Crime and Courts Bill 2012

Briefing for Report Stage
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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists.

2. The Crime and Courts Bill was introduced to the House of Lords immediately after the Queen's Speech on 10th May 2012, and to the Commons on 19th December 2012. The Bill is wide ranging in scope and application. Part 1 of the Bill makes provision for a new body to fight organised crime, the National Crime Agency (NCA), which will also take a leading role on economic crime, border security, cyber crime and the protection of children. Part 2 provides for reform of the system of judicial appointments, for the streamlining of the courts system, for the broadcasting of court proceedings from the Court of Appeal, for changes to the community sentencing regime, changes to self defence in relation to dwelling burglary, deferred prosecution agreements which can occur in the context of offences of dishonesty and extradition arrangements. Part 3 contains provisions for strengthening attempts to combat drug driving, enhancing the powers of immigration officers and the reform of some aspects of the immigration appeals system. It also contains an important change to the public order offence of causing harassment, alarm or distress.

3. This briefing is intended to highlight JUSTICE's main concerns regarding provisions of the Bill. Silence as to the content of a provision should not be taken as approval.

- Lack of legal certainty; Despite its broad content, as in previous legislation introduced to Parliament, throughout the Bill Henry VIII clauses are employed. In our view, too much recourse has been left to secondary legislation in areas which ought to be subject to the full scrutiny of Parliament. In particular, NCA counter terrorism functions, and the recording of court procedures. Likewise, despite the existence of a super affirmative procedure, secondary legislation provided for in the Bill will in the majority be subject to the negative resolution procedure, allowing minimal parliamentary scrutiny;
- The National Crime Agency should not be excluded from the operation of the Freedom of Information Act;
- The introduction of a presumption in favour of broadcasting court hearings must be accompanied by safeguards set out in primary legislation to ensure only appropriate hearings are included;

- No change is necessary to the law on self-defence. The amendment endorses disproportionate force;
- Punitive requirements in sentencing must be form part of a wider community sentence and not replace beneficial rehabilitation elements. Exceptions must be based on particular, not exceptional, circumstances and consider the effectiveness of the sentence;
- Deferral of sentencing to allow for restorative justice is to be welcomed;
- Electronic monitoring should not extend to simply monitoring the whereabouts of a convicted offender. It must attach to a specific and justified requirement or condition already imposed as part of a community sentence;
- Prosecution certificates and an exhaustive list of what is in the interests of justice must not fetter the judge's discretion to impose a forum bar to extradition;
- The Human Rights Act must continue to apply to the Secretary of State in extradition proceedings;
- The removal of the right of appeal from the family visit visa system is an unjustified infringement of due process;
- The removal of an in-country right of appeal for certain immigration applicants could dangerously impact upon refugees;
- Extension of powers to immigration officers must be clearly and narrowly defined;
- The removal of a criminal sanction for using insulting words or behaviour that cause or are likely to cause harassment, alarm, or distress is to be welcomed;

PART 1 – THE NCA

Schedule 8 - Freedom of Information

4. Part 1 of the Bill, and Schedules 1 to 8 establish the NCA, set out its functions, provide for the appointment of a Director General as the operationally independent head of the NCA, and make provision for its governance.

5. Schedule 8 provides that the NCA will be exempt from freedom of information legislation. At Report stage in the House of Lords, Lord Taylor explained the Government's position: [1]

[1] Hansard, Report, House of Lords, 27 November 2012, Col 160

[A] blanket exemption is the most appropriate arrangement, not for administrative convenience but to ensure full effectiveness and as a critical operational safeguard.

He further explained that the functions of the NCA will mean that some material will not be suitable for release into the public domain and it will depend upon its partners to provide this intelligence, who may be inhibited from sharing that information. However, the functions of the NPIA and the UK Border Agency, which the Bill proposes will be covered by the NCA, were not previously exempt from FOI. Moreover, Schedule 1 to the Freedom of Information Act 2000 also lists police authorities, including transport, defence and civil nuclear protection. There already exists an extensive exemption regime under the Freedom of Information Act 2000 which ensures that information relating to national security, law enforcement or investigation does not have to be revealed. The application of the FOI regime to these existing police bodies has not hampered their ability to investigate crime. The responsibilities under the FOIA are made clear by each agency on their websites and no doubt in their requests for operational support.

6. Lord Taylor further indicated that:

The FOI Act offers [organised criminals] an opportunity to acquire information about the NCA's operational tactics, to disrupt its operations and to evade detection. While the exemptions might apply to some of this information, the risk is that it might not always be the case.

We find this highlight unlikely given the exemptions under the FOIA regime and the sensitive material handled by many public authorities to which it applies. It is important that the new agency is open and transparent so that it can be subject to proper scrutiny. Section 1 FOIA creates a general right of access to information held by public authorities. The opportunity to apply for information, regulated by the FOIA and the Information Commissioner ensures that where information should be in the public domain, it is properly made available.

7. The NCA should be subject to the FOIA.

PART 2 – COURTS MODERNISATION AND JUDICIAL APPOINTMENTS

Clause 28 - Filming and sound recording in court

8. Clause 28 provides for the Lord Chancellor with the concurrence of the Lord Chief Justice to remove current prohibitions on the making and publication of sound and visual recordings in courts. Although JUSTICE recognises the laudable intentions behind this initiative,[2] the Bill does not provide any parameters to protect the interests of those involved in court proceedings that could potentially be affected by the broad permission. Save for the clause 28(3) provision that the court or tribunal judge can prevent recording of any particular proceedings to ensure that any person involved in the proceedings is not unduly prejudiced, there are no exempted categories of case or evidence despite the clear need for this. In its paper *Proposal to allow the broadcasting, filming, and recording of selected court proceedings* the Ministry of Justice suggests that victims, witnesses, jurors and defendants will not be filmed under any circumstances and further: [3]

> *Existing rules regarding reporting restrictions on cases will also continue to apply to filmed cases, as they do to other types of news reporting, meaning for example that the identities of any young people involved in court proceedings will be protected. The broadcasting of court proceedings will also be restricted to 'recognised' media organisations, using authorised cameras installed in court rooms for the purpose of filming footage to be broadcast. The general public will remain prohibited from filming the proceedings on a camera phone for example.*

None of these sensible parameters are included in the Bill. Nor is the intention to limit recording to appellate courts and summing up set out, which would exclude all evidence taking in principle. Parliament should set clear parameters in the Bill as to when recording is appropriate, so that the provision cannot be used in circumstances which will impact upon the proper administration of justice.

9. Whilst courts are generally open to the public, recording affords the opportunity to the broadcaster to film and edit proceedings in a way that they consider more interesting to the television viewer. Recordings can also be repeatedly viewed and widely disseminated. This can only impact adversely upon victims, witnesses and defendants at trial and promote sensationalism. Since the Government's own paper accepts this, there is no justifiable reason for excluding the recording of evidence from the Bill. Safeguards must be inserted into the Bill to ensure that:

   (i) only licensed media organisations will be permitted to record;

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[2] Ministry of Justice, *Proposals to allow the broadcasting, filming, and recording of selected court proceedings,* May 2012: allowing people to see and hear judges' decisions will increase their understanding of the court without undermining the proper administration of justice.

[3] *Ibid.* pp 20 and 21.

(ii) no evidence can be recorded.

Clause 30 – Use of force in self-defence at place of residence

10. Section 76 of the Crime and Immigration Act 2008 put self-defence on a statutory footing. That section already makes clear that a defendant has a defence of reasonable mistake about the circumstances in which they use force, can exert a reasonable degree of force against a person in the circumstances, which cannot be weighed to a nicety, and can do what they think is honestly and instinctively necessary for legitimate purposes.

11. Clause 30 would import a further qualifier that the degree of force exercised need only be grossly disproportionate to the circumstances as the defendant believed them to be. The clause then goes on to define various circumstances of homeowner occupation to which the further qualification will apply. We cannot see any justification for this further qualification. The test of proportionality is long established in the common law defence and has applied satisfactorily to all cases involving use of force against an intruder. Lord McNally introduced the amendment at Report in the Lords with the justification that:[4]

> *This means that a householder who has acted honestly and instinctively to protect himself or his loved ones from an intruder could end up being prosecuted if his actions are deemed to have been disproportionate when viewed in the cold light of day. The Government feel strongly that householders, acting in extreme circumstances to protect themselves or others, cannot be expected to weigh up exactly how much force is necessary to repel an intruder.*

12. We do not dispute how terrifying and traumatic it can be for people to find a burglar in their own home. However, the concern raised is already entirely reflected in the current law. This is spelt out in the Crown Court Bench Book through which judges across the country obtain guidance on how to direct a jury: [5]

> *If the defendant did genuinely believe or may genuinely have believed that he needed to defend himself the jury must decide whether the force he used was reasonable. Reasonable force means force proportionate to the nature of the threat the defendant honestly believed was posed by his adversary. If the defendant went well beyond what was needed to defend himself from the force offered by his assailant, that is good evidence that the defendant acted*

[4] Hansard, Report, House of Lords, 10 Dec 2012 : Col 881

[5] Judicial Studies Board, *Crown Court Bench Book* (March, 2010), p 298

unreasonably. But, in judging whether the defendant acted unreasonably, the jury should have regard to the fact that it is difficult for a person to measure precisely what is needed in response and, if the defendant did only what he honestly and instinctively thought was necessary, that is strong evidence that he responded reasonably.

In the 3rd Reading debate in the Lords, Lord Woolf opposed the amendment 'because I regard it as a very bad example of where statutory interference with the common law is wholly unnecessary'. He gave the appellate judgment in the case of Tony Martin, who shot dead a burglar leaving his property.[6]

13. In the 9th Committee Stage debate in the Commons Jenny Chapman MP agreed that[7] 'there is wide-ranging consensus out there that the Government's changes are at best unnecessary, and that they could increase risk and confusion.' He also questioned the significance of the issue:

> *When asked about the evidence to support the policy, and the number of cases in which a home owner has been arrested or charged after defending their home against a burglar, the Government responded that they do not hold that data—we have tried a couple of times to ask them—but The Guardian was able to do a trawl of cases. There were 11 cases between 1990 and 2005 and seven of those were domestic. That was even before the law was altered in 2008.*

14. What the amendment effectively allows for is the infliction of *serious* harm upon an intruder. It introduces uncertainty as to what the law will allow 'grossly' disproportionate to sustain. For example, will it now be acceptable to kick someone in the head if they fall to the ground during a scuffle when previously it would only have been proportionate to punch them to the body? Does the Government approve repeated stabs with a kitchen knife in the chest when previously one or two would have been acceptable? In our view an amendment which condones anything other than *grossly* disproportionate force, condones disproportionate force. That is contrary to the European Convention on Human Rights which requires any use of force in the context of the right to life under article 2, torture, inhuman or degrading treatment under article 3, and the right to physical integrity under article 8 ECHR to be necessary and proportionate.

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[6] Hansard, Report, house of Lords, 10 Dec 2012, Cols 885-891, see also Lord Beecham, Baroness Kennedy, Lord Lloyd and Lord Pannick, Lord Morris, Baroness Butler-Sloss, and Lord Goodhart, all practicing or former practicing lawyers or judges, condemning the amendment.

[7] Hansard, Committee, House of Commons, 5 February 2013, Col 273.

15. The amendment is unnecessary, will create uncertainty and could condone disproportionate use of force. The amendment should be withdrawn.

Clause 31 - Community sentences

16. Clause 31 in conjunction with Schedule 15 provides for changes to the community sentencing regime. The changes follow the consultation on community sentencing entitled *Punishment and Reform: Effective Community Sentences.*[8] The consultation sought views on a set of proposed reforms to the way sentences served in the community operate in England and Wales. JUSTICE responded to the consultation[9] and we replicate our concerns, or support as appropriate, below.

Punitive elements

17. Paragraph 2 of Schedule 15 amends the Criminal Justice Act 2003 to require each community sentence to include a punitive requirement, or a fine, or both. In JUSTICE's view, it is unhelpful to demand a particular punitive requirement as distinct from the existing approach to sentencing, which recognises five purposes to sentencing: punishment, deterrence, reparation, rehabilitation, and protection of the public. Punishment is only one aspect. All elements of community sentences are to a certain extent punitive because they are not undertaken by choice. Since no indicative list of punitive requirements has been created, we presume that the courts will have the discretion to decide what will be punitive in a given case. We would welcome an indication from the Government that this is the intention, and that the Sentencing Council is in the best position to provide guidelines about how the requirement should be defined.

18. It is also important to acknowledge that offenders should not be set up to fail – too many requirements may be hard to manage, particularly if people have mental health or addiction problems. Any programmes must build in a direct relationship with a probation supervisor who has the power to ensure flexibility in the programme and to decide whether breach proceedings are appropriate. Identifying a punitive requirement is going to demand sufficient time set aside in the sentencing exercise to ensure that pre-sentence reports properly reflect the requirements and are properly tailored to the offender's ability to meet the sentence as well as their level of culpability. *A punitive requirement should not be imposed at the expense of other worthwhile requirements*, such as a treatment order. In our view, rehabilitation is the most important aspect of

[8] Ministry of Justice, *Punishment and reform: Effective Community Sentences,* Cm 8334 (2012)

[9] Available here http://www.justice.org.uk/data/files/resources/337/Effective-Community-sentencing-consultation.pdf

sentencing, in order to reduce recidivism. The Ministry of Justice research into the impact of punitive requirements does not demonstrate that these alone can reduce re-offending,[10] but in connection with other sentences, and has the greatest impact when a supervision requirement is added to an existing punitive requirement:[11]

19. We agree with the Criminal Justice Alliance[12] that any exclusion to the requirement should not be on the basis of 'exceptional circumstances' as proposed in paragraph 2 of Schedule 15 but rather in '*particular* circumstances'. It is further insufficient to afford this exception solely on the basis that it would be 'unjust' to impose a punitive requirement or a fine.[13] There must be an additional ground available, that the punitive requirement is likely to *reduce the effectiveness* of the order in preventing reoffending by the offender. This will acknowledge that for some categories of offender, such as children or vulnerable persons, a punitive element is not appropriate.

20. Paul Goggins MP in 9th Committee Stage Debate in the Commons:[14]

> *It is a rather important point, because if a sentencer is faced with a set of circumstances in which a particular individual is not exceptional, because they have learning disabilities and mental health problems, but putting the punitive element in would not be appropriate, the sentencer will be in a difficult position … It may not be an exceptional case —there are many people who go before the courts who have personality problems, addictions and difficulties —but the punitive element might not be appropriate. I ask [the Minister] to reflect on the difference between appropriate and exceptional.*

21. It is crucial that sufficient funding is provided to ensure that programmes can continue to be effective and that imposing a punitive requirement is not deemed a cost saving measure by replacing existing treatment programmes.

Restorative Justice

22. We welcome the inclusion of a provision that extends the possibility of deferral of sentence to allow restorative justice activities to take place. Research has repeatedly

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[10] H. Bewley, The effectiveness of different community order requirements for offenders who received an OASys assessment, Ministry of Justice Reasearch Series 17/12 (October 2012)

[11] Ibid, p 59.

[12] CJA, Crime and Courts Bill Briefing, House of Lords, 13 November 2012, available at http://www.criminaljusticealliance.org/CJA_Crime&Courts_Bill.pdf

[13] Crime and Courts Bill, p262, Lines 11-14

[14] Hansard, Committee, House of Commons, 5 February 2013, Col 295.

shown the positive effects of restorative justice for victims in processing the trauma of crime and for offenders in understanding the impact of their behaviour, thereby reducing their offending. We look forward to the publication of minimum standards by the Restorative Justice Council.[15] It is important that the same opportunities for accessing restorative justice are available across the country, and that the practitioners engaged in the delivery of restorative justice programmes meet the requisite standards to ensure the programmes are effective in meeting the needs of the victims and offenders taking part.

Electronic Monitoring

23. Paragraph 16 of Schedule 15 amends the definition of an electronic monitoring order so that it will apply not only to the monitoring of another community sentence requirement but will simply 'monitor the whereabouts of the offender during a specified period'.[16]

24. We are extremely concerned about the wide and ill-defined purpose of this power. This type of monitoring would have an obvious impact upon the private life of the individual under article 8 ECHR. In principal it would not have a legitimate aim because there would be no existing suspicion of crime but only of potential future offending and it would almost certainly be disproportionate, over whatever period it was to be in place for, because it would be monitoring everything that the person did indiscriminately. There would be significant data protection issues concerning the recording of the monitoring – whether this was done by a person in real time and for how long a recording would be stored.

25. The only justifiable use of this monitor would be, in relation to post conviction exclusion and restraining orders because these would be defined geographical zones and indicate that the type of criminal behaviour for which the person was convicted justifies the imposition of the monitoring requirement, for example to protect victims of harassment or domestic violence.

26. We welcome the intention to produce a code of conduct. This should provide clear guidance on data protection requirements, storage and destruction of data obtained through the monitoring activity.

[15] As indicated by the Parliamentary Under-Secretary of State, Minister for Prisons and Rehabilitation in *Restorative Justice Action Plan for England and Wales* (Ministry of Justice, November 2012)

[16] P 265, line 7.

Clause 35 – Extradition

27. Clause 35 in conjunction with Schedule 19 provides for changes to extradition arrangements.

Forum

28. We welcome the acknowledgement of Government that a forum bar is needed in the UK extradition system. In our evidence to the Scott Baker Review on Extradition[17] we questioned why the forum bar contained in section 42 and schedule 13, paragraphs 4 and 5 to the Police and Justice Act 2006 had not been enacted. With expanding use of the internet and international transactions, we observed that the risk of extra-territorial prosecution by other states against individuals acting, possibly through inadvertence, was high. We thought that the forum bar would ensure that where it is appropriate for a person to be prosecuted in the UK, this route would remain available despite an extradition request. We concluded that in the interests of ensuring the right to private and family life of those suspected of crime, and in the interests of legal certainty, the forum bar must be enacted.[18]

29. The forum bar in the 2006 Act would have provided:

> (1) A person's extradition to a category 1 territory ("the requesting territory") is barred by reason of forum if (and only if) it appears that—
> (a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and
> (b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.
> (2) For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question.
> (3) This section does not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence."

[17] Commissioned by the Home Secretary and carried out during 2011. Our evidence is available here http://www.justice.org.uk/data/files/resources/163/Home_Office_Extradition_Review_-JUSTICE_response_jan11.pdf

[18] *Ibid* at p 22.

30. We are greatly concerned that the newly proposed forum bar in Schedule 19 to this Bill would render it virtually impossible to exercise a forum bar in any extradition proceeding.

31. Firstly, an exhaustive list of matters which the court can take into account to demonstrate the interests of justice at proposed sections 19B(3) (Part 1) and 83B(3) (Part 2) Extradition Act 2003 (EA) limits the independent discretion of the judge to take into account relevant factors in the circumstances of the case. Whilst the list proposed may attempt to cover everything important in a decision about forum, it cannot hope to anticipate every matter which may be significant in a case. The list should be indicative only and ensure that it is for the judge to decide in their discretion whether a forum bar is in the interests of justice.

32. Secondly, sections 19B(4) (Part 1) and 83B(4) would expressly provide for forum shopping rather than a forum bar: the question of disclosure of evidence should not prevent the judge concluding that the most appropriate forum for prosecution is the UK when a substantial measure of the activity and the interests of justice indicate as such. If there is sensitive material, the judge should be able to follow the usual public interest immunity procedure already available to conclude whether the UK is the better forum. This provision will allow other states to withhold relevant evidence to ensure that the trial does not take place in the UK and negates the important purpose of ensuring the correct forum is used, as well as safeguarding the rights of the requested person.

33. Thirdly, sections 19C and 83C would enable a prosecutor's certificate to entirely fetter the judge's discretion as to whether the UK is the correct forum in the interests of justice. The provision presumes that a decision on forum is either (a) the CPS has decided to prosecute in the UK and therefore extradition should be refused or (b) the CPS has not decided to prosecute and therefore the person should be extradited. This is already the current law under the Extradition Act, sections 22 and 88. We and other organisations argued for the forum amendment in the Police and Justice Act 2006 because the alternatives were inadequate to protect the requested person. All this proposed provision does is to make the current exercise more complex.

34. The evaluation of the CPS as to whether a prosecution should be brought in the UK is but one element for the judge to take into consideration, by indicating whether a prosecution, on the available information, is possible. However, if the judge finds that a substantial measure of the activity took place in the UK, and the interests of justice so require it, the judge ought to exercise the forum bar. This may mean that a prosecution takes place in neither country. The purpose of the bar is not to facilitate the best venue for prosecution in the eyes of the prosecuting authorities alone but to acknowledge the best venue taking into account all relevant issues. This is a decision for the judge in

open and fair proceedings. Otherwise it allows for a forum shopping agreement between the two countries' prosecuting authorities made behind closed doors. The assessment to be made by the prosecution is different to the assessment of the judge. *We therefore consider that the suggested certification process should be removed from the Bill.*

35. We do not believe this will create any difficulty because the decision of the CPS is contemplated and best explored by way of sections 19B(5), and 83B(5) which provide for the prosecutor to be made a party to the proceedings. This way the reasons for the decision will be given in open court, and can be tested by the requested person and the judge. It will be possible for the judge to contemplate how the decision of the CPS can assist their decision as a result. If it transpires that the CPS considers there is insufficient evidence to charge because a crime has not been made out, notwithstanding that the conduct occurred in the UK and involved UK citizens, that is a relevant decision to assist the judge toward exercising the forum bar, not, as this provision would allow, to extradite to the other country, where there is likely to be even less evidence available.

36. Furthermore, the certification process suggested allows the prosecution to issue a certificate pursuant to not only the usual full code test as to whether there is sufficient evidence upon which to try the person and whether a prosecution would be in the public interest (at sections 19D(4) and 83D(4) but also, where there is 'sensitive' material (Matter D). Sections 19D(5) and (7) and 83D(5) and (7) are drafted so widely that they could encompass any vaguely relevant material where there are concerns about disclosure -

    (a) in the prosecution of the corresponding offence or
    (b) *any other proceedings*

37. Sensitive material is then defined in sections 19D(7) and 83D(7) as:

> [M]aterial which *appears to the responsible prosecutor to be sensitive*, including material appearing to be sensitive on grounds relating to—
> (a) national security,
> (b) international relations, or
> (c) the prevention or detection of crime (including grounds relating to the identification or activities of witnesses, informants or any other persons supplying information to the police or any other law enforcement agency who may be in danger if their identities are revealed).
>
> (emphasis added)

This definition includes not only a circular description of sensitivity, but every piece of potential evidence that might be expected to provide grounds for an ordinary domestic prosecution. These are not reasons to issue a certificate against prosecution, but reasons either to conduct a public interest immunity hearing, as in any domestic case involving such similar material, or to simply carry out an ordinary disclosure review which will prevent clearly non-disclosable personal information from being made available to the court or accused person. We fail to see why these issues could result in a certificate, and are particularly concerned that these considerations alone could render any possibility of a forum bar impossible. If the certification process remains, which we do not condone, Matter D should be removed.

Human Rights

38. Part 2 of Schedule 19 purports to limit the human rights compliance obligations upon the Secretary of State when dealing with Part 2 requests. Paragraph 11 would amend section 70 of the Extradition Act 2003 so as to provide that once the Secretary of State has issued a certificate that an extradition request has been made in the approved way and by a designated territory:

> The Secretary of State is not to consider whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998

39. The intention of the amendment was explained during the 12th sitting of the Commons Committee:

> *At present, the Home Secretary is obliged to consider human rights issues raised after a person has exhausted their appeal rights, because she is a "public authority" for the purposes of the Human Rights Act 1998, section 6(1) of which makes it clear that public authorities must not act in a way that is incompatible with the European convention on human rights. If a person raises new human rights matters that have not previously been considered during the progress of an extradition case, the Home Secretary must consider them to ensure that the person's extradition is compatible with those rights. That can lead to significant delays while cases are considered and while any decision to uphold the extradition is challenged in the courts.* [19]

40. Paragraph 12 provides for appeal to the High Court on human rights grounds. It is suggested by the Government that this is an appropriate alternative to the obligation upon the Secretary of State to consider human rights issues. We disagree. Firstly,

[19] Hansard, House of Commons, 12th February 2013, col 415, Jeremy Browne MP, Minister for Crime Prevention.

paragraph 12 does not deal with situations where the information concerning an impact upon human rights occurs subsequent to an appeal. The amendment must also allow for an *application to reopen the appeal* to the High Court, not simply an extension of time as provided here. Further, the application should be not only for human rights ground but also medical grounds, pursuant to section 91 EA.

41. Secondly, to expressly disapply the Secretary of State's obligations under the Human Rights Act (HRA) is a serious and significant departure from the role of public authorities in protecting human rights. It is not only the case that requested persons apply to the Secretary of State, but that the Secretary of State receives information or intelligence which would implicate the human rights of the requested person of which that person is unaware. The amendment would remove the obligation upon the Secretary of State to consider the impact of the potential rights violation upon the person. This is unlawful, unless a statement is to be made to Parliament pursuant to s19(2) of the HRA. In order to comply with the HRA, an amendment to section 70 must ensure that the Secretary of State retains the obligation to uphold Convention rights when information relating to the person comes to her attention. This could involve an amendment requiring her to inform the requested person so as to enable them to make an application to the High Court on the issue, or to refer the matter to the High Court herself. This is the presumption of the Scot Baker review, which recommended a judicial decision, but did not advocate the exclusion of the Secretary of State's obligation under the HRA.[20]

PART 3 – BORDER CONTROL AND CRIMINAL JUSTICE

Clause 37 – Removal of Rights of appeal against refusal of a family visit visa

42. Clause 37 amends section 88A of the Nationality, Immigration and Asylum Act 2002 (NIAA) to remove the right of appeal for applicants who wish to challenge a refusal to grant a family visit visa to the UK. Consequently, if applicants are denied a family visit visa then they will need to reapply and incur the cost of a new application.

43. The Government suggests there has been a huge rise in the number of appeals from those wanting to visit family living in the UK. The rise is apparently burdening the system and diverting resources that could be better invested. Likewise, it is argued that in many cases appeals are successful because new evidence has been submitted by the applicant. The Government therefore believes that the proper course should be to submit a new application.

[20] *A Review of the United Kingdom's Extradition Arrangements,* pp287 – 294, available at http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review?view=Binary

44. This limitation to the family visit scheme could produce serious problems to refugees and their families. Notwithstanding the expensive costs of several applications, it denies the visitor the opportunity to challenge a wrongful decision. As Baroness Smith observed during Second Reading in the Lords, the poor track record of the UK Border Agency does not instil confidence in the decision making process:[21]

> *In 2011, the Chief Inspector of the then UK Border Agency looked at entry clearance decisions where there is currently no full right of appeal; that is, those decisions that are currently subject to the limitations that are sought in this Bill for family visit decisions. In 33% of the 1,500 cases he looked at, the entry clearance officer had not properly considered the evidence. The Government must prioritise better decision-making on first-round applications. It is unfair to demand that applicants make a fresh application as an alternative to an appeal if so many applications are turned down for reasons that are no fault of the individual.*

45. The removal of the right to appeal could unfairly impact upon the Article 8 ECHR right to a family life, particularly in the case of refugees unable to return home whose family members are refused a family visit visa. We cannot imagine that the cost savings in removing the appeals structure outweighs the value of allowing family visit visas to those residing in the UK, particularly given the high number of poor decisions at first instance. The removal of the appeals structure is therefore unjustified and disproportionate.

Clause 38 – Removal of in-country right of appeal of persons excluded from the UK by the secretary of state

46. Clause 38 removes the in-country right of appeal against the decision of the Secretary of State to cancel an individuals' leave to enter, or right to remain, in the UK where they have decided to exclude that individual on the grounds of the public good. The Clause is a response to the 2011 judgment made by the Court of Appeal in the case the *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333 which allowed for such a right of appeal.

47. Although a person served with a certificate of the exclusion decision would continue to be able to exercise their right of appeal against the cancellation of leave from outside the UK, this raises several serious problems. Not only is it extremely difficult to conduct a satisfactory appeal in absence, but in cases where the life or integrity of a person is in

[21] Hansard, Second reading, House of Lords, 28 May 2012 : Column 982.

danger in her country of origin, all that can protect her from her return there is the human rights framework in the country she appeals to. The UK has an obligation to protect refugees under the Refugee Convention, the ECHR and EU law. Often genuine asylum claims are fraught with complexity and trauma. Deportation may cause a significant risk to the well being and even life of an applicant.

48. We agree with the Immigration Law Practitioners' Association briefing and suggested amendment which sheds light on the problems that will be caused by this amendment for asylum seekers.[22]

Clause 40 – Powers of immigration officers

49. Clause 40 and Schedule 20 strengthens the investigatory powers available to customs officials and immigration officers within the UK Border Agency crime teams. It extends the list of 'authorising officers' who can authorise applications to interfere lawfully with property and wireless telegraphy; grants search and seizure powers; and extends the power to authorise intrusive surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA).

50. We agree with Liberty about the risks in extending powers to officials who do not hold a police function, with the potential criminalisation of immigration itself.[23] Although the Explanatory Note[24] states that the purpose of this amendment is to provide for immigration officers working in Criminal and Financial Investigation teams in the UK Border Agency property interference powers equivalent to those already used by customs officials in the investigation of cross border crimes, there is no provision in the Bill that reflects this limited scope, or provides the correspondent safeguards to the public and requisite qualification to be held by the authorising officer. The Bill must be amended to make the limitations on these authorisations clear.

[22] ILPA, Crime and Courts Bill House of Lords Third Reading: Proposed amendments from the Immigration Law Practitioners' Association (18 December 2012), available at http://www.ilpa.org.uk/data/resources/16596/12.12.18-ILPA-brefing-Crime-and-Courts-Bill-HL-3R.pdf

[23] Liberty, Second Reading Briefing on the Crime and Courts Bill in the House of Lords, May 2012 p. 10.

[24] At [380].

Clause 42 – Public Order Offences

51. Clause 42 would reform Section 5 of the Public Order Act 1986 (POA) to remove the threat of criminal sanction from speech or conduct deemed "insulting". JUSTICE has long argued for such reform.[25]

52. Freedom of expression is arguably 'the primary right in a democracy', without which 'an effective rule of law is not possible'.[26] In England and Wales its importance has long been recognised by the common law:[27] In particular, it is a fundamental aspect of freedom of expression that included is not merely the expression of ideas or sentiments that everyone in society agrees with or approves of. If the right to freedom of expression is to mean anything, it must also extend to forms of expression that others find offensive or insulting, including ideas that 'offend, shock or disturb'.[28] This aspect of freedom of expression is especially important in the context of protests and demonstrations and other circumstances where the expression is political, for expression of political ideas enjoy particularly strong protection under article 10 of the European Convention on Human Rights.[29] In addition to engaging freedom of expression, arrests for section 5 POA offences will also frequently interfere with the right to freedom of assembly, protected under Article 11 ECHR.[30]

53. There is no right, either in English law or under the ECHR, not to be offended. While there is clearly a public interest in the criminal law protecting members of the public from being threatened or harassed by others, merely causing offence (or being likely to do so) through words or conduct in a public place should not, without more, constitute a criminal offence. Public words and conduct which some members of society would have been offended by in previous centuries has been responsible for important social

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[25] The previous Government consulted on this issue in 2009. JUSTICE's response can be found here: http://www.justice.org.uk/resources.php/185/public-order-act-1986-section-5-amendment-justice-response. Most recently JUSTICE proposed amendments to the Protection of Freedoms Bill in order to amend POA: http://www.justice.org.uk/resources.php/137/protection-of-freedoms-bill

[26] Lord Steyn in *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at p297.

[27] *Bonnard v Perryman* [1891] 2 Ch 269 at p284.

[28] See e.g. the decisions of the European Court of Human Rights in *Lehideux and Isornia v France* (2000) 30 EHRR 665, para 55; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1.

[29] See e.g. *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62: Political expression includes discussion of matters of public concern.

[30] See Joint Committee on Human Rights, Seventh Report of Session 2008-2009, *Demonstrating respect for rights? A human rights approach to policing protest*, Written Evidence – Volume I (HL 47-I/HC 320-I), available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47i.pdf For JUSTICE's evidence see Volume II (HL 47 – II/HC 320 – II) available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47ii.pdf

and political reforms: the assertion of racial and gender equality; gay Pride marches; religious worship. It is essential for the progress of society that we do not ossify public views by censoring debate on matters of current public controversy.

54. The removal of the word 'insulting' from s5 POA would go some way to prevent the overuse of this power. It is uncontroversial, in our view, that 'threatening' words and conduct should be restrained by the law. However, the word 'abusive' in s5 POA remains problematic since it can be defined as 'insulting or rude.'[31]

55. The 'abusive' element of s5 is outside the scope of this amendment. Clear guidance should be developed by the CPS and issued to police officers to distinguish disproportionate uses of the legislation in the case of 'abusive' words and behaviour (similarly for the extremely broad category of 'disorderly behaviour' which we believe should also be subject to scrutiny and reform). In particular, we do not consider that prosecution should result for, without more, the use of a single swear word against a police officer (for example, the case of *Southard*[32]), since this may be a waste of public funds as well as detrimentally criminalising the person concerned. This is particularly so where a section 5 offence appears at the end of a charge sheet because 'abusive' language has been used during the course of an arrest for another offence, or a charge results because of swearing during a stop and search. This adds little if anything to the prosecution of the main offence and can harm community relations with the police in the context of the disproportionate use of stop and search against certain ethnic groups, or in relations between police and young people. In these cases it is likely that a verbal warning would suffice.[33]

Jodie Blackstock
JUSTICE
March 2013

[31] Chambers 21st Century Dictionary

[32] *Southard v DPP* [2006] EWHC 3449 (Admin). See also Home Office, *Consultation on Police Powers to Promote and Maintain Public Order,* October 2011, page 8.

[33] We note that since the consultation on this issue in 2009, a number of controversial cases about the scope of Section 5 POA have arisen. See for example, *Reda v DPP* [2011], EWHC 1550 (Admin) QBD, where an individual was charged after shouting "fuck the police" on the street. This was heard by a police officer emerging from a nearby building who arrested the defendant. See also *Harvey v DPP* QBC, 17 November 2011.