Crime and Courts Bill 2012

Briefing for Committee Stage
House of Lords

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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. 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, and for the broadcasting of court proceedings from the Court of Appeal. 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, and community sentencing.

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, the recording of court procedures. With respect to community sentencing, since the Government has not yet completed its consultation on effective community sentencing, the absence of a clear remit leaves the opportunity to introduce important changes to the system at a late stage of the Bill when full scrutiny will no longer be possible. 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 (see clause 28);

- The NCA is afforded to wide an exclusion from 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;
- 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 offers must be clearly and narrowly defined.

PART 1 – THE NCA

4. Part 1 of the Bill, and Schedules 1, 2 and 4 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. Clause 2 enables the Home Secretary to confer counterterrorism functions on the NCA, through orders subject to the super affirmative procedure. Though in principle JUSTICE does not object to the creation of the NCA, insufficient detail has been provided as to the powers and functions that are envisaged. The Bill suggests this will be contained in a 'framework document' rather than the Bill itself. We agree with the criticism raised during Second Reading[1] about the delay in making available that framework document and the difficulties this will cause for the Committee in approving the legislation. In our view, the omission of clear parameters to the NCA from the Bill will prevent the Committee from carefully assessing whether the intrusion into the civil liberties of the public that the NCA is undoubtedly expected to perform are justified. The structure and functions of the NCA should be specifically set out in the Bill.

6. Schedule 8 provides that the NCA will be exempt from freedom of information legislation. However, the functions of the NPIA and the UK Borders Agency,

[1] Hansard, Second reading, House of Lords, 28 May 2012.

which the Bill proposes will be covered by the NCA, were not previously exempt from FOI. There is no explanation or justification for this exemption, particularly given that 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.[2] 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. Unless a justified reason is given for an exemption to disclosure the Government has committed to ensuring openness and transparency because 'unnecessary secrecy in government leads to arrogance in governance and defective decision-making.[3]

PART 2 – COURTS MODERNIZATION AND JUDICIAL APPOINTMENTS

Clause 22 - Filming and sound recording in court

7. Clause 22 provides for the Secretary of State 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,[4] 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 22(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:

> 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

[2] Liberty's Second Reading Briefing on the Crime and Courts Bill in the House of Lords, May 2012.
[3] White paper, *Your Right to Know The Government's proposals for a Freedom of Information Act*, Cm 3818 (TSO: 1997) http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm
[4] 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.

> 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.[5]

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. Without clear parameters in the Bill as to when recording is appropriate, the provision could be used in circumstances which will impact upon the proper administration of justice.

8. Whilst courts are generally open to the public, recording affords the opportunity to the broadcaster to film and edit the proceedings in a way that they consider more interesting to the television viewer. Recordings can be repeatedly viewed and widely disseminated. As Baroness Kennedy[6] explained during Second Reading, without being present in the court room it is impossible to observe all participants in a trial, their reactions to questions, answers and to appreciate the proceedings in sequence and in full. This can only impact adversely upon victims, witnesses and defendants at trial. Since the Government's own paper accepts this, there is no justifiable reason for excluding the recording of evidence from the face of the Bill. Safeguards must be inserted into the Bill to ensure that evidence will not be recorded, vulnerable witnesses will be protected, and sensationalism is prevented.

Clause 23 - Community sentencing to be made by regulations

9. Clause 23 provides for the Secretary of State to make regulations for non-custodial sentences of people aged over 18. On 27 March 2012, the Ministry of Justice published a consultation on community sentencing entitled *Punishment and Reform: Effective Community Sentences (Cm 8334)*. The consultation seeks views on a set of proposed reforms to the way sentences served in the

[5] Ministry of Justice, *Proposals to allow the broadcasting, filming, and recording of selected court proceedings,* May 2012, p. 21.
[6] Note 1 above, cc 1038-1040

community operate in England and Wales. The consultation is scheduled to conclude on 22 June 2012.

10. According to the Explanatory Notes,

> Given the timing of the consultation clause 23 is designed as a placeholder to allow the Secretary of State for Justice to bring forward amendments in the light of responses to the consultation.

As a consequence, the Lords in Committee will have no opportunity to consider what proposed legislation may be brought forward. Given the potentially wide ranging changes to the sentencing framework this is unacceptable. We hope that time will be provided to ensure the Lords can consider the proposals once inserted.

11. In any event, clause 23 is worryingly drafted. Non-custodial penalties must not be created by regulation. The clause should be removed from the Bill and if proposals are brought forward in the future this should be done by amendment in the usual way.

PART 3 – BORDER CONTROL AND CRIMINAL JUSTICE

Clause 24 – Removal of Rights of appeal against refusal of a family visit visa

12. Clause 24 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.

13. 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.

14. 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, the poor track record of the UK Border Agency does not instil confidence in the decision making process:

> 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.[7]

15. The removal of the right to appeal could unfairly impact upon the Art 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 structured is therefore unjustified and disproportionate.

Clause 25 – Removal of in-country right of appeal of persons excluded from the UK by the secretary of state

16. Clause 25 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

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

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.

17. 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 situation raises several serious problems.[8] Not only is it extremely difficult to conduct a satisfactory appeal in absence, but in cases where the life or integrity of the person is in danger in their 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 be a huge risk to the well being and even life of an applicant.

Clause 26 – Powers of immigration officers

18. Clause 26 and Schedule 14 of the Crime and Courts Bill 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).

19. 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.[9] Although the Explanatory Note[10] 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.

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[8] Liberty's Second Reading Briefing on the Crime and Courts Bill in the House of Lords, May 2012, p. 9.
[9] *Ibid,* p. 10.
[10] At [380].

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