Criminal Justice and Courts Bill

House of Lords

Report Stage

Briefing and Suggested Amendments on Part 1

October 2014

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 *(Part 4)*

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, given the release requirements imposed by the Bill;**
- **Recall Adjudicators will not successfully relieve the burden unless they are also properly resourced, independent, suitably qualified and apply fair processes with procedural safeguards for prisoners;**
- **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;**
- **Prisoners serving indeterminate sentences for public protection with a tariff of less than two years, and imposed prior to 2008, should be released;**
- **Second offence custody for knife crimes is unjustified, especially for children**

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 and tabled amendments in Part 1 of the Bill. We have prepared and circulated a separate briefings on Part 3 and the changes to judicial review in Part 4, which we will update in readiness for Report. 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 – over 30 in the Bill at Committee stage, with more proposed for Report. 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 the use of imprisonment.

3. While we continue to hold concerns about many aspects of the Bill, there are three priority areas that we are concerned must be addressed before the Bill is passed. We invite members of the House to support the tabled amendments that address our pressing concerns.

Parole Board Release
Clause 3 – Schedule 15B
Lord Beecham, Lord Kennedy of Southwark
Amendment 1
Page 4, line 43, at end insert—

"(13) Before this section comes into force, the Secretary of State shall—

(a) consult the Parole Board about the resources required for additional hearings resulting from the implementation of this section; and

(b) lay a report before Parliament containing—

(i) his assessment of the resources required for additional hearings; and

(ii) his plans to ensure that the Parole Board has adequate resources to fulfil the requirements of this section effectively."

4. Clauses 3, 4, 5 and 7 change the automatic release rules for prisoners serving extended sentences, offenders of particular concern and the test for release following recall of prisoners on license. Clause 3 extends the category of listed offences for which people can receive a life sentence or extended determinate sentence. Clauses 4 and 6 make 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). Clause 8 requires the Secretary of State or Parole Board to only release a person where they are satisfied that the person is not highly likely to breach a condition in their licence.

5. These changes 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. Widening the category of cases that must be qualitatively 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[1] and PRT[2] record in their briefings, the Parole Board is under considerable strain as a result of cuts to staff and double the number of oral hearings.[3] The Parole Board's most recent newsletter estimates 9,000 hearings a year up from 4,500 will be needed.[4] This will be managed only due to significant efforts to re-organise resources. The Board is under pressure even before the proposals in the Bill take effect.

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.

7. Lord Beecham's amendment would ensure that consideration is given to the impact of the changes upon the resources of the Parole Board and sufficient provision put in place to meet the increased demands. Without this there is a risk that the Parole Board will be overwhelmed and custodial terms will extend, risking violation of the article 5 ECHR right to liberty of prisoners.[5]

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[1] 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

[2] 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

[3] 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.

[4] Parole Board, 'The Boardsheet', August 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/349062/Boardsheet.Aug.14.pdf See also 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

[5] The European Court of Human Rights found in *James, Wells and Lee v UK,* App. Nos. 25119/09, 57715/09 and 57877/09 (18 September 2012) that the post-tariff detention of the IPP prisoner applicants was arbitrary due to delay in the progression of the sentences and the failure to provide appropriate courses and therefore unlawful until steps were taken to resolve the problems.

Clause 7 Electronic monitoring following release on licence etc
Lord Marks of Henley-on-Thames, Baroness Linklater of Butterstone, Lord Carlile of Berriew, Baroness Harris of Richmond
Amendment 6
Page 6, line 33, at end insert—

> **"(c) include provision for the court to decline to make an electronic monitoring condition in any case where the court considers that it would be unjust, unnecessary or impractical to do so."**

Lord Beecham, Lord Kennedy Of Southwark
Amendment 7
Page 7, line 13, at end insert—

> **"(1A) The code of practice must include a requirement that a person carrying out electronic monitoring who is not a public authority, as defined by section 3 of the Freedom of Information Act 2000 (public authorities), shall provide information in respect of the carrying out of electronic monitoring in the same manner as if they were such a public authority."**

Amendment 8
Page 7, line 19, at end insert—

> **"(6) A code of practice under this section must be made by statutory instrument.**
> **(7) A statutory instrument containing a code of practice under subsection (3) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."**

8. Section 62 of the Criminal Justice and Courts Services Act 2000 (the 2000 Act) 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 7 amends the legislation through clause 7(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 without proper scrutiny of Parliament, or of the individual's circumstances. The power is unnecessary and disproportionate and should be removed from the Bill. Amendment 6 would enable discretion to be exercised.

The UKSC has this year heard a further challenge of lawfulness of detention in IPP cases (*Massey and Robinson)*. Judgment is pending.

9. 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 why this power cannot be exercised more frequently without the new power in the Bill.[6] 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.

10. The Impact Assessment[7] 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. Existing provisions already do this. Moreover, 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.

11. A mandatory provision also makes 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 and violent offenders, many of which were also given curfew and exclusion requirements by way of individual assessment.[8] We are concerned that without provision for express limits and

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[6] The existing power in s62(2)(b) is not being exercised. The Minister confirmed during Committee Stage debate in the Commons that current technology only allows for curfew orders to be monitored, see Col. No. 182, 18 March 2014.

[7] 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

[8] 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/d

safeguards around who will be subject to an order, this form of surveillance will become routine and widespread without adequate opportunity for oversight. This is all the more concerning given that the body undertaking the monitoring is likely to be a private company.[9] In order to ensure a monitoring requirement is fair and proportionate in the circumstances, it should be imposed on a case by case basis, with appropriate assessment of the offender and their offence.

12. A blanket monitor could also pose a disproportionate invasion of privacy, particularly over lengthy license periods,[10] and the storage of the data obtained is a matter of concern. 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 concerns apply to the proposal for blanket electronic tracking and the data obtained through it. While we remain opposed in principle to the proposed power, at the very least a code of practice would be required to assuage these concerns and Amendments 7 and 8 implement the recommendations of the recent Joint Committee on Human Rights report, which concludes that:

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ocs/satellite-tracking-of-offenders.pdf (Pilot Study) The pilot study was conducted between 2005 and 2006 and reviewed tags of 336 offenders.

[9] 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.

[10] 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.

> 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 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.[11]

13. Furthermore, rather than support the desistance of released persons by integrating them back into society, this measure will engender suspicion and confrontation with the police from the outset because tracking data may 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 could counteract those efforts.

14. If better technology is available, this should be utilised under existing legislation, on a case by case basis and in a manner consistent with the right to private life of those concerned. However, a wide-ranging power to impose mandatory electronic tracking by executive order, of a whole class of people, is in our view wholly unjustified.

Before Clause 8 Recall Adjudicators
Clause 8 Release after recall
Clause 9 Power to change test of release after recall

15. The Government has tabled amendments nine to 38 that would introduce a new recall adjudicator process to consider the detention or release of a prisoner who has been recalled to prison during the period of their licence.

16. We assume that this has been introduced to alleviate the burden upon the Parole Board, as set out above. To this extent, the provision is welcome. However, it is entirely unclear how the new adjudicators will operate. Given the late introduction of this newly devised body in the Bill, we are concerned that the continuing scrutiny of Parliament is necessary over its establishment and operation. This would enable proper consideration of whether

[11] 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.

sufficient resource is allocated to the establishment of adjudicators, to avoid delay and therefore unlawful detention.[12] Recall adjudicators will have to be sufficiently qualified and trained to understand the complexities of prison regulation and human rights considerations as to detention of prisoners. Although the UK Supreme Court has recently held in the case of *Whiston*[13] that article 5(4) ECHR does not apply to prisoners recalled on Home Detention Curfew or serving determinate sentences, it is not at all certain that the right to a speedy decision as to the lawfulness of detention by an independent tribunal is not engaged by this proposed system. Notwithstanding, common law principles of fairness do apply, and require the person to have the opportunity to make representations at an oral hearing before an independent arbiter concerning their detention, and be legally represented (with publicly funded legal aid) if they so choose. It is unclear why the Parole Board is not the best body to continue to oversee and carry out the review of release following recall, especially given the heightened test that will apply to the consideration of release provided by clause 8 of the Bill – that the recall adjudicator is satisfied that it is highly likely the person will not breach their licence conditions.

17. We share the concerns set out by the Prison Reform Trust[14] in its detailed briefing regarding the operation of review hearings that "A fair and transparent process of recall and review is vital to ensure people are not unjustly deprived of their liberty when they are recalled to custody" and cooperation between relevant services is key to ensuring the correct decisions are reached. We would urge Peers to vote against the amendments until the Government has shown cause for and provided detail as to the operation of the new proposals.

Clause 10 Initial release and release after recall: life sentences and IPPs
Lord Lloyd of Berwick, Lord Brown of Eaton-Under-Heywood
Amendment 39
Page 11, line 2, after "(prisoners)" insert—

"(a) after subsection (2) insert—

"(2A) Without prejudice to the powers of the Secretary of State to change the release test under this section, the Parole Board shall direct the release on

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[12] Such as in *James* above.

[13] *R (on the application of Whiston) v Secretary of State for Justice* [2014] UKSC 39

[14] PRT, 'Recall Adjudicators, House of Lords Report Stage', available at: http://www.prisonreformtrust.org.uk/Portals/0/Documents/CJC%20Bill/PRT%20Briefing%20Recall%20Adjudicators.pdf

licence of prisoners serving indeterminate sentences with a tariff of less than 2 years imposed before 2008 when the Criminal Justice Act 2003 was amended.";"

18. The indeterminate sentence for public protection was introduced in 2003 and inadvertently demanded all offenders who were convicted of a specified offence to be sentenced to an IPP, irrespective of their circumstances. This was remedied by the Criminal Justice and Immigration Act 2008 which introduced judicial discretion. However, it was accepted by Parliament in the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LASPO), that the IPP was no longer suitable, and the sentence was abolished. As we said in our briefing on LASPO, 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.[15] 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.[16]

19. As at 30 June 2014, there were 5,118 IPP prisoners, of which 3,620 had passed their tariff. There were also 7,469 prisoners serving life sentences, of which 2,557 had passed their tariff.[17] We also highlighted in our LASPO briefing that it is unacceptable to leave those sentenced to an IPP in prison past their tariff any longer than is absolutely necessary, particularly given the Government's acknowledgement of the failings of the sentence. There can no longer be any justification for keeping IPP prisoners incarcerated who sentences were passed prior to the 2008 Act, before any opportunity for judicial

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[15] 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

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

[17] Ministry of Justice, *Prison Population Tables* (30 June 2014), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276084/prison-population-tables-q3-2013.xls and Ministry of Justice, *Offender Management Statistics Bulletin England and Wales*, Quarterly January – March 2014 (31 July 2014), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339023/offender-management-jan-mar-2014.pdf at page 8.

discretion as to imposition of the sentence was available. The amendment seeks to remedy the position for the people who continue to be affected.

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
Lord Marks of Henley-on-Thames, Baroness Linklater of Butterstone, Lord Carlile of Berriew, Baroness Harris of Richmond
Amendment 63
Page 25, line 1, leave out "16" and insert "18"
And subsequent amendments

21. 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.[18]

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[18] PRT Briefing, note 2 above, p9.

22. This amendment would prevent the new sentencing provision from applying to children and we would urge Peers to support it.

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17 October 2014