Act 1952 or an offence of attempting, inciting, conspiring or aiding, abetting, counselling or procuring the commission of such an offence.

95. The new section 86A enables the requirement to wait to be imposed solely in order to enable a constable to arrive. It also makes clear that the period for which a visitor may be required to wait shall be for so long as is necessary for a constable to arrive and, in any event, shall not exceed two hours. Section 86A also enables the prisoner custody officer to use reasonable force to prevent the visitor whom he has detained from making off. Further, it provides that a person who makes off when required by a prisoner custody officer to wait with him will be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.

96. *Subsection (2)* ensures that the new power to detain extends to a prisoner custody officer performing contracted out functions at a directly managed prison.

97. *Subsection (3)* amends the Criminal Justice and Public Order Act 1994 by inserting a new section 9A which gives a custody officer in a secure training centre a power to detain, equivalent to that in the new section 86A of the 1991 Act.

98. *Subsection (4)* makes clear that the new section 9A power extends to a custody officer performing contracted out functions at a directly managed secure training centre.

Section 18: Powers of authorised persons to perform custodial duties and search prisoners

99. *Subsection (2)* of this Section amends the 1991 Act further by inserting a new section 86B.

100. Section 86B provides a mechanism for authorising a person working at a contracted out prison who is not a prisoner custody officer to perform restricted activities. Such activities are those that would involve the performance by the worker of a custodial duty. A custodial duty can only be performed by prisoner custody officers, owing to the effect of section 85(1) of the 1991 Act.

101. The new section 86B enables the Secretary of State to specify in an order subject to negative procedure the activities that a worker may be authorised to carry out. The director of a prison in which that worker is working may then authorise a worker to carry out one or more of the listed restricted activities. Any authorisation may be limited or given in general or specific terms and be given either to individuals or a defined class of persons. Finally, none of the powers conferred by the section permit the use of force by a worker when carrying out a restricted activity. That will not prevent the use of force in circumstances where it is authorised by another enactment or the common law.

102. *Subsection (3)* provides that section 85(1) of the 1991 Act, which requires custodial duties to be performed only by a prisoner custody officer, takes effect subject to the new section 86B.

Section 19: Powers of director of a contracted out prison

103. This Section removes the prohibition in section 85(3) of the Criminal Justice Act 1991 that prevents a director in a contracted-out prison from exercising certain adjudication and segregation functions. The effect of this amendment is that a director, rather than a controller (who is employed by the Ministry of Justice and currently exercises the functions in question) will be able to inquire into a disciplinary charge laid against a prisoner, conduct the hearing of a charge or make an award in respect of any charge. All such proceedings will take place in accordance with the Prison Rules or the Young Offender Institution Rules, as appropriate. By virtue of the amendments made by this Section a director will also be able to segregate prisoners, temporarily confine prisoners or apply special controls or restraints on a routine basis. At present, these powers are available to a director only in an emergency.

Section 20: Amendment of section 87 of Criminal Justice Act 1991

104. This Section makes two small amendments to section 87 of the Criminal Justice Act 1991. The principal effect of the Section is to enable the search powers vested in "authorised employees" under section 8A of the 1991 Act, together with the mechanism for authorising those searches, to apply in a contracted-out prison. Accordingly a director of such a prison will be able to authorise employees who are not prisoner custody officers to carry out "rub down" searches in accordance with section 8A.

Section 21: Assisting a prisoner to escape

105. This Section replaces section 39 of the Prison Act 1952 with a new section 39 to bring the terminology up-to-date and in line with the terminology used in the new offences on the conveyance of prohibited articles in and out of prisons contained in Section 22.

Section 22: Conveyance of prohibited articles into or out of prison

106. This Section replaces section 40 of the Prison Act 1952 with new sections 40A, 40B and 40C. These new sections clarify the existing law, make changes to the penalties and mode of trial for certain offences and create new offences of taking mobile phones, sound recording devices and cameras into a prison.

107. New section 40A defines the categories of article which are referred to in sections 40B and 40C. There are 3 groups (described as List A, List B and List C) of prohibited items. *Subsection (2)* provides for List A (dangerous articles and controlled drugs). *Subsection (3)* provides for List B articles (alcohol, mobile telephones, cameras and sound-recording devices). *Subsection (4)* defines "camera" and "sound-recording device". *Subsection (5)* provides that the reference in list B to a mobile telephone, a camera or a sound-recording device includes component parts and articles designed or adapted for use with those articles as well as the articles themselves. *Subsection (6)* enables the Secretary of State to amend new section 40A by adding, repealing or modifying an entry to List A or B or any provision for the interpretation of the section.

108. *Subsection (7)* enables the Secretary of State to amend new section 40A by adding, repealing or modifying an entry to List A or B or any provision for the interpretation of the section. An Order relating to List A articles is exercisable by statutory instrument and is subject to the affirmative procedure. Where an amendment is made to the list of List B articles then the order is subject to the negative resolution procedure. Section 22(2) makes the necessary consequential amendments to section 52 of the Prison Act 1952 which deals with the Secretary of State's power to make orders under that Act.

109. New section 40B makes it an offence to convey List A articles into or out of prison without authorisation. *Subsection (1)* details the type of conduct which is covered by the new offence. *Subsections (2) to (5)* define "authorisation" and detail how the authorisation may be given and by whom. *Subsection (6)* sets out the maximum penalty and mode of trial for the new offence.

110. New section 40C makes it an offence to convey List B or C articles into or out of prison. *Subsections (1)* (List B) *and (2)* (List C) detail the type of conduct which is prohibited by the new offences. A person commits an offence if he carries out a listed activity without authorisation. *Subsection (4)* provides for defences where the accused individual reasonably believed he had authorisation or where there was an overriding public interest which justified the doing of the prohibited act. *Subsections (5)* (List B) and *(6)* (List C) set out the maximum penalty and mode of trial for the new offences.

Section 23: Other offences relating to prison security

111. This Section inserts new sections 40D and 40E to the Prison Act 1952. These new sections create new offences of taking a photograph or making sound recordings within a prison or transmitting images or sounds from a prison without authorisation. It also creates an offence of taking a restricted document out of a prison.

112. New section 40D creates the offence of taking a photograph or making sound recordings in a prison or transmitting any image or sound by electronic communications. *Subsection (3)* creates offences designed to prohibit the conveyance or transmission of restricted documents out of a prison. *Subsection (4)* provides for defences where the accused individual reasonably believed he had authorisation or where there was an overriding public interest which justified the doing of the prohibited act. *Subsection (5)* sets out the maximum penalty and mode of trial for the new offences.

113. New section 40E gives details of how an authorisation may be given and by whom. It also provides definitions of terms used in the new sections and makes minor repeals of, and consequential amendments to, the Prison Act 1952.

Section 24: Offences under sections 22 and 23: extension of Crown immunity

114. New section 40F extends Crown immunity in relation to offences under new sections 40B, 40C and 40D to designated persons working at a prison. This ensures that all relevant staff can be treated the same in relation to the new offences.

Section 25: Removal of requirement to appoint a medical officer etc

115. Historically, prison health services were provided via a requirement in the Prison Act 1952 for each prison to appoint a medical officer. From April 2003, prison health services became the responsibility of the Secretary of State for health under separate existing legal provisions. This section removes the original requirement in the Prison Act 1952.

116. The original medical officer role is at odds with modern professional management of health services and the development of multi-disciplinary clinical teams and the role as envisaged by the original legislation has become defunct. As the NHS, in the form of Primary Care Trusts, have now assumed statutory responsibility for local prison health services, the original medical officer role is no longer required.

Section 26: Independent Monitoring Boards

117. Section 26 provides for the change of name from "Boards of Visitors" to "Independent Monitoring Boards" and replaces references to "Boards of Visitors" in the Prison Act 1952 with the title "Independent Monitoring Boards". It also removes the requirement in section 6 of the Prison Act 1952 that at least two members of the Board must be magistrates.

Section 27: Amendment of section 8A of the Prison Act 1952

118. This Section makes a small amendment to section 8A of the Prison Act 1952 by providing that a person who is not necessarily an employee of a prison, but who is working there can be authorised to carry out a "rub down search" under section 8A.

PART 3: OTHER PROVISIONS ABOUT OFFENDER MANAGEMENT

Section 28: Application of polygraph condition to certain licences

119. This Section permits a polygraph condition to be included in the licence of an offender convicted of a specified sexual offence who is released from custody into the community on licence. Any offender released from custody with such a condition would be required to undertake polygraph tests. Polygraphy is a means of measuring certain physiological responses that may be associated with deception. The purpose of the polygraph test is to

monitor whether offenders are complying with their licence conditions or to improve the management of the offender during his release in the community on licence.

120. *Subsection (1)* permits the Secretary of State to include a polygraph condition in the licence of a person covered by *subsection (2)*. The term 'licence' refers to the licence issued to certain offenders on release from relevant custodial sentences, which specifies the terms of their conditional release from prison. Current legislation allows certain conditions to be set in release licences – this legislation extends this to enable the addition of a requirement to undertake polygraph testing in the case of offenders serving sentences for relevant sexual offences.

121. *Subsection (2)* specifies the offenders who may be required to undertake a polygraph test, namely those who have served a relevant custodial sentence for a relevant sexual offence and who are released on licence and are not aged under 18 on the day of release from custody.

122. *Subsection (3)* defines 'relevant custodial sentence' for the purposes of *subsection (2)*.

123. *Subsection (4)* defines 'relevant sexual offences' for the purposes of *subsection (2).*

124. *Subsection (5)* amends the Criminal Justice Act 2003 to enable the polygraph condition to be inserted in the licence of a prisoner released under that Act, provided that he meets the eligibility requirements for having a polygraphy condition included in his licence.

Section 29: Effect of polygraph condition

125. This Section sets out the requirements placed on an offender where polygraph testing is set as a condition of licence, describes a polygraph session and permits the Secretary of State to make rules to govern the conduct of polygraph sessions.

126. *Subsection (1)* describes the requirements of a polygraph condition. When imposed, such a condition requires an offender to participate in a polygraph session with a view to monitoring his compliance with the other conditions of his licence and improving his management on licence in the community. It also provides that an offender must participate in a polygraph session in accordance with instructions given by the appropriate officer and comply with instructions given him by the polygraph operator.

127. *Subsection (2*) describes what takes place during a polygraph session. During a polygraph session, the polygraph operator conducts a polygraph examination and interviews the offender in question in preparation or in connection with that examination.

128. *Subsection (3)* describes a polygraph examination. The polygraph operator questions the offender, and the offender's answers are recorded. In addition, the physiological reactions of the released offender are measured and recorded by means of equipment approved by the Secretary of State.

129. *Subsection (4)* defines who is an 'appropriate officer' for the purpose of subsection (1).

130. *Subsection (5)* requires appropriate officers to have regard to any guidance issued by the Secretary of State with regard to instructions that an appropriate officer may issue with regard to attendance at polygraph sessions.

131. *Subsection (6)* enables the Secretary of State to make rules regarding the conduct of polygraph sessions.

132. *Subsection (7)* states that rules made under subsection (6) may include the qualifications that polygraph operators must satisfy, the way in which records of polygraph sessions are to be kept and the way reports on the results of polygraph sessions are to be prepared.

133. Subsection (8) states that the power to make rules as described in subsection (6) is excercisable by statutory instrument subject to the negative resolution procedure.

Section 30: Use in criminal proceedings of evidence from polygraph sessions

134. This Section provides that any statement made by a person during a polygraph session or any physiological reaction made during such a session may not be used in criminal proceedings in which that person is the defendant.

Section 31: Accreditation of programmes for purposes of programme requirements

135. Currently section 202 of the Criminal Justice Act 2003 makes provision for an 'accreditation' body to accredit programmes. The Correctional Services Accreditation Panel (CSAP) is designated as the accreditation body and is an advisory non-departmental public body. The Panel replaced the Prison Service's General and Sex Offender Treatment Programme Accreditation Panels established by the Prison Service in 1996.

136. The establishment of the National Offender Management Service (NOMS) has created a different framework for the provision of correctional services. The separation of commissioning from operational delivery has secured the independence from service providers necessary for NOMS to make accreditation decisions itself in relation to offending behaviour programmes. There is therefore no longer a need for an accreditation body that is independent of NOMS and constituted as a non-departmental public body. This Section amends section 202 of the Criminal Justice Act 2003, making provision for the Secretary of State to accredit programmes in place of the accreditation body. Decisions on accreditation will be taken after consulting and receiving advice from an independent non-statutory panel of experts to replace the CSAP.

Section 32: Functions of Youth Justice Board

137. Section 41 of the Crime and Disorder Act 1998 ("the 1998 Act") deals with the Youth Justice Board. Section 41(5) of the 1998 Act lists the functions of the Youth Justice Board and section 41(6) enables the Secretary of State, by order, to allow the Board to exercise concurrently with him his own functions in relation to the youth justice system. The Youth Justice Board already exercises Secretary of State functions in relation to the placement of offenders sentenced to a Detention and Training Order.

138. *Subsection (2)* of this Section amends section 41(5) of the 1998 Act to enable the Secretary of State to ask the Board to assist him in carrying out his functions in relation to the release of offenders in youth detention accommodation.

139. *Subsection (3)* allows the Secretary of State, in an order under section 41(6), to restrict the manner or classes of case in which the Youth Justice Board may exercise functions of his in respect of individual offenders. The Secretary of State is also given power to include in the order supplementary, incidental or consequential provisions.

Section 33: Detention and training orders: early release

140. This Section introduces an element of flexibility into the arrangements for early release from the custodial part of the Detention and Training Order. Young offenders serving Detention

and Training Orders of 8 months or longer may be released one month before the mid-point of their sentence. Those serving orders of 18 months or longer may be released either one or two months before the mid-point. At present, early release, where authorised, must take place exactly one or, where appropriate, two months before the mid-point. If anything happens to prevent this, the young person must remain in custody for a further month (i.e. until the halfway point of a sentence or the second early release point in the case of sentences of 18 months or longer).

141. The amendments made by *subsection (1)* enable the trainee to be released at any point during the last month before the mid-point of the order (or two months, in the case of orders of 18 months or longer).

142. *Subsection (2)* specifies that this new flexibility will apply to orders made before the Section comes into force as well as those made subsequently.

Section 34: Accommodation in which period of detention and training to be served

143. Detention and Training Orders are in two parts: the first spent in custody and the second under supervision in the community. At present, the young person (or "trainee") must be placed, during the custodial part, in one of the types of "secure accommodation" listed in section 107 of the Powers of Criminal Courts (Sentencing) Act 2000.

144. The amendments made by the Section provide that (unless he or she has attained the age of 18) the trainee must be placed in "youth detention accommodation". This category is wider than the current "secure accommodation". In future, it will be possible, for example, to place a young person in other forms of local authority accommodation as well as in a secure children's home. Trainees who are sent back to custody because they have breached the terms of their notice of supervision or committed a further offence during the community part of the order must, unless they have reached 18, also be placed in "youth detention accommodation".

145. *Subsection (6)* replaces the list of "secure accommodation" with a new list of "youth detention accommodation". *Subsection (6)(b*) adds, as a type of "youth detention accommodation", secure accommodation provided *on behalf of* a local authority to the list of allowable types of placement. (Secure accommodation provided *by* the local authority itself is already on the list.). *Subsection (6)(c)* removes the requirement that accommodation, directed by the Secretary of State to be "youth detention accommodation", must have the purpose of restricting liberty as its purpose.

Section 35: Escort arrangements

146. Arrangements for conveying juvenile offenders between courts, custodial establishments, police stations and hospitals are currently provided in the Criminal Justice Act 1991 and the Criminal Justice and Public Order Act 1994. This Section extends the provisions of the 1994 Act. It gives authority for the transporting of a greater range of detained young persons between a wider range of types of premises, including young offender institutions, secure training centres and secure children's homes. Transporting of remanded, as well as sentenced, young people is covered, between any of the types of youth detention accommodation defined in section 107(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (as amended by Section 25(7)), as well as courts, police stations and hospitals.

PART 4: SUPPLEMENTAL

Section 36: Orders and Regulations

147. This Section sets out the level of parliamentary scrutiny applicable to orders and regulations made under the Act. It does not apply to commencement orders which are not subject to any Parliamentary procedure. Save for orders made under Section 5(3)(c), Section 14(2)(h) or (7), Section 15 or Section 38(2)(a), which are subject to the affirmative procedure, orders and regulations will be subject to negative resolution procedure.

Section 37: Financial Provisions

148. This Section gives the Secretary of State authority to spend money provided by Parliament for the purposes of the Act.

Section 38: Power to make consequential and transitional provision etc

149. This Section enables the Secretary of State, by order, to make any supplemental, incidental or consequential provision, and any transitory, transitional or saving provision which he considers necessary to give full effect to the Act.

150. *Subsection (2)(a)* states that such an order may amend, repeal or revoke any enactment and *subsection (2)(b)* states that the order may also provide for any provision of this Act which comes into force before another provision has come into force to have effect until that other provision has come into force, with specified modifications. The power in subsection (2)(a) is subject to the affirmative procedure by virtue of Section 36(3)(d).

151. *Subsection (3)* makes clear that the reference to an enactment in subsection (2) includes legislation which is passed or made before the end of the 2007/2008 parliamentary session.

Section 39: Minor and consequential amendments, transitionals and repeals

152. This Section gives effect to Schedules 3, 4 and 5 which deal with minor and consequential amendments, transitional provisions and savings, and repeals respectively.

Section 40: Extent

153. The Bill forms part of the law of England and Wales only, save for the exceptions listed.

Section 41: Commencement

154. This Section sets out the arrangements for bringing into force the provisions of the Act.

155. *Subsection (1)* states that the preceding provisions shall come into force on a day which the Secretary of State may, by order, appoint.

156. *Subsection (2)* states that different provisions may be brought into force at different times and in different areas.

157. *Subsection (3)* states that orders under this section may include transitional provisions or savings.

158. *Subsection (4)* provides that, unless making provision as set out in subsections (5)(a) and (6), an order made bringing into force anything in sections 24 or 25 (which relate to polygraph testing) will be subject to the affirmative resolution procedure.

159. Under *subsection (5)(a),* the Secretary of State may by order bring polygraph testing as a condition of licence into force in a specified area for a specified period.

160. *Subsection (6)* provides that an order made under subsection 5(a) may be amended by a subsequent order so as to extend the period in which polygraph testing as a condition of licence is in force in respect of the specified area.

Section 42: Short title

161. This Section sets out the short title of the Bill.

COMMENTARY ON THE SCHEDULES

Schedule 1: Probation trusts: further provisions

162. *Paragraph 1* states that a probation trust is a body corporate and that its name is that specified in the order. It is envisaged that the order will name the probation trust in accordance with the geographical area in which it is based but without limiting the trust's area of operation to that geographical area.

163. *Paragraph 3(1)* specifies that a probation trust shall comprise a chairman and no fewer than four other members appointed by the Secretary of State. In practice, it is envisaged that most trusts will have more members than this but the legislation allows flexibility for the number to vary between trusts and over time, depending on the nature and scale of an individual trust's business. A trust shall also include the chief executive who will become an *ex officio* member on appointment. *Paragraph 3(2)* clarifies that, where subsequent provisions refer to an "appointed member" of a trust, this refers to a member appointed by the Secretary of State; it does not include the chief executive.

164. *Paragraph 3(3)* states that, where practicable, at least one of the appointed members of a trust must, when appointed, be a member of a relevant local authority. *Paragraph 3(4)* defines "relevant local authority" for these purposes.

165. *Paragraph 5* states that the Secretary of State shall pay appointed members and pay, or make provision for the payment of, pensions etc. In both cases, the level of such payments is for the Secretary of State to determine. The paragraph also enables, but does not require, the Secretary of State to compensate a member who ceases to hold office (other than on the expiry of his term) if the Secretary of State deems it appropriate.

166. *Paragraph 6* states that the members appointed by the Secretary of State shall appoint a chief executive who shall be an employee of the trust and whose terms of employment are for the appointed members to determine (at present the chief officer of a local probation board is appointed by the Secretary of State). But this would not apply if the Secretary of State were to direct the appointment of the first chief executive of the trust and his terms and conditions.

167. *Paragraph 7* sets out the provisions for the appointment of staff. The trust appoints its own staff and sets its own terms and conditions, subject to the proviso (in *paragraph 8*) that the determination of terms of employment relating to remuneration, fees or expenses and pensions, allowances or gratuities requires the approval of the Secretary of State.

168. *Paragraph 9* enables the trust to regulate its own procedure.

169. *Paragraph 10* clarifies that the validity of a trust's proceedings are not affected by a vacancy among its members or a defect in the appointment of any member.

170. *Paragraph 11* enables a probation trust to authorise an appointed member, a committee, the chief executive or any other member of staff to do anything that the trust would otherwise have to do itself.

171. *Paragraph 12* empowers a trust to do anything it thinks necessary to achieve its purposes, except that it may not hold land or borrow or invest money without the general or specific approval of the Secretary of State

172. *Paragraph 13* requires a trust to keep proper financial records and prepare an annual statement of accounts, which may be examined by the Comptroller and Auditor General and, in the case of a Welsh probation trust, the Auditor General for Wales. The paragraph also makes consequential amendments to the Audit Commission Act 1988 (as amended by the 2000 Act), and the Public Audit (Wales) Act 2004.

173. *Paragraph 14* requires a trust to comply with any general or specific directions given to it by the Secretary of State and to provide the Secretary of State with information if he so directs.

Schedule 2: Transfers of property etc and staff in connection with probation services arrangements

174. *Schedule 2* covers certain matters relating to the abolition of local probation boards or the making or termination of any arrangements for the delivery of probation services.

175. *Paragraph 1* states that transfer schemes may be made in connection with this and defines "property transfer scheme", "property", "relevant person" and "staff transfer scheme".

176. *Paragraphs 2 to 4* deal with property transfer schemes.

177. *Paragraph 2* enables the Secretary of State to make a property transfer scheme to transfer to the Secretary of State the property and liabilities of a local probation board, or a relevant person, or to transfer to a relevant person any property or liabilities of the Secretary of State.

178. *Paragraph 3* states that a property transfer scheme takes precedence over any other provisions which might restrict transfers. Such compensation for loss of rights or reverter is to be paid by the transferor and/or transferee as appropriate, and the scheme may include a mechanism for resolving disputes over compensation.

179. *Paragraph 4* states that any ongoing proceedings or activities relating to the transferor are to be treated as if relating to the transferee when the transfer has taken place.

180. *Paragraphs 5 to 10* deal with staff transfer schemes. The policy intention is that staff who transfer between providers of probation services should have their terms and conditions protected by law. In many cases the Transfer of Undertakings (Protection of Employment) Regulations 2006 will provide the appropriate protection. But, in cases where TUPE does not apply, these paragraphs enable the Secretary of State to make equivalent provision.

181. *Paragraph 5* enables the Secretary of State to make a staff transfer scheme to transfer:

- employees of a local probation board to a relevant person;
- employees of one relevant person to another; or
- transfers from providers to the civil service and vice versa.

A scheme may not be made unless any directions about consultation given by the Secretary of State have been complied with.

182. *Paragraph 6* deals with transfers between relevant persons or between probation boards and relevant persons and it provides that, when an employee is transferred under the scheme, his continuity of employment is maintained and the rights, duties and liabilities of his previous employer are transferred to the new one. If an employee does not wish to transfer to the new employer, his contract is terminated and he is not to be treated as having been dismissed for the purposes of the Employment Rights Act 1996.

183. *Paragraph 7* makes similar provision in relation to employees of probation boards who transfer to the civil service.

184. *Paragraph 8* makes similar provision in relation to civil servants who transfer to the employment of a probation trust or other provider.

185. *Paragraph 9* makes clear that the Schedule does not prejudice an employee's right to terminate his employment if his working conditions are changed substantially to his detriment.

186. *Paragraph 10* states that, if a contract of employment with either a board or a trust is not transferred to a new employer, the contract is terminated and the employee is treated as having been dismissed for the purposes of the Employment Rights Act 1996.

Schedule 3: Minor and Consequential Amendments

187. *Part 1* makes amendments to the following Acts consequential on the provisions in Part 1 of the Act relating to the new arrangements for the provision of probation services: the Race Relations Act 1976, Interpretation Act 1978, Crime and Disorder Act 1998, Children Act 2004 and Local Government and Public Involvement in Health Act 2007 (at the time of writing, this is still the Local Government and Public Involvement in Health Bill). With the exception of the amendments to the Interpretation Act, these consequential amendments clarify how responsibilities which are currently placed on local probation boards in other enactments will be exercised under the new arrangements. However, most consequential amendments will be made through secondary legislation using the power in Section 38.

188. *Part 2* makes a number of consequential amendments to existing legislation to reflect the change of name of Boards of Visitors in Section 26. "Independent Monitoring Board" is inserted into the Race Relations Act 1976 and Freedom of Information Act 2000 and is substituted for "Boards of Visitors" in the Prison Act 1952, Employment Rights Act 1996 and Powers of Criminal Courts (Sentencing) Act 2000.

189. *Part 3* makes amendments to various Acts consequential on the amendments in Section 34 relating to the accommodation in which a person may be detained under a detention and training order.

190. *Part 4* makes changes consequential to the revision by Section 35 of the escort arrangements for young people who are detained, so as to include those remanded or committed to custody and to cover the full range of "youth detention accommodation".

Schedule 4: Transitional and transitory provisions and savings

191. *Paragraph 1* deals with what happens when a chief officer of a local probation board is not appointed chief executive of a probation trust. If a local probation board is abolished under the terms of the Act and the chief officer of that board is not appointed as chief executive of a

probation trust before ceasing to hold office as chief officer, the Secretary of State may pay such compensation as he considers appropriate.

192. *Paragraph* 2 deals with what happens when a chief officer of a local probation board is appointed chief executive of a probation trust. In that case, his continuity of employment is preserved and the period he spent as a chief officer (including any previous service as a chief probation officer with a probation committee) will count as a period of employment with the trust.

193. *Paragraph 6* makes clear that the Secretary of State may make an order under Section 38(1) to provide transitional arrangements, in the event that the new escort arrangements in Section 35 are introduced before the sentences of detention in a young offender institution and custody for life are abolished.

194. *Paragraph 7* of the Schedule makes transitory provision to cover the possibility that section 59 of the Criminal Justice and Court Services Act 2000 (which provide for the abolition of remand centres) does not come into force before the amendment made by paragraph 8(2) of Schedule 3.

Schedule 5: Repeals and revocations

195. This Schedule lists provisions repeals as a consequence of the Act.

FINANCIAL EFFECTS AND EFFECTS ON PUBLIC SERVICE MANPOWER

196. Resource spending on probation related services for 2007/08 is forecast as £976m. This estimate includes the cost of local probation boards and certain probation related functions that are carried out at NOMS centre such as Estates, Public Protection, Human Resources and Finance. The cost of electronic monitoring is not included in this estimate.

197. The main financial implications arise from implementation of the new arrangements for the provision of probation services in Part 1. Offering other providers the opportunity to demonstrate what they could deliver will incur costs for NOMS in a number of areas, including the administration of procurement exercises, the preparation of providers' proposals and commissioner requirements, and the management of contracts and in-house contract compliance. These are both affordable within current allocations and expected to be offset and exceeded by the savings from implementing commissioning with contestability.

198. It is not envisaged that Parts 2 or 3 of the Bill would have any significant financial effects**.**

Effects of the Bill on Public Sector Manpower

199. Public sector manpower is not expected to increase as a result of the Bill.

200. The new arrangements for the provision of probation services may result in some public sector staff transferring to the private or voluntary sector. In such circumstances, terms and conditions will be protected by TUPE regulations, or by the equivalent provisions detailed in paragraph 5 of Schedule 2.

SUMMARY OF THE REGULATORY APPRAISAL

201. A regulatory impact assessment was published with the Bill. There are no proposals that have an adverse impact on business. Some additional business opportunities for the small business sector may be created through the increased competition for services.

EUROPEAN CONVENTION ON HUMAN RIGHTS

202. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before the Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The then Minister of State for the Home Department (the Department responsible for introducing the Bill, since which time responsibility has passed the Ministry of Justice), Baroness Scotland of Asthal, made the following statement:

> "In my view the provisions of the Offender Management Bill are compatible with the Convention rights."

Part 1 –New arrangements for the provision of probation services

203. Sections 1 to 13 and Section 15 abolish local probation boards and give the responsibility for providing probation services to the Secretary of State. These are the legislative provisions necessary to enable the Secretary of State to commission probation services from the best available provider, whether in the public, private or voluntary sectors. Probation trusts will be established as the public sector provider with whom he may contract. Section 13 deals with approved premises. In most cases the Government expects that probation services commissioned under Section 3(2) are to be regarded as "public functions" for the purposes of section 6 of the Human Rights Act 1998. It is not considered that these Sections give rise to any other ECHR issues.

204. Section 14 enables the Secretary of State, providers of probation services and their officers, to share information with each other or with any of the following: other Government Departments; relevant Local Authorities; the Youth Justice Board; the Parole Board; relevant contactors including private prisons; a chief officer of police; any person responsible for electronically monitoring an individual, and any other person specified or described in regulations made by the Secretary of State. The power applies where it is necessary or expedient for certain specified purposes.

205. Disclosure of information relating to individuals is capable, in individual cases, of engaging the Government's obligations under article 8 of the ECHR (right to respect to private life). The power created by the clause is compatible with those obligations. This is because the clause creates a power to disclose information, not a duty to do so. Accordingly, the party proposing to disclose is able to refrain from doing so if he considers that such a disclosure would amount to an unlawful interference with an individual's article 8 rights. That the clause enables disclosure of information where it is expedient to do so does not undermine the obligation to ensure that a particular disclosure is necessary in pursuit of a legitimate aim in those cases where Article 8 is engaged and interference with that right has been established.

Part 2 – Prisons

206. *Powers of search etc.* Sections 16 and 18 confer new powers of search upon prisoner custody officers working in contracted out prisons. It is possible that the exercise of these new powers might engage the "right to respect for private life" limb of article 8 ECHR. Such an issue is most likely to arise in relation to exercise of new search powers or where the exercise of these new powers might engage the "correspondence" limb of article 8 ECHR, e.g. where the exercise of the new power authorises the performance of an activity which requires the supervision or observation of a prisoner in the prison or his communications with the outside

world. However, it is considered that any interference with the right to respect for private life occasioned by these new powers would be in accordance with the law (because of the provision the Bill makes and also the fact that the procedures adopted will mirror those already operated in public sector prisons, and which have already been found to satisfy the procedural requirements of the ECHR by the European Court of Human Rights). Further, the use of these powers would be justified by reference to a legitimate aim – that of maintaining good order, protecting the health and security of prisoners and others and, possibly, preventing the commission of a crime. The question of whether any interference is proportionate will always depend on the circumstances of each case.

207. *Powers to detain*. Section 17 amends the Criminal Justice Act 1991 and the Criminal Justice and Public Order Act 1994 to enable a prisoner custody officer, or a custody officer, to require a person to wait with him for a period no longer than is necessary for a constable to arrive and, in any event, for no longer than two hours. The Government considers that this requirement to wait does not amount to a deprivation of liberty and therefore does not engage article 5 of the ECHR (the right to liberty and security).

208. However, even if this were not the case and article 5 was engaged, the power does not of itself breach any of the obligations under article 5 in any event. Firstly, the Government takes the view that detention is authorised by Article 5(1)(b) which enables a deprivation of liberty "in order to secure the fulfilment of any obligation prescribed by law". In the Government's view a requirement to submit to a search in accordance with the Prison Rules is an obligation prescribed by law as referred to in Article 5(1)(b). Detention may be required in certain circumstances in order to enable a constable to attend a prison to ensure that a visitor fulfils the obligation that a search be carried out.

209. In addition, 5(1)(c) permits an interference with the right to liberty guaranteed by article 5, where that interference is "effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". The power provided for in the Bill is squarely within this limb of article 5, as it is clear from the express wording of the Section that a requirement to wait can be imposed by a prisoner custody officer or custody officer only where that officer has reason to believe that a person has committed a prison offence.

210. *Prison adjudication powers*. Section 19 enables a director of a contracted out prison to inquire into a disciplinary charge against a prisoner and to order the removal of a prisoner from association with other prisoners, temporarily confining him or imposing any control or restraints. It is not considered that this gives rise to any ECHR issues as the procedures used are not in themselves new and will simply mirror those already in use in public sector prisons.

211. *Conveyance of prohibited articles into or out of a prison*. Section 22 amends the law relating to taking prohibited articles into and out of a prison by replacing section 40 of the Prison Act 1952 with new sections 40A to C. The new section 40B prohibits the conveyance of illegal articles like drugs, explosives and weapons; the Government takes the view that this therefore would be unlikely to engage ECHR rights.

212. The new section 40C prohibits the conveyance of, amongst other things, cameras, sound-recording devices and mobile phones as well as any other article prescribed by prison rules. These offences will only be committed if the person is acting without authorisation. The

Government is of the view that the new section 40C may engage and interfere with rights under Article 10 of the ECHR. However, the Government believes that the interference would be justified for the following reasons:

- the protection of the security, good order and effective running of the prison;
- the protection of the rights of prison staff and prisoners and visitors;
- the protection of health and morals;
- the prevention of crime or disorder;
- the protection of the integrity of the trial process by avoiding prejudicial media coverage; and
- the protection of the public.

213. *Other offences relating to prison security.* Section 23 inserts new section 40D into the Prison Act 1952. It creates the offences of taking a photograph or making a sound-recording inside a prison, or the transmission of images or sound. This section also creates an offence of removing or transmitting a restricted document from a prison. Both of these offences are only committed if the person is acting without authorisation. The Government is of the view that the new section 40D may engage Article 10 of the ECHR but that this is justifiable for the same reasons as for new section 40 D.

214. *Abolition of requirement for a medical officer*. Section 22 provides that it is no longer a requirement for there to be a medical officer for every prison. The reason for this change is because the provision of medical care is now contracted out to primary care trusts and the role of medical officers has become redundant. The transfer of services to the NHS complies fully with the European Prison Rules and the UN Basic Principles for the Treatment of Prisoners. It raises no ECHR issues.

Part 3 – Other provisions about offender management

215. *Polygraph condition*: Sections 24, 25 and 26 provide the Secretary of State with the power to impose a mandatory polygraphy test condition on the licences of certain released sex offenders. A proposal to conduct mandatory polygraph tests for certain prisoners as a condition of their release on licence is capable of engaging Article 8 ECHR (the right to respect for private life).

216. The Government takes the view that, where such a condition is imposed, the clear benefits for effective offender management will ensure that any interference with an Article 8 right will be necessary in pursuit of a legitimate aim (i.e. the interests of public safety and for the protection of the rights and freedoms of others) for the purposes of Article 8(2). That is particularly the case, given that polygraphy test conditions will only be imposed upon a specific class of serious offender i.e. adults sentenced to 12 months or more for certain sexual offences.

217. The Government takes the view that its conclusion is bolstered by the limited use to which test results will be put in practice, along with the prohibition contained in the Section which limits its use in criminal proceedings in which the offender is the defendant.

Part 4 – Supplemental

218. The provisions in Part 4 of the Bill do not give rise to any ECHR issues.

COMMENCEMENT DATE

219. With the exception of sections 38 and 39, the provisions of the Bill will be brought into force by way of a commencement order made by the Secretary of State.

HANSARD REFERENCES

220. The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	**Date**	**Hansard Reference**
House of Commons		
Introduction	22 November 2006	Vol. 453, Col 547
Second Reading	11 December 2006	Vol. 454, Cols 583- 690
Committee	11 January 2007 (two sittings) 16 January 2007 (two sittings) 18 January 2007 (two sittings) 23 January 2007	Cols 1−24 and 25−54, Cols 55−92 and 93−126, Cols 127−150, and 151−184 Cols185−224
Report	28 February 2007	Vol. 457, Cols 932-1017
Third Reading	28 February 2007	Vol. 457, Cols 1017−1037
Commons Consideration of Lords Amendments	18 July 2007	Vol. 463, Cols 350−394
House of Lords		
Introduction	1 March 2007	Vol. 689, Col 1644
Second Reading	17 April 2007	Vol. 691, Cols 121−204
Committee	16 May 2007 21 May 2007 23 May 2007 5 June 2007 11 June 2007 12 June 2007	Vol. 692, Cols 202-250 and 259-280 Vol. 692, Cols 475-519 and 537-562 Vol. 692, Cols 670-706 Vol. 692, Col 1024-1091 and 1098-1120 Vol. 692, Col 1466-1478 and 1489-1507 Vol. 692, Col 1593-1658 and 1675-1696
Report	27 June 2007 3 July 2007	Vol. 693, Cols 602-658 and 665-685 Vol. 693, Cols 905-917 and 935-971 and 988-1015
Third Reading	16 July 2007	Vol. 694, Cols 11 - 25

These notes refer to the Offender Management Act 2007 (c.21) which received Royal Assent on 26 July 2007

Lords consideration of Commons Reasons	24 July 2007	Vol. 694, Cols 727-749

Royal Assent - 26 July 2007 House of Commons Hansard Vol. 463, Col 1068
House of Lords Hansard Vol. 694, Col 967

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