These notes refer to the Anti-Social Behaviour, Crime and Policing Act 2014 (c.12) which received Royal Assent on 13 March 2014

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014

EXPLANATORY NOTES

BACKGROUND

Part 13: Criminal Justice and Court Fees

Compensation for miscarriages of justice

89. Article 14(6) of the International Covenant on Civil and Political Rights (which was ratified by the United Kingdom in May 1976) requires State Parties to compensate those who have suffered a "miscarriage of justice". Section 133 of the Criminal Justice Act 1988 ("the 1988 Act"), which extends throughout the United Kingdom, gives effect to that obligation. Section 133 of the 1988 Act provides for the payment of compensation to a person whose conviction has been reversed as a result of a new or newly-discovered fact which shows beyond reasonable doubt that a "miscarriage of justice" has occurred. In England and Wales, the Secretary of State for Justice determines applications under section 133. The Scottish Ministers determine such applications in Scotland. The Department of Justice in Northern Ireland determines all applications under section 133 in that jurisdiction save for certain cases involving sensitive national security information which are determined by the Secretary of State for Northern Ireland.

90. Section 133 of the 1988 Act has given rise to a significant body of case law and the way section 133 has been interpreted by the courts has changed over time. Prior to May 2011, the test applied was that of "clear innocence", following the judgment of Lord Steyn in *Mullen*.[1] However, in May 2011, the majority of the Supreme Court in *Adams*[2] held that the meaning of miscarriage of justice under section 133 was wider than that. Lord Phillips identified two categories of case which would qualify as miscarriages of justice: the first, a case where the new (or newly discovered) fact showed the applicant to be "clearly innocent"; the second, where the new fact "so undermines the evidence against the applicant that no conviction could possibly be based on it". In January 2013, the Divisional Court, in the case of *Ali and others*,[3] redefined the second category test to be: "has the claimant established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered?" In February 2014, on appeal, the Court of Appeal held that the definition of a miscarriage of justice as articulated by the majority of the Supreme Court in *Adams* was to be preferred over the Divisional Court's.[4]

91. Section 175 provides a statutory definition of a miscarriage of justice as a case where the new or newly discovered fact shows beyond reasonable doubt that the applicant did not commit the offence. This new definition will apply to decisions taken by the

1 http://www.bailii.org/uk/cases/UKHL/2004/18.html
2 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0012_Judgment.pdf
3 http://www.bailii.org/ew/cases/EWHC/Admin/2013/72.html
4 http://www.bailii.org/ew/cases/EWCA/Civ/2014/194.html

Secretary of State in England and Wales, and to decisions taken by the Secretary of State for Northern Ireland in relation to applications involving sensitive national security information.

92. At present in England and Wales, some 40 to 50 applications under section 133 are received each year; of these some 2 or 3 are found to be eligible for compensation. Once an application has been accepted as eligible for compensation, the amount to be paid is decided by an Independent Assessor, based on information provided by the applicant. The Secretary of State has no influence over the amount paid, although there are statutory limits (see sections 133A and 133B of the 1988 Act) which restrict the maximum payable to £500,000 where the applicant spent less than 10 years in prison, and £1,000,000 where the period of imprisonment was more than 10 years. These limits were introduced by the Criminal Justice and Immigration Act 2008, and came into force on 1 December 2008.

93. The table below shows awards of miscarriages of justice compensation made under either section 133 of the Criminal Justice Act 1988 or the ex gratia scheme (which was abolished by the Home Secretary in 2006) between 2001 and 2012 in England and Wales.

94. There is no correlation between the numbers of people who have been granted eligibility to the two schemes in any one year by the Secretary of State and the amount of compensation paid by the Government in that year. The process by which the independent assessor decides the amount of compensation that is payable can take some time, so payments may not be made in the same year that the applicant was granted eligibility. The table also shows that one applicant was found eligible for compensation under the ex gratia scheme in 2010/11, well after the scheme was abolished. This application had initially been refused, but the decision was reversed following Judicial Review proceedings.

	No Applications Granted (England & Wales)	*Section 133*	*Ex-Gratia*	*Paid £M*
2001-02	27	17	10	6.2
2002-03	36	25	11	8.2
2003-04 -	31	23	8	6.3
2004-05	47	39	8	6.5
2005-06	27	21	6	8.3
2006-07	28	23	5	12.3
2007-08	9	7	2	8.2
2008-09	7	7	0	12.6
2009-10	1	1	0	11.5
2010-11	1	0	1	11.3
2011-12	3	3	N-A	13.2
2012-13	1	1	N-A	1.2

Low-value shop theft

95. The police are empowered to prosecute directly a number of uncontested, low level cases without the involvement of the CPS, and a best practice model for police-led prosecutions is being implemented in a number of pathfinder areas. Police-led prosecutions are designed to be a simpler and more proportionate response to high-volume, low-level offences where the case is uncontested, increasing police discretion

to tackle crime in their area, freeing up CPS resource to focus on more complex cases and generating efficiencies in the criminal justice system. On 16 May 2012, as part of the Government's commitment to improve the efficiency of the criminal justice system, the Home Secretary announced her intention in a Written Ministerial Statement to simplify and extend the police-led prosecutions model (House of Commons, Official Report, column 36WS; House of Lords, Official Report, column WS37).

96. Shop theft is a high-volume crime that causes significant harm in local communities. Under current law the police may choose to deal with such offences by means of a Penalty Notice for Disorder,[5] where this is deemed appropriate. However, approximately 80,000 cases of shop theft come to court each year and the fact that the vast majority of these are dealt with in magistrates' courts (where most cases result in a guilty plea) makes shop theft a suitable offence for the simpler, more proportionate police-led process. In addition, the value of goods stolen is typically low. Research into shop theft in 2006[6] showed that the median value of goods stolen was £40, and that 90% of cases involved property worth less than £200. Shop theft has, therefore, been identified as a suitable offence for police-led prosecutions. However, the police-led model is designed for summary-only offences, that is, cases that are dealt with in the magistrates' courts rather than the Crown Courts. In order to extend the benefits of this simpler, police-led model to uncontested cases of low-value shop theft, section 176 enables minor offences of shoplifting in England and Wales to be treated as summary only for most purposes.

Marital coercion

97. Section 47 of the Criminal Justice Act 1925 abolished the previously existing presumption that a wife who committed any offence (except treason or murder) in the presence of her husband did so under his coercion and should therefore be acquitted, and instead provided a defence to all criminal offences other than treason and murder where a wife could show that she committed the offence in the presence of, and under the coercion of, her husband. The Law Commission concluded in 1977 (*Criminal Law: Report on Defences of General Application*, Law Com. No. 83)[7] and in 1993 (*Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com. No. 218)[8] that the defence was not appropriate to modern conditions as it only applies to married women and called for it to be abolished. Section 177 abolishes the defence of marital coercion and accordingly repeals section 47 of the Criminal Justice Act 1925.

Victim Surcharge

98. The duty to order the Victim Surcharge was introduced through section 161A of the Criminal Justice Act 2003 ("the Criminal Justice Act") which requires a court when dealing with a person for one or more offences to order him or her to pay a surcharge. Section 161B of the Criminal Justice Act gave the Secretary of State the power to specify the amount of Surcharge, which was originally set at £15 whenever an offender was dealt with by way of a fine in the Criminal Justice Act 2003 (Surcharge) (No 2) Order 2007 (SI 2007/1079).

99. The Victim Surcharge has raised approximately £52.4 million over the last six years (£3.8 million in 2007/08, £8.1 million in 2008/09, £9.2 million in 2009/10, £10.5 million

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5 A Penalty Notice for Disorder ("PND") is a type of fixed penalty notice that can be issued for a specified range of minor disorder offences, introduced in the Criminal Justice and Police Act 2001. An "upper tier" PND (attracting a £90 penalty) may be issued for theft from a shop (section 1 of the Theft Act 1968) where the goods stolen are below the value of £100. Although a penalty notice is not a conviction it will be recorded in police records and may be disclosed under an enhanced criminal records check.

6 Research for the Sentencing Advisory Panel in 2006 http://www.lccsa.org.uk/assets/documents/consultation/researchreport-theft0806.pdf

7 http://www.official-documents.gov.uk/document/hc7677/hc05/0556/0556.pdf

8 http://www.official-documents.gov.uk/document/cm23/2370/2370.pdf

in 2010/11, £10.3 million in 2011/12 and £10.5 million in 2012/13) with all revenue being used by the Government to fund victim support services.

100. In the response to the consultation, *Getting it right for victims and witnesses*,[9] the Government set out proposals to ensure that offenders are responsible for making greater reparation to victims and for contributing more to the cost of victim support services.

101. Under the Criminal Justice Act 2003 (Surcharge) Order 2012 (SI 2012/1696) ("the 2012 Order"), which came into force on 1 October 2012, courts are now required to order an adult offender sentenced to a fine to pay a surcharge equating to 10% of the fine subject to a minimum of £20 and a maximum of £120. The 2012 Order also requires the court to order a surcharge of £60 where an adult offender is sentenced to a community order and a surcharge as determined in the table below where an adult offender is sentenced to imprisonment (including a suspended custodial sentence):

Period of custody	***Amount of surcharge***
Six months or less	£80
More than six months and up to and including 2 years	£100
More than 2 years	£120

102. The 2012 Order specifies lower surcharge amounts where the offender is under the age of 18. The approach to ordering the surcharge as set out in the 2012 Order ensures that the amount to be paid is linked to the seriousness of the sentence. The arrangements for payments of the Victim Surcharge in the 2012 Order, along with increased financial penalties such as penalty notices for disorder, are expected to raise up to an additional £50 million per year for victim support services.

103. Currently magistrates' courts (but not the Crown Court) in sentencing a person to immediate custody have the power to add additional days to be served in default of payment of the Surcharge. The response to the consultation, *Getting it right for victims and witnesses* (paragraphs 141 and 142) set out the Government's intention to legislate to remove this power. Section 179 gives effect to this change in magistrates' courts sentencing powers.

Court and tribunal fees

104. On 26 March 2013 the Lord Chancellor and Secretary of State for Justice announced his intention to explore proposals for the reform of the resourcing and administration of courts and tribunals (House of Commons, Official Report, column 95WS; House of Lords, Official Report, column WS84 to WS85). This included the contributions litigants make to proceedings and the necessity of raising revenue and investment to modernise court and tribunal infrastructure and deliver a better and more flexible service to court users.

105. The civil and family courts in England and Wales are mostly funded by court fees paid by those people using court services. Fees are charged in the civil and family courts and in some tribunals. For example fees are charged in civil courts for those making money and possession claims, and in family courts for those seeking divorce and for proceedings relating to the arrangements for separating couples, including financial provision and the arrangements for looking after their children. The cost of running the civil and family courts in England and Wales is approximately £600m a year. In 2012/13, 81 per cent of this amount was funded through court fees. The remaining 19 per cent was met by the taxpayer. A system of remissions (fee waivers) exists to ensure that those unable to afford fees are not denied access to justice. As part of

9 https://consult.justice.gov.uk/digital-communications/victims-witnesses

Spending Review 2010 the Ministry of Justice is committed to delivering, by 2014/15, a fee strategy that delivers full-cost recovery in the civil and family courts, excluding remissions.

106. The Court of Protection is a specialist court which deals with all issues relating to people who lack capacity to make specific decisions in England and Wales. It can make decisions and appoint deputies to make decisions about someone's property and financial affairs or their healthcare and personal welfare. The Court of Protection can also decide on where a person should live and, in cases where a person lacks capacity, can give consent to medical treatment and decide on what treatment that person should have.

107. The Office of the Public Guardian is an Executive Agency of the Ministry of Justice with responsibilities that extend across England and Wales. It supports the Public Guardian with the registration of Lasting Powers of Attorney (LPA) (and older Enduring Powers of Attorney (EPA)), the supervision of deputies appointed by the Court of Protection, and the investigation of any concerns about the way an attorney or deputy is acting.

108. Section 180 provides the Lord Chancellor with a general power, subject to the agreement of the Treasury, to charge fees above cost when prescribing fees under specified enactments for services provided by the civil and family courts, the Court of Protection, the Office of the Public Guardian and tribunals. The purpose of charging enhanced fees is to ensure that the courts and tribunals are adequately resourced. In using this power, the Lord Chancellor is required to have regard to:

- the financial position of the courts and tribunals; and
- the competitiveness of the legal services market.

109. On 3 December 2013, the Government set out its detailed proposals for using the power to set enhanced fees in the consultation paper *Court fees: Proposals for reform*.[10] This sought views on a series of proposals for charging enhanced fees, including for money claims, in commercial proceedings and for divorce, alongside proposals for reducing the current deficit of £100 million in the cost of running the Courts and Tribunals Service. The consultation closed on 21 January 2014.

10 https://www.gov.uk/government/consultations/court-fees-proposals-for-reform