Criminal Justice and Courts Bill

House of Lords Second Reading

Briefing on Criminal Justice Proposals

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For further information contact

Jodie Blackstock, Director of EU and Criminal Justice Policy *(Criminal proposals)*

email: jblackstock@justice.org.uk direct line: 020 7762 6436

Angela Patrick, Director of Human Rights Policy *(Civil proposals)*

email: apatrick@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Summary

- **Resources must be assured for the increase in Parole Board scrutiny prior to release;**
- **Electronic monitoring of people released from prison on licence should only be imposed on a case by case, not mandatory, basis, as the law already allows;**
- **In considering release after recall, Parole Boards must review licence conditions to ensure the person is able to comply;**
- **Second offence custody for knife crimes is unjustified;**
- **Powers of restraint to enforce 'good order and discipline' should not be available to staff in secure colleges;**
- **Trial by justices on the papers must only be available where the courts are satisfied that the defendant has unequivocally waived their right to a public hearing, be tried by a minimum of two justices, and the process be published;**
- **Court charges in criminal cases must not be imposed unless it is just and reasonable to do so in the circumstances of each case, and upon a detailed impact assessment of the proposed charges and costs of enforcement.**

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. The issues raised in this briefing should not be taken as our sole concerns with regard to the proposals contained in the Bill.

2. This briefing deals with the criminal justice proposals in Parts 1, 2 and 3 of the Bill. We have prepared and circulated a separate briefing on the changes to judicial review in Part 4. The criminal justice provisions of this Bill contain two concerning themes. First, the increase in mandatory orders and powers of the Secretary of State to change the law by executive act. Such powers, without the possibility of exercising discretion in the circumstances, and without the scrutiny of Parliament, are contrary to the principles of fairness and proportionality that govern the rule of law. Second, the creation of new offences, sentencing thresholds, and release and recall tests that will increase the population of young people and adults incarcerated. At a time when all actors agree desistance is a primary aim of the criminal justice system, and that

prison creates the highest recidivism rates of all sentencing options, the combined effect of the provisions of this Bill would create a worrying return to imprisonment.

3. We also express our concern that with only five Committee days tabled, and a Bill that has significantly increased in size since it was introduced to the Commons, there is insufficient time available to properly consider its provisions. We consider that more time is required to ensure important issues are not overlooked.

Clause 4 Parole Board release when serving extended sentences

4. Clause 4 changes the automatic release rules for prisoners serving extended sentences. The provision makes it necessary for prisoners to satisfy the Parole Board that it is no longer necessary for the protection of the public that they be confined, pursuant to section 246A(6)(b). While this may seem reasonable in principle, it will have a significant impact upon both the resources of the Parole Board and the programmes available to prisoners to demonstrate they are suitable for release. The provision will be utilised to encompass prisoners formally detained under indeterminate sentences for public protection (IPP). It was accepted by Parliament in the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LASPO), that the IPP had become unworkable, and the sentence was abolished. As we said in our briefing on the Bill, "These sentences have proved unworkable and unlawfully detained many prisoners passed the appropriate sentence that they should have served due to an ill thought out regime which was almost impossible to satisfy."[1] This was because, as the Prison Reform Trust (PRT) reported in 2010, the Parole Board is overstretched and highly risk averse, the necessary 'offending behaviour programmes' are scarcely available and limited in their scope and effectiveness, and it is inherently difficult to demonstrate reduced dangerousness and pass the high safety threshold for release.[2]

5. As at 31 December 2013, there were 5,335 IPP prisoners, of which 3,561 had passed their tariff. There were also 7,463 prisoners serving life sentences, of which 2,584 had passed their tariff.[3] Widening the category of cases that must be qualitatively

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[1] JUSTICE, LASPO, Part 3 Briefing for House of Lords Report Stage (March 2012), available at: http://www.justice.org.uk/data/files/resources/284/JUSTICE-Briefing-LASPO-HLCS.pdf

[2] J Jacobson, M Hough, *Unjust Deserts: imprisonment for public protection* (PRT, 2010)

[3] Ministry of Justice, *Prison Population Tables* (30 January 2014), available at:

assessed before release by the Parole Board, without increasing its resources or the courses available to prisoners, may lead to further cases of unlawful and unnecessary detention. As the Howard League[4] and PRT[5] record in their briefings, the Parole Board is under considerable strain as a result of cuts to staff and an increase in oral hearings.[6] This provision, together with further assessment prior to release following recall and the potential of increased breaches of licence should electronic monitoring of people's whereabouts be introduced (see below), without additional resources will risk the Parole Board being unable to cope with its case load. That is without knowing the impact of the cuts to legal aid introduced by LASPO, which will result in more prisoners applying to the Parole Board without legal representation in a wide range of circumstances. Unrepresented applicants almost inevitably extend the length of proceedings.[7]

Clause 6 Electronic monitoring following release on licence etc

6. Section 62 of the Criminal Justice and Courts Services Act 2000 currently provides the Secretary of State with the discretion to attach electronic monitoring conditions to the release of a person from prison on licence. Clause 6 amends the legislation through clause 6(3), which provides for the Secretary of State by order to require the *mandatory* imposition of electronic tracking of a class of people released on licence. JUSTICE considers that this would give far too much power to the Secretary of State

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276084/prison-population-tables-q3-2013.xls

[4] HC Committee Stage Briefing available at: https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Briefings/Briefing_for_Criminal_Justice_and_Courts_Bill_Committee_Stage_in_House_of_Commons_March_2014.pdf

[5] Second Reading Briefing available at: http://www.prisonreformtrust.org.uk/Portals/0/Documents/PRT%20Briefing%20Criminal%20Justice%20and%20Courts%20Bill%20House%20of%20Lords%202nd%20Reading%2030June14.pdf

[6] Due in the immediate past to the decision in *Osborn v the Parole Board* [2013] UKSC 61, that prisoners are entitled to an oral hearing in a wider set of circumstances than was previously provided. See Parole Board website (update April 2014) for the impact on hearings, in particular:

> Our next key challenge is to conclude as many reviews as possible. Around 550 cases are listed a month which is the maximum current capacity. Additional resources will be recruited to reach a monthly hearing figure of nearer 750 cases.

available at https://www.justice.gov.uk/offenders/parole-board/osborn,-booth-and-reilly-supreme-court-judgment

[7] W. Foxton, 'How legal aid reforms are clogging up the courts', *The Spectator,* 20 February 2014, available at: http://blogs.spectator.co.uk/coffeehouse/2014/02/how-legal-aid-reforms-are-clogging-up-the-courts/

without proper scrutiny of Parliament, or of the individual's circumstances. The power is in any event unnecessary and disproportionate and should be deleted from the Bill.

7. Currently, an electronic monitor (or 'tag') can be imposed to monitor compliance with other conditions, such as a curfew or exclusion zone. Under s62(2)(b) of the 2000 Act, it can also already monitor the movements and location ('whereabouts') of the released person, but on a discretionary and individual basis. Parliamentarians may wish to ask Government whether the existing power is being used and why this cannot be exercised more frequently without the new power in the Bill. [8] The proposal in the Bill would require:

   - the mandatory imposition of electronic tracking;
   - of a whole class of persons, potentially all those released on licence;
   - for an unspecified period, simply to monitor a person's whereabouts.

8. The Impact Assessment[9] explains that the purpose of this measure is to (1) reduce re-offending, (2) protect victims and witnesses, and (3) assist police in the detection and investigation of crime. We cannot see how the use of a 'tag' will reduce re-offending or protect victims or witnesses without being attached to an exclusion condition, which can only be imposed on a case by case basis. Tracking can only show where a person is, not what they are doing there. We find it difficult to see which group of offenders will be suitable for a general 'whereabouts' monitor that is not already identified as appropriate for a curfew or exclusion order, despite the existing power to impose tracking.

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[8] We are not aware that the existing power in s62(2)(b) is being exercised. Prison Service Order 6000 (Parole Release and Recall), Issue no. 226, re-issue date 26/11/12 (PSO), available at https://www.justice.gov.uk/downloads/offenders/psipso/pso/pso-6000.pdf makes no mention of the power to release on condition pursuant to s62 Criminal Justice and Court Services Act. This is because the Criminal Justice (Sentencing) (Licence Conditions) Order 2005 paragraph 3 – other conditions of licence – does not include a provision for electronic monitoring as a condition of a licence. Chapter 14 of the PSO indicates that tracking conditions were only to be used in the course of the Pilot Study (see note 10 below), which concluded in 2006. Prison Service Instruction 40/2012 (Licences and Licence Conditions) (valid until 30 November 2016) restricts the use of electronic monitoring to home detention curfew or multi-agency public protection cases of high risk offenders or where the case is likely to attract national media interest, and then only in conjunction with a curfew.

[9] Ministry of Justice, *Electronic monitoring of whereabouts as a compulsory licence condition*, IA No: MoJ004/14, (5th February 2014) p 8, available at http://www.parliament.uk/documents/impact-assessments/IA14-03D.pdf

9. The third justification is founded on an inappropriate assumption that all those released from custody are likely to re-offend. It would be a significant and concerning departure to allow tracking of a whole class of persons for the purposes of preventing future crime. Without a focussed assessment of each case, we consider that such a broad order will undermine the presumption of innocence and impose a disproportionate restriction on people's movements. Even the Pilot Study that looked at tracking offenders when the 2000 Act came into force only focussed on prolific and priority offenders, sex, violent and domestic violent offenders, many of which were given curfew and exclusion requirements by way of individual assessment.[10] We are concerned that without provision for express limits and safeguards around who will be subject to mandatory order, this form of surveillance will become routine and widespread without adequate opportunity for oversight. 52% of tracked people interviewed for the Pilot Study said that satellite tracking could best be described as 'like being watched'.[11] This is all the more concerning given that the body undertaking the monitoring is likely to be a private company.[12]

10. In the recent Supreme Court case of *Osborn v the Parole Board* [2013] UKSC 61 (9 October 2013) Lord Reed explained the importance of ensuring procedural fairness:

> [J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the

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[10] S. Shute, *Satellite tracking of offenders: A Study of the Pilots in England and Wales*, Research Summary 4 (Ministry of Justice, 2007), available at: http://webarchive.nationalarchives.gov.uk/20100505212400/http:/www.justice.gov.uk/publications/docs/satellite-tracking-of-offenders.pdf (Pilot Study) The pilot study conducted was in 2005 and 2006 and reviewed tags of 336 offenders.

[11] *Ibid.* p 14.

[12] The remarkable findings last year surrounding the G4S electronic monitoring contract provides a sobering example, see BBC, 'G4S probe after tag firms' multi-million over charging confirmed', 11 July 2013, available at http://www.bbc.co.uk/news/uk-23272708 NAPO in *Electronic tagging: A flawed system* (2012) available at: https://www.napo.org.uk/sites/default/files/Electronic%20Tagging%20a%20flawed%20system.pdf, records recent problems with the private firm tagging process – faulty equipment, communication breakdown between private companies operating the equipment and probation staff, lack of discretion being used or dismissal of valid explanations in circumstances of breach, failure to take into account the offence history and personal circumstances of the offender.

decision to be taken. As Jeremy Waldron has written ("How Law Protects Dignity" [2012] CLJ 200, 210):

> "Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves."

It cannot be right that a condition which would so invade the life of a released person can be imposed without proper consideration of their individual circumstances. In JUSTICE's view, such a process would be procedurally unfair.

11. It could also pose a disproportionate invasion of privacy, particularly over lengthy license periods.[13] There has already been significant intrusion into people's lives resulting from wide monitoring powers available under the Regulation of Investigatory Powers Act 2000,[14] and through existing powers to impose substantive licence conditions. In *S and Marper v UK* (2009) 48 EHRR 50 the European Court of Human Rights (ECtHR) held that the blanket and indiscriminate powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences by the police was a disproportionate interference with the right to respect for private life protected by article 8 ECHR, that could not be regarded as necessary in a democratic society. Without stronger justification, we consider that the same principles apply to the proposal for blanket electronic tracking and the data obtained through it. We agree with the recent Joint Committee on Human Rights report in which it concludes that:

> The detailed safeguards in the Code of Practice [proposed to apply to the collection and storage of data obtained through electronic monitoring] will be crucial to ensuring that the processing of data gathered from electronic monitoring following release on licence is carried out in such a way that any

[13] Licence periods will vary significantly, dependent upon the type of sentence imposed upon the convicted person, since a licence period will last until the end of the person's sentence. For those serving an indeterminate sentence for public protection, a licence period is for life, subject to the possibility of review after ten years.

[14] See our report *Freedom From Suspicion: Surveillance Reform for a Digital Age* (JUSTICE, 2011)

interference with the right to respect for private life is necessary and proportionate to the legitimate aims pursued. It is therefore important that there is some opportunity for parliamentary scrutiny of the adequacy of those safeguards.[15]

12. Rather than support the desistance of released persons by integrating them back into society, this measure will engender suspicion and contact with the police from the outset because tracking data will be the first place the police look when crime is committed. The Offender Rehabilitation Act 2014 provides the possibility for convicted people to receive support to prevent them re-offending. This measure will counteract those efforts.

13. We understand that electronic monitoring can increase the effectiveness of imposed conditions upon licences. If better technology is available, this should be utilised under existing legislation. A wide-ranging power to impose mandatory electronic tracking by order, of a whole class of people, is in JUSTICE's view wholly unjustified.

Clause 7 Test for release after recall: determinate sentences

14. Clause 7 creates a significant new test for release on licence once a person has been recalled to prison. The Secretary of State, or the Parole Board, dependent upon which release provision applies, will have the additional burden of only releasing the person where it appears that the person is *highly unlikely* to breach a condition in their licence. This is an onerous task that will seriously affect the liberty of those who would otherwise be suitable for release. The decision should require a careful review of the circumstances of breach and conditions placed upon the licence so that where it is clear that the person will be unable to meet a particular condition due to vulnerability or circumstances beyond their control, it is removed. Our amendment seeks to ensure that this takes place. The Howard League is concerned that the provision will "affect those prisoners who are deemed to be less likely to be able to comply, such as children, the mentally ill and people with learning disabilities" and lead to an increase in the number of these people in prison, who are not a risk to the public, but otherwise have difficulty managing their licence.[16] We consider it wholly

[15] JCHR, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, Fourteenth Report of Session 2013-2014, HL 189/ HC 1293 (11 June 2014), para 1.37.

[16] Briefing, supra.

inappropriate that the young and vulnerable be caught by this provision.

Clause 25 Possessing an offensive weapon or bladed article in public or on school premises: sentencing for second offences for those aged 16 or over

15. We were concerned by the introduction of this new provision at Report Stage in the Commons. There would appear to be little evidence to support its necessity and it is contrary to current policy attempting to reduce custodial terms for young people given the clear evidence that detention increases rather than reduces offending amongst young people. The PRT in its Briefing sets out the evidence to suggest this provision is unwarranted:

> The new clause will lead to the inappropriate imprisonment of children and young people. While the Government has yet to provide an impact assessment of the clause, we estimate that it could lead to the imprisonment of around 200 children and 2,000 adults per year. Knife crime is a serious problem in some inner-city communities but the term covers a wide-range of offences from those involving threat or injury to the much less serious offence of possession. Research shows that the majority of children and young people who carry knives do so out of fear and for protection; not to threaten or injure others.18 The number of possession-related offences has fallen by 34 per cent for children and 23 per cent for adults over the past three years.19 Over the same period levels of youth crime and the numbers of children in custody have also declined. Courts already have sufficient powers to deal appropriately with repeat offenders and the existing framework is working to deter children and adults from committing further knife possession offences.[17]

Clauses 29 and 30, Schedules 5 and 6 – Detention of Young Offenders in Secure Colleges

16. While we welcome the Government's intention set out in *Transforming Youth Custody: Putting education at the heart of detention*[18] to give education prominence in

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[17] PRT Briefing, note 5 above, p9.

[18] Ministry of Justice, *Transforming Youth Custody – Government response to consultation*, CM 8792 (TSO, January 2014)

sentences of detention imposed upon children, we are concerned that the secure colleges proposed at clause 29 may, pursuant to clause 30, be run by contracting out the service to private companies. We also share the concerns expressed by the Howard League, SCYJ, CRAE[19], Prison Reform Trust, Prisoners Education Trust and other groups in their briefings that a secure college housing over 300 children is unlikely to be an effective way of educating children and reducing their propensity to re-offend. Much more information is required from Government as to how children housed in the college will be appropriately educated. Although the Minister explained in Committee that an education, health and care plan would be available for children with special educational needs, it is not clear how the attainment of other children is to be measured and accommodated.[20] The JCHR observed in its most recent report that is has been difficult to conduct a human rights and equality based assessment of the proposals since the detailed provisions of how the secure college will operate are at an early stage of development.[21] It seems remarkable that Parliament is being asked to create the framework for such a significant change to youth detention without information indicating the practicalities of its operation.

17. More specifically, those private companies providing a secure educational environment will have the power to use reasonable force against the children detained there. Schedule 6, paragraph 8 provides for custodial duties as regards

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[19] See Joint Briefing of these organisations for Second Reading, https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Briefings/Criminal_Justice_and_Courts_Bill_-_HoL_Second_Reading_joint_briefing.pdf

[20] This is particularly unclear given that a child serves a detention period of months, each one of which commences on a different day. There are many questions currently unanswered as to how the facility will operate. For example: Is it envisaged that children will attend lessons in classrooms? How many children will be in each class? Will they be taught by age group? Will girls and boys be taught together? How is the curriculum to be delivered with such a transient population? What provision will be made for those with particular behavioural difficulties and educational needs?

We visited the Cook County Juvenile Temporary Detention Center in Chicago, Illinois in April 2014, which houses a school on its lower floor and secure accommodation on the upper floors for children awaiting trial and conviction. We were advised that a high staff-to-student ratio is required to ensure classes can progress, often with as many staff as pupils in each classroom, in order to maintain security and additional support. Moreover, significant time is spent in liaison with mainstream education to understand the academic attainment of each pupil, which is much easier to assess in the US point based system than the UK system. We are not convinced that the UK Government has considered the administrative burden of educating so many children in one location.

[21] JCHR, note 15 above, para 1.56.

children: (a) to prevent their escape from lawful custody, (b) to prevent, or detect and report on, the commission or attempted commission by them of other unlawful acts, (c) *to ensure good order and discipline on their part*, and (d) to attend to their well-being. Paragraph 9 provides for the power to search children. Paragraph 10 provides that a custody officer may use reasonable force where necessary in carrying out the duties in paragraphs 8 and 9, *if authorised to do so by secure college rules*. In Committee the Minister argued that the use of reasonable force was therefore a matter for the secure college rules. We disagree.

18. As Frances Crook has said, "the Howard League holds that restraining children for not doing what they are told is dangerous and gives the erroneous lesson that might is right."[22] Moreover, the Court of Appeal found in *R (C) v Secretary of State for Justice* [2009] QB 657 that restraint for 'good order and discipline' engages article 3 ECHR (prohibition on torture, inhuman and degrading treatment), and the Secretary of State must justify the necessity of force. The Court did not accept any of its uses by the company running the secure training centres were necessary to ensure discipline and a safe custodial environment. The restraint infringed article 3 ECHR. The Joint Committee on Human Rights has also expressed concern regarding the purpose and imposition of this power:

> The statutory instrument which sought to enable restraint to be used [to maintain good order and discipline], which the Government claimed was necessary in order to clarify the law, has now been quashed by the courts. Before this, restraint was used to maintain good order and discipline 16 times between April and September 2008. Following the concerns expressed about the use of restraint, the Government established an independent review. Its report and the Government's response were published in December 2008. The review made over 50 recommendations, most of which have been adopted, including discontinuing use of the "nose distraction" technique. The review concluded, however, that "a degree of pain compliance may be necessary in exceptional circumstances" but recognised that this would be

[22] Frances Crook, 'Criminal Justice and Courts Bill and Restraint', 12th February 2014, available at http://www.howardleague.org/francescrookblog/criminal-justice-and-courts-bill-and-restraint/

"irreconcilable" with the UNCRC and would be unpopular with the Children's Commissioners, our Committee and others.[23]

19. We consider that a provision for the use of force in a secure educational facility to enable 'good order and discipline' would appear to be unlawful and go against the intentions of the introduction of a facility, 'where learning, vocational training and life skills will be the central pillar of a regime focused on educating and rehabilitating young offenders.'[24] At a time when the Government has announced an independent review of deaths of people aged 18-24 in custody, given the concerning numbers of deaths of young people over the past decade,[25] the inclusion of this provision is particularly unsavoury. The Bill enables secure college rules to apply force where it should not do so. The provision should be deleted from the Bill.

Clauses 36 – 40 – Trial by single justice on the papers

20. The first section of Part 3 provides for a new power to deal with summary cases not punishable by imprisonment in the magistrates' court, on the papers. The procedure may apply in circumstances where the defendant does not serve a notice indicating either a desire to plead not guilty, or to be tried in court, thereby providing consent to a trial on the papers by omission. The defendant may submit written representations by way of mitigation of sentence. Whether the procedure is followed is at the discretion of the court, and may not be followed where the defendant gives notice that they do not wish it to be. The procedure can also be set aside where the defendant makes a statutory declaration to the effect that they did not know of the single justice procedure.

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[23] JCHR, 25th Report of Session 2008-2009, *Children's Rights,* HL 157/HC 318 (20th November 2009), paras 88-94, available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157.pdf

[24] Lord Chancellor and Deputy Prime Minister, *Transforming Youth Custody, ibid,* p 3.

[25] See BBC, 'Government to review young deaths in custody', 6th February 2014, available at http://www.bbc.co.uk/news/uk-26061816 and NGO letter to the Daily Telegraph, 'Young People are still dying in prison', 5th February 2014 http://www.telegraph.co.uk/comment/letters/10617755/Young-people-are-still-dying-in-prison.html and INQUEST website for further details http://www.inquest.org.uk/media/pr/inquest-calls-for-independent-review-into-deaths-children-young-people

21. We understand the purposes behind the proposal set out in the impact assessment[26] to be primarily aimed at reducing costs and achieving efficiencies in the courts to hear more cases. While we do not object to the proposal *per se*, we have two concerns about its operation in practice. First, the single justice procedure notice issued pursuant to proposed section 16A(2)(a) must comply with the article 6 ECHR right to a fair and public hearing. Where this right is waived, it must be established in an unequivocal manner and be attended by safeguards commensurate with its importance. In this particular type of case, it must be shown that the defendant understood what the consequences of waiver would be.[27] The notice must therefore explain the procedure in clear terms, setting out what a paper process will entail as compared to a public court hearing. While the Bill provides for the setting aside of the procedure where a person can show that they did not know of the notice, this does not provide for a lack of *understanding* concerning the contents of the notice. It is important that this new procedure can be clearly understood, particularly since legal aid is not available for these types of offences, and the defendant will not have the benefit of an explanation from court staff. We therefore suggest that the Government consult on the proposed wording of the notice prior to it being finalised. It is particularly important that this information is communicated in a manner which will allow all people, including those from groups with language and communication difficulties, to understand the implications of waiver.

22. Second, we do not consider it appropriate for these cases to be dealt with by a single magistrate. Magistrates perform the role of a jury in the summary justice system. This entails lay persons reaching a collective decision as to the appropriate outcome of a case against another member of the public. It is justifiable as trial by ones' peers, which is a cornerstone of our criminal justice system and legitimates the interference with personal liberty by the State. The Magistrates' Courts Act 1980 reflects this by requiring that trial and sentence be presided over by a court of no fewer than two justices. This new procedure would subvert this key safeguard by allowing a decision to be taken by one lay magistrate reading the papers alone. It is disappointing that

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[26] Ministry of Justice, *Streamlining high-volume, low-level 'regulatory cases' in magistrates' courts*, IA no. 227 (5th February 2014), available at http://www.parliament.uk/documents/impact-assessments/IA14-03J.pdf

[27] See *Jones v the UK ,* App No. 30900/02, admissibility decision 9th September 2003, where the ECtHR held that "the applicant, as a layman, cannot have been expected to appreciate that his failure to attend on the date set for the commencement would result in his being tried and convicted in his absence and in the absence of legal representation. It cannot be said, therefore, that he unequivocally and intentionally waived his rights under Article 6". The case was deemed inadmissible for other reasons.

the Parliamentary Under-Secretary in Committee failed to see the benefits of two magistrates, as opposed to one.[28] While it may be the case that in simple, straightforward cases magistrates are capable of reaching a decision by themself, and indeed they may think they can in complex matters also, the principle of justice being done by one's peers ought not to be diluted simply to make efficiencies.

23. We consider the requirement for a minimum of two justices to try and sentence a case should continue to apply for the purposes of the new paper procedure, to ensure that the proceedings are administered in accordance with common law principles of fairness. This means affording the appropriate checks and balances that are provided when a decision has to be reached by consensus. A process with at least two justices on the papers will continue to deliver significant savings as court formalities will not be required, while ensuring an important safeguard remains in place. This would not prevent the paper process being presided over by a district judge, who has the benefit of legal qualification and expertise, and can already sit alone to hear trials and pass sentence in the Magistrates' Court.

24. Further, we agree with the Magistrates' Association that so as to avoid the paper procedure being seen as a secret process not open to scrutiny,[29] courts must publish the details of when it uses the paper procedure and the outcomes in each case. This would support the maintenance of the principle of open justice, which is another key facet of the right to a fair trial.

Clause 42 – Criminal courts charge

25. Clause 42 creates a new requirement for all criminal courts (Magistrates, Crown and Court of Appeal) to impose a costs order upon convicted people. This is a significant change to the current regime. We are concerned that the imposition of a charge may have an unfair bearing on the exercise of a person's right to plead not guilty, and therefore the presumption of innocence. Proceedings are brought against an individual by the State, following which they have the right to contest any offence charged, which must be proven by the Crown. The imposition of court costs may

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[28] Hansard, PBC, Deb 25 March 2014, col 337

[29] Magistrates' Association, *Briefing for House of Commons 2nd Reading of Criminal Justice and Courts Bill 2014*, 19 February 2014, available at http://www.magistrates-association.org.uk/dox/briefings/1394563832_mp-briefing-2nd-reading-criminal-justice-courts-bill-21-feb-2014.pdf

further increase the perverse incentives placed on accused people to plead guilty, despite their protestations of innocence; not only will a higher sentence be imposed if the defendant proceeds to trial, but a potentially substantial, mandatory, court charge as well as prosecution costs. Moreover, since further charges will be sought if a convicted person pursues an appeal, they may be unduly dissuaded from appealing by the potential costs of doing so. A restriction placed on access to a court or tribunal will not be compatible with article 6(1) ECHR unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[30] As drafted, a mandatory court costs order that does not take into account the circumstances of each case may infringe article 6 ECHR. The JCHR in its recent report found it difficult to assess this risk in the absence of clear evidence about the impact of court charges in practice, and recommended that the Government monitor carefully the impact of the criminal courts charge on the right of defendants to a fair trial of the criminal charge against them and make available to Parliament the results of that monitoring.[31] Parliamentarians may seek to include such a commitment in the Bill.

26. In our view a discretionary order is necessary, such that it will only be imposed where the presiding judge or tribunal considers it just and reasonable in the circumstances of the case. This is a familiar test, which assess both the means and other surrounding circumstances as to whether costs can realistically be paid, and whether they should be paid. The Prosecution of Offences Act 1985, s18 gives the courts the discretion to award prosecution costs against a convicted person only where it considers it just and reasonable to do so.[32] No such discretion is provided in the new provision, which suggests that the intention is to apply court charges irrespective of

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[30] *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (1999) EHRR 249, para 72; *Kreuz v Poland,* App. No. 28249/95 (unreported, 19th June 2001).

[31] JCHR, note 15 above, para 1.72.

[32] The operation of this award is further understood by reference to the CPS Guidance on costs, which provides that an application for costs need not be made where it would be unmeritorious or impractical. The guidance gives examples of where it would not be appropriate for a prosecutor to seek costs, such as: the defendant does not have the means to pay, i.e. where a lengthy term of imprisonment, hospital order or substantial compensation is likely to be ordered, see http://www.cps.gov.uk/legal/a_to_c/costs/; and the Practice Direction on Costs in Criminal Proceedings at para 3.4:

> An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay. The order is not intended to be in the nature of a penalty which can only be satisfied on the defendant's release from prison,

available at http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/costs-in-criminal-proceedings.pdf.

the means and circumstances of the convicted person. This is concerning and draconian, particularly where the person is sentenced to a term of imprisonment or a hospital order by reason of a mental illness, or has an addiction at the root of their criminal conduct. It is fair and appropriate for the courts imposing charges to have the discretion in the circumstances to review whether it is just and reasonable to impose a charge, otherwise it may be impossible for the person to pay.

27. Amendments were laid to afford such discretion during Committee, but the Parliamentary Under-Secretary rejected them on the basis that they would not only make the scheme more complicated and difficult to understand and apply, but would also create the risk of unequal treatment of different offenders.[33] We find this conclusion hard to follow, since this is the historical and current basis upon which costs are awarded by all courts, civil and criminal, across the country. It has not previously been found wanting for the reasons indicated, rather it is considered the fairest way to apportion costs.

28. Moreover, no impact assessment has been carried out to indicate the anticipated charge, nor the costs of enforcing any charge made, nor whether the amount likely to be recovered is worth the costs of the process. The cost of running courts is complex and varied. Courts employ many staff whose salaries, national insurance, pensions and employment rights must be paid for. They incur utility, IT, insurance and other maintenance costs for the court buildings and capital costs for the court estate. Are all these costs to be included in a charge?

29. Likewise, each case will involve differing complexities such as type of offence; length of trial; complexity of issues, which must be factored into a court charge. For example:

- Should multiple defendant cases bear the costs evenly? What if a co-defendant has a minor part in the commission of an offence, would they only be required to pay the portion of court time devoted to their share of the proceedings?
- What if during the course of proceedings it appears that evidence has been obtained in breach of the Police and Criminal Evidence Act 1984 and an application to exclude evidence is necessary, which takes a further court day and deliberations of the judge. Should the person

[33] Hansard, PBC, Deb 25 March 2014, col 372

bear these costs if the judge excludes the evidence but a finding of guilt is still made out?

30. Statistical information concerning the cost per-case, per-day is unavailable and there is no information regarding the likely recovery of these charges on top of fines, compensation awards, victim surcharges and prosecution costs that are already imposed in criminal trials. Of the information publicly available it seems that a significant amount of money is already owed by people under court orders. The total overdue debt to HM Courts & Tribunals Service in all cases was £2 billion as at March 2013. Of this, £1.3 billion amounts to confiscation order debt and £0.7 billion is described as "other".[34] The Courts Act 2003 provides for a fines collection scheme. A collection order made by a magistrate usually groups all financial impositions, including fines, compensation, costs and victims' surcharge unless there is a good reason for it not to be included.[35] In 2010/11[36] there was a total financial imposition of £413m though it is not clear if this includes costs, surcharges, etc. for cases not dealt with solely by way of fines. These figures do not provide accurate information to assist in understanding the impact of court charges.

31. With regard to enforcement of penalties, in 2011/12 the cost to HM Courts and Tribunals Service for the enforcement of fines, penalty notices and confiscation orders was £54m. The service employs 340 Civilian Enforcement Officers and 1500 enforcement administrative staff.[37] As of December 2010, the total outstanding debt for all criminal financial penalties was £608m. Aged debt (>12 months) was £420m, made up of 1.2 million individual accounts.[38] It also appears that HM Courts & Tribunals Service plans to outsource its enforcement activity to the private sector in 2014, under its Compliance and Enforcement Services Project.[39] Given the announcement on 11th June that fines levels are set to dramatically increase, the likelihood of convicted people being able to cover all of the existing charges in addition to court costs is very uncertain. The Government must produce proposals for

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[34] http://www.nao.org.uk/wp-content/uploads/2015/02/Managing-debt-owed-to-central-government.pdf, at p14.

[35] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217304/hmcts-aged-debt-pilot-report.pdf at [10]. Nearly 900,000 offenders were sentenced to a fine in criminal courts; some 65% of criminal cases were dealt with by way of financial penalty.

[36] Ibid at [2].

[37] Ibid at [3].

[38] Ibid at [27].

[39] Ibid, at p43.

regulating the courts costs process as soon as possible in order for these complex and important details to be properly considered by Parliament.

32. With little explanation of how the costs recovery scheme will operate, or any safeguards to protect the integrity of the criminal justice system, we consider the demand for court charges to be unprincipled, unjustified and unnecessary. The Government must make available information regarding the current demands upon convicted persons before Parliament is asked if they are able to sustain more. It must also make clear how it intends to recover these charges without incurring disproportionate enforcement costs, and in a way that is fair to the convicted person. We currently do not see how this will be possible.

JUSTICE

26 June 2014