Policing and Crime Bill

Briefing on Second Reading
House of Lords

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Introduction and summary

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. It is also the British section of the International Commission of Jurists.

2. This briefing is intended to highlight JUSTICE's main concerns regarding the Policing and Crime Bill. Where we have not commented upon a certain provision in the Bill, that should not be taken as an endorsement of its contents.

3. Our interest in the Bill is focussed upon Parts 2, 3, 4 and 6 and 8; in particular we are concerned that:

- **The Bill fails to decriminalise child victims of sexual exploitation;**
- **Many of the provisions on prostitution will be counter-productive and will make conditions less safe for sex workers;**
- **Dispersal of 10-15 year olds from the streets may be used arbitrarily and will put children at risk;**
- **The regime for 'gang injunctions' is likely to contravene fair trial provisions;**
- **The 'gang injunction' provisions are extremely vague; 'gang' is still far too broadly defined;**
- **They are not reserved for serious cases, and include 'violence against property' in the definition of 'gang-related violence';**
- **They can be used in order to protect an individual; in the case of adults this is an inappropriate use of an injunction;**
- **People should not be returned under Part 6 to states where they are at risk of human rights abuses;**
- **A person who may be returned under Part 6 is entitled to a judicial hearing in order to raise any human rights concerns. The Secretary of State should not be the decision-maker as to the compatibility of the return;**
- **Extended periods of detention under provisional arrest where a European Arrest Warrant has not even been issued should not be entertained;**
- **Live links should not be used in extradition proceedings, in particular at initial hearings;**
- **The new scheme for retention of DNA and other samples should be the subject of primary legislation and should not proceed via regulations.**

Part 2: Sexual offences and sex establishments

Clauses 13 and 14: Paying for sexual services of a prostitute subjected to force etc

4. Clauses 13 and 14 would create new offences in England and Wales and Northern Ireland, respectively, where a person pays or promises payment for the sexual services of a prostitute, and a third person has, for or in the expectation of gain, used force, deception or threats likely to induce or encourage that prostitute to provide those services. The offences are of strict liability, in that it is irrelevant whether or not the client was aware that the prostitute was controlled for gain.

5. These offences were amended by the government following opposition in the Commons to earlier versions which referred to prostitutes who were 'controlled for gain' by a third person. JUSTICE opposed the earlier versions of these offences on the grounds that the definition of 'controlled for gain' was too broad and in particular, did not require the absence of free will. In that context, we welcome the amendments made by the government. However, we also opposed the earlier provisions because they created offences of strict liability, and this aspect is unchanged.

6. While strict liability offences may be appropriate in certain contexts (such as regulatory offences or environmental pollution) we do not believe that a strict liability offence is appropriate in these circumstances. While a person using the services of a prostitute should be under a duty to make reasonable inquiry as to whether those services are being provided of the prostitute's own free will, there may be cases where a third person has used force, deception or threats that reasonable inquiry would not discover: for example, where an absent pimp has promised a reward to the prostitute that he never intends to provide. In these circumstances we believe that it would be inappropriate to criminalise the client, particularly since the reputational damage associated with a conviction of this type could be severe. Further, a minor summary only offence would in our view be insufficient to address the criminality in those cases where a client was aware or suspicious of force, deception or threats (for example, due to visible signs that the prostitute's liberty was restricted or that she had been frequently subjected to violence) but chose to pay for sexual services anyway.

7. We are also concerned that the creation of these offences may be counter-productive if, as we hope, their aim is to combat the coercion of trafficked people and others into prostitution and the exploitation and abuse of prostitutes by violent pimps. To

criminalise clients of prostitutes in circumstances which the client cannot control (since they can often not be sure that the prostitute has not been subject to force, deception or threats, thereby making them liable for these offences) may lead them to prefer to use sexual services in locations out of the public eye – away from known kerb-crawling areas, red light districts and signposted brothels and in more isolated locations – and the industry may respond to those preferences. Further, where a client does become suspicious that a prostitute is being abused or coerced, to criminalise him may deter him from reporting this.

Clause 15: Amendment to offence of loitering etc for purposes of prostitution
Clause 16: Orders requiring attendance at meetings

8. Clause 15 proposes that loitering or soliciting by a prostitute would only be an offence if it takes place on more than one occasion in any period of three months. However, this is in our view a largely meaningless change. The criminalisation, and use of anti-social behaviour orders (ASBOs), against street sex workers is, we believe, likely to make them more unsafe by: encouraging them to seek out more isolated areas in which to work; discouraging them from reporting dangerous clients or attacks; discouraging them from seeking help from services such as needle exchange; etc. While it is entirely understandable that local authorities and communities do not welcome the presence of 'red-light' areas, these will inevitably remain somewhere unless their causes are better addressed.

9. Clause 16 represents an attempt to address causes by requiring convicted prostitutes to attend meetings with a supervisor. However, it must be questioned why this attempt at helping street sex workers should be carried out through the criminal justice system. Money spent on processing (and re-processing) prostitutes through the criminal justice system could be better diverted into the widespread provision of refuge, addiction and counselling services and through the pursuit and prosecution of violent and coercive pimps and traffickers.

10. We are also extremely concerned at the government's continuing failure to decriminalise child prostitutes, who as victims of sexual exploitation should be subject to protection and support, not arrest and prosecution. The Joint Committee on Human Rights has supported decriminalisation for under 18s and suggested an amendment

to this Bill which we support.[1] Further, in its latest set of concluding observations on the UK's compliance with the United Nations Convention on the Rights of the Child, the UN Committee on the Rights of the Child emphasised that:[2]

> *The State party should always consider, both in legislation and in practice, child victims of these criminal practices, including child prostitution, exclusively as victims in need of recovery and reintegration and not as offenders.*

This policy was acknowledged by the government in 2008 during the passage of the Criminal Justice and Immigration Bill, when the Minister said that he wished to give the:[3]

clear message that child sexual exploitation is a grave crime that will not be tolerated and that the child is always the victim.

11. We believe that the continued criminalisation of children involved in prostitution is likely to deter them from seeking assistance from the authorities and plays into the hands of abusers. We draw attention in this context to the House of Lords Second Reading briefing of the Standing Committee for Youth Justice (SCYJ), of which JUSTICE is a member. We therefore believe that even if the offence of loitering/soliciting is retained for adult prostitutes it should be repealed for children.

Clauses 18 and 19: Soliciting

12. We oppose the creation of these offences, for similar reasons to our opposition to clauses 13 and 14 above. Criminalisation of kerb-crawlers will not deter those with little respect for the law and we are concerned that it is likely to lead to an increase in violence against sex workers. Like other prohibitory measures, we fear that it is likely to push street prostitution into more isolated areas. JUSTICE has not taken a position on the morality of prostitution but we believe that – as in the case of controlled drugs – while it is possible that legal prohibition may deter some clients from using prostitutes, many others – in particular those with less respect for the law in general –

[1] Ibid, pp23-25.
[2] UN Doc CRC/C/GBR/CO/4, 20 October 2008, para 74.
[3] *Hansard*, House of Commons Tuesday 27th November. Column 537ff

will not be so deterred. We believe that the priority should therefore be to ensure that sex work is carried out only by willing participants, in a safe environment, but fear that these provisions are likely to make prostitutes less safe.

Clause 20: Closure orders

13. Where premises are being used for child sexual exploitation, clearly serious offences are being committed; in these circumstances appropriate remedies must lie in arrest and prosecution of offenders and if necessary care proceedings in relation to the children. Closure orders cannot provide an adequate alternative in these circumstances, and we question to what extent they would in fact deter such activity – which could of course simply move to different premises not known to the authorities. We hope and assume that they would be used alongside rather than instead of arrest and prosecution in relation to premises associated with offending against children.

14. However, our objections to Schedule 2 centre upon the use of these orders against ordinary brothels. The legislation fails to distinguish between premises where people are being forced into sex work by violent or coercive pimps and traffickers, and brothels where prostitutes are working of their own free will. In relation to non-consensual trafficking and coercion, the appropriate remedy again lies in criminal proceedings against the pimps and traffickers concerned; undercover policing, surveillance and other techniques are available to facilitate the prosecution of those responsible. We question whether a closure order would do more than force determined traffickers or violent pimps to move the sex workers to other premises (perhaps further away from the public eye, where they may be even less safe).

15. Where a brothel is operating with the free consent of those working within it, however, different considerations should apply. We fear that the closure of brothels through closure orders is likely to have counter-productive effects: forcing some prostitutes into street prostitution, or into working in their own homes or client's homes, which is likely to be less safe and will also expose children of prostitutes to risk; pushing other brothels 'underground' into less safe, more isolated locations. Like other provisions related to prostitution, therefore, these orders are likely to be counter-productive. If the government wishes to remove brothels from residential areas for understandable reasons, they should provide a safe alternative (for example, licensed brothels in designated non-residential areas).

Part 3: Alcohol misuse

Clause 27: Increase in penalty for offence

16. This provision would increase the maximum fine for consuming alcohol in a designated public place from level 2 (currently £500) to level 4 (currently £2,500). We believe that a £2,500 fine is a disproportionate penalty for an offence of this type, even if committed persistently. We are concerned that hefty fines could be used against problem drinkers suffering from alcoholism (in particular those who are also homeless) who may already have financial problems and for whom financial penalties will do nothing to counteract their dependence on alcohol and may result in further social exclusion. We therefore question the necessity of this provision.

Clause 29: Confiscating alcohol from young persons
Clause 30: Offence of persistently possessing alcohol in public place

17. We believe that children and young people who are drinking in public places should not, without more, be subject to criminal sanction; dragging them into the criminal justice system and giving them a criminal record will have damaging effects upon their future prospects for employment and will be little deterrent against what is common teenage behaviour. In relation to younger children in particular, public drinking suggests a lack of proper supervision and carries evident risks to their health. A welfare-oriented approach should therefore be used. Criminalising this behaviour may also lead to children seeking out isolated locations in which to drink in which they may be at risk, particularly at night.

18. We are also disturbed by the proposition in clause 29 that those young people from whom alcohol is confiscated should have to give their name and address to police, and that this is then likely to be used as evidence against them in proceedings under clause 30 in order to establish persistence. Children from whom alcohol is confiscated are therefore required under clause 29 to incriminate themselves; they will not be warned of this by police nor legally advised, nor are they likely to have an appropriate adult with them. Further, there is a risk that false names and addresses may be given and may implicate innocent young people who will then find it hard to dispute their identity as the person from whom alcohol was confiscated.

Clause 31: Directions to individuals who pose a risk of disorder

19. Clause 31 extends the police power to issue 'directions to leave' under s. 27(1) of the Violent Crime Reduction Act 2006 so that they can be issued to children and young people aged 10-15. Section 27 of the 2006 Act grants a power for a police constable to issue an individual with a direction to leave a locality for up to 48 hours. A direction may be issued if an individual in the locality is likely, in all the circumstances, to cause or contribute to the occurrence, repetition or continuance of alcohol-related crime or disorder in that locality and the direction is necessary to remove or reduce that likelihood. There is no requirement in the 2006 Act that those subject to the power are in fact consuming alcohol or are themselves drunk or disorderly.

20. Where children in the 10-15 age group, particularly at the younger end of that age group, are drinking or drunk in public, we believe that this raises serious concerns as to their welfare. A power that merely displaces them to another location – perhaps away from a town centre or other busy public place to a more isolated location such as industrial land or a park at night – may compromise their safety even further. If they are genuinely likely to commit offences it may well make it easier for them to do so by removing them from the location where police are patrolling.

21. We therefore believe that this power should not be extended to 10-15 year olds, and that instead children who are at genuine risk as a result of drinking or alcohol-related crime and disorder should be removed to their home or a place of safety and other appropriate services engaged if necessary.

Part 4: Injunctions: gang-related violence

22. While we support the government's intentions to address the serious harm caused to individuals and communities by gang-related crime, we believe that these provisions go beyond what is appropriate for an injunction and in effect are an attempt to bypass the due process guarantees of the criminal justice system by using the civil courts instead of bringing criminal prosecutions. In this they replicate many of the problems of control orders, anti-social behaviour orders (ASBOs) and other similar orders already in existence. In our view, the purpose of an injunction is to restrain specified unlawful behaviour where the court is satisfied that it is ongoing or threatened, and where alternative relief will not suffice, through orders aimed directly at the specified unlawful behaviour. A positive requirement may rarely be imposed – for example, to correct an existing unlawful situation brought about by the defendant or to enforce a contractual provision.

23. However, it is entirely inappropriate to use an injunction to create an individual code of behaviour for a person – to restrict their liberties and enforce certain activities upon them in whatever way the court thinks beneficial to them and to society, on an ongoing basis. Just as ASBOs have been used inappropriately to attempt (often, unsurprisingly, unsuccessfully) to control the behaviour of people with mental illness and addiction problems, we fear that these provisions will be used to control the associations, activities and movement of people who have committed no crime but whose lifestyle, style of dress, place of residence and associations have aroused suspicion. In particular, these provisions may impact disproportionately upon young men, and in particular black and minority ethnic young men.

24. We recognise that difficulties may be encountered in prosecuting cases of gang-related crime due to witness intimidation; however, methods of investigation such as bugging, use of informants, telephone intercepts (evidence of which remains, unfortunately, inadmissible in criminal proceedings), and witness protection measures are available. There may also be circumstances in which civil orders could be legitimate – for example, to restrain a known threat to an individual. However, such a wholesale regime of behavioural control as is proposed here is, we believe, equivalent to a criminal sanction and therefore the guarantees of a criminal trial and of Article 6(3) European Convention on Human Rights (ECHR) should be offered.

25. We also believe that it is unlikely that the regime in Part 4 would be found to be compatible with the ECHR in domestic proceedings; at the least, the provisions would have to be severely read down in scope under s3 Human Rights Act 1998. In the well-known case of *McCann*[4] the House of Lords held in relation to anti-social behaviour orders (ASBOs), that given the seriousness of the matters involved, at least some reference to the heightened civil standard of proof – *which was all but indistinguishable from the criminal standard* – should apply. They decided that as a matter of pragmatism, the criminal standard of proof should be applied in ASBO cases. 'Injunctions to prevent gang-related violence' will in many cases involve more serious matters than those raised in ASBO applications – which can address relatively minor issues involving nuisance neighbours and minor disorder. They represent a much more serious slight upon the reputation of a respondent. It is therefore inappropriate for a lower standard of proof to apply.

26. Further, while ASBOs can only impose prohibitions, these injunctions could include mandatory requirements – equivalent or more serious than many community sentences following criminal convictions. This extremely open-ended power would allow courts to impose requirements including curfews; attending certain programmes; etc. The fact that the stated purpose of such requirements is to prevent violence, or the assistance or encouragement of violence, is not determinative of whether they amount to a criminal sanction for the purposes of the ECHR.

27. We understand that since injunctions are not enforceable against children these provisions are, for the present, directed only at adults. We do not believe that adults, outside the mental health or mental capacity context, should be the subject of compulsory protective interventions by the courts; we therefore do not believe that it is appropriate to grant an injunction against an adult to protect him from gang-related violence, as cl33(3)(b) provides.

28. We are also concerned that the grounds upon which an injunction can be granted are far too broad. As a result of concerns expressed at earlier stages of the Bill the government has introduced a definition of 'gang-related violence' as violence or a threat of violence (against person or property) which occurs in the course of, or is otherwise related to, the activities of a group that consists of at least 3 people, uses a

[4] *R v Manchester Crown Court, ex parte McCann* [2002] UKHL 39

name, emblem or colour or has any other characteristic that enables its members to be identified by others as a group, and is associated with a particular area.

29. Aside from the requirement of violence, the group characteristics could describe any local football team, not to mention numerous other sports teams, clubs and associations, local uniformed services, etc. No reference to criminality is included. The 'violence' requirement need only be 'related to' the activities of the group, not committed by members of the group. The respondent need only be proved (on the balance of probabilities) to have 'encouraged' such violence, or the threat of such violence. Ordinary criminal damage (violence against property) is sufficient to constitute 'violence' for these purposes.

30. Considering the sweeping nature of these powers, the conditions for their exercise are far too broad. We emphasise that although these provisions create civil injunctions they can result in imprisonment for contempt. We also reiterate our concern that these injunctions can exist perpetually in their current form and no time limits for their duration have yet been introduced into the Bill. We believe that considerable amendments should be made to these provisions if they are to remain in the Bill, and will propose amendments at later stages.

Part 6: Extradition

Clauses 67– 69 – Deferral of extradition

31. The Bill's proposed amendments in clauses 67 to 69 deal with a gap in the application of the Extradition Act 2003 to circumstances where it is discovered that a person arrested has charges pending or is serving a sentence in the UK. The current power to defer exists only at the time of the extradition hearing and not before. We welcome the identification of this omission.

32. However, we consider it imperative that bars to extradition must be addressed *at the point when the request is made*, not once the domestic matter has been resolved at some date in the future. There may be any number of reasons why the extradition request definitively cannot be entertained. It is accepted in international law that to detain a person for more than 5 years pending the execution of a death sentence amounts to inhuman and degrading treatment: the requesting country retains the death penalty or torture for which there is reasonable belief that the defendant will face these; there is a passage of time bar; the crime has already been tried here or in another country; the defendant suffers from a physical or mental condition through which it would be oppressive or unjust to extradite; Article 6 or 8 reasons pertinent to the individual concerned. Bars such as these are not going to resolve in the intervening period. The ensuing uncertainty to the defendant of adjourning a warrant where there are clear bars to extradition is unconscionable. If the requesting state wishes to pursue the warrant at a later stage when there are no domestic proceedings, they can reapply and provide representations as to how the circumstances have changed in their favour. It should not be to the detriment of the defendant that proceedings are adjourned.

33. We therefore believe that the judge or the Minister should be obliged to consider bars or human rights implications at the point where the request is made.

Clause 71 – Return to extraditing territory etc

34. We welcome the inclusion of the Refugee Convention in addition to the Human Rights Act 1998 in new section 153D(1) but we believe that the proviso in s153D

should go further, as was proposed by the Joint Committee on Human Rights in their report on the Bill.[5]

35. The proviso in section 153D of the Extradition Act 2003 (EA) is particularly important given that the proposed amendments provide no limit on which territories may be granted an undertaking. By extending the ambit of the undertaking to territories outside the Council of Europe, many countries will not be signatories to the ECHR. The decision maker must be required to consider the type of regime that is requesting the undertaking, likely procedure, prison conditions and sentence. Furthermore, there is no consideration built into section 153C EA as to how the sentence passed in the UK will be served in the executing territory, whether early release will be available and what body permits release. A requirement to ensure Convention rights alone are complied with will not guarantee that the procedure and sentence will be carried out in accordance with UK law.

36. Furthermore, in relation to European Arrest Warrant (EAW) countries, it is disappointing that, despite the aims of the EAW Framework Decision[6] to abolish extradition between EU Member States and to replace this with a system of surrender through judicial process, the Secretary of State is to be given this power rather than a judge at a hearing. We consider that as a minimum, the Secretary of State must consider the representations of the defendant. Logically, the Secretary of State will have to be informed that there are human rights implications before these can be raised as a bar. Whilst it may be possible to obtain routine information on the regime in place in the requesting country, it will not be possible to obtain information on the particular circumstances pertaining to the individual unless he is given an opportunity to raise representations in that regard.

Clause 75 – Provisional arrest

37. The provision affords the presiding judge discretion to allow an extension of *provisional* arrest where they consider that the initial 48-hour period could not reasonably be complied with. The Explanatory Notes do not justify why this additional 48-hour period is necessary, nor has evidence been produced at Committee Stage.

[5] *Legislative Scrutiny: Policing and Crime Bill*, Joint Committee on Human Rights, Tenth Report of Session 2008-2009, HL Paper 68, pp32-34.

[6] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), O.J. l 190, 18.7.02 P. 1

The Government has stated that the suggested amendment is in accordance with Article 5(1)(f) ECHR:

…the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

However, the EAW scheme, under which provisional arrest operates, is intended to remove extradition between Member States and replace it with mutual recognition of judicial decisions from other Member States with a view to arrest and surrender to that Member State. Recital (5) of the EAW framework decision proclaims as follows,

The objective set for the Union to become an area of freedom, security and justice leads to ***abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities****. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member* States *should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.*

38. It is in no way clear that Article 5(1)(c) ECHR does not apply, in that no one shall be deprived of his or her liberty save for:

…the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority ***on reasonable suspicion of having committed an offence*** *or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so…*

And further, as to Article 5(3) ECHR:

…Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power…

39. Furthermore, at the point of provisional arrest, no warrant has yet been issued. There are no grounds for arrest. All section 5 Extradition Act (EA) requires for an officer to arrest without a warrant is *reasonable grounds for believing that a warrant has been*

or will be issued. It is the British police who are making the arrest on the basis of mutual cooperation at that stage. Article 5(2) ECHR requires every arrested person (irrespective of domestic or extradition proceedings) to be informed promptly of the reasons for his arrest and charges against him.

40. The minister suggested at House of Commons Committee stage that the problem was with the time it takes to get a case together prior to issuing a warrant. However, it goes against fundamental legal principles to suggest that arrest can still be effected even if the requesting state cannot found a case with the evidence that it has. In domestic proceedings, the Police and Criminal Evidence Act 1984 (PACE) requires reasonable suspicion to effect an arrest. JUSTICE considers that more protection should be afforded where a foreign request is being made; if the requesting state has not put its case together, it should not be making the request.

41. In *Commr of the Met v Raissi*[7] the Court of Appeal held that it was not reasonable for a police officer to infer that his superiors had good grounds for suspicion that a terrorism offence had been committed when he effected an arrest. He had to have reasonable grounds for suspicion on the information he himself held. Here, officers are already making arrests without reasonable suspicion, in circumstances that we consider could already infringe Article 5 ECHR. To extend the current power past 48 hours is completely unjustified.

42. Furthermore, the suggested exception for weekends and public holidays is not made under s41 PACE, which allows 24 hours post-arrest detention. The exception in the Bill could lead to a period in custody without reasonable suspicion for 144 hours over the Easter holiday period. The same could occur for Christmas if the days fell appropriately. A bank holiday gives 120 hours, and a weekend 96 hours. We believe that detention during these periods would be both arbitrary and excessive.

43. For an officer to exercise their powers under s5 EA, a warrant should be in the process of transmission. A warrant can be transmitted electronically pursuant to section 204 EA, thereby instantaneously, and on the introduction of the Schengen Information System II, this will be the normal means of transmission. We consider it inconceivable that any scenario could justify an arrest without warrant, on reasonable belief that a warrant will arrive rather than an offence having been committed, with a

[7] [2008] EWCA Civ 1237.

remand period for more than 48 hours. This is particularly so since the prospects of bail for an extradition offence are slim.

44. We believe that attention should be paid to narrowing section 5, not extending section 6. No amendment that further restricts the liberty of the arrestee can in our view be justified and we oppose clause 74 in its entirety.

45. Further, observing the minister's explanation that the power is used very sparingly and only in the most serious of cases, the provision should at least reflect its usage. Section 5 requires no higher than a constable to make a decision as to arrest. A senior officer should make the decision and the class of offences for which the section should be used should be restricted.

Clause 76 – Use of live link in extradition proceedings

46. The increasing use of live links in criminal proceedings has no doubt been fostered by the 'CJSSS' ('*Criminal Justice: Simple, Speedy, Summary*') objective of efficiency savings in court hearings. They reduce the risks of delay in persons being transported from prison to court and the pressure placed on cells in court centres. However, this push for expediency should not be to the detriment of a defendant receiving a fair hearing. We welcome the necessary provisos contained in the proposed section 206A(5) that the judge must be satisfied that it is in the interests of justice to give a direction for a live link and the proposed section 206B(2) that a judge must not give a direction until parties have been able to make representations.

47. However, we are concerned at the risk inherent in live link proceedings that ill-treatment, misconduct by public officials or other issues such as self-harm, illness, fitness to plead etc will not be noted by the court or lawyer and/or that the detainee may feel inhibited from confiding in the court or lawyer as to such matters. If a live link is used in an extended detention hearing it is likely to breach Article 5(3) ECHR. The European Committee for the Prevention of Torture (CPT) made the following comments in its report following its 2007 visit to the UK, regarding pre-charge detention in terrorism offence cases:[8]

> *As the Committee has emphasised on previous occasions, one of the purposes of the judicial hearing should be to monitor the manner in which the detained person is*

[8] CPT/Inf (2008) 27, paras 9-10.

being treated. From the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of the judge. Further, it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video conferencing link.

In their response to the report on the CPT's November 2005 visit, the United Kingdom authorities stated inter alia that the judicial authority concerned "has ultimate responsibility for deciding whether the physical presence of a detainee at a hearing is necessary". The CPT cannot agree with such an approach; the physical presence of the detainee should be seen as an obligation, not as an option open to the judicial authority[2]. As regards more particularly the first possible extension of detention beyond 48 hours, the physical presence of the detained person at the judicial hearing would also appear to be a requirement by virtue of Article 5, paragraph 3, of the European Convention of Human Rights. In the Grand Chamber judgment of 12 May 2005 in the case of Öcalan against Turkey, the Court stated that the purpose of Article 5(3) is to ensure that "arrested persons are physically brought before a judicial authority promptly". The Court went on to comment that "Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment".

48. Whilst we appreciate that there is some attraction for routine extradition remand hearings to be conducted by video link, particularly as all hearings take place in Westminster Magistrates' Court and the journeys can be uncomfortable for the defendants, never mind the expense, we question the suitability of live links for extradition proceedings. Firstly this is because of the complex nature of the proceedings, where the legal representative has to explain the intricacies of both the UK and issuing territory's legal systems. This is very difficult to achieve over a live link. Secondly, extradition cases are far more likely to involve persons who require an interpreter. The technical difficulties of attempting to interpret with a live link are numerous.

49. As drafted, the proposed provisions will to apply to the initial hearing, prior to which the person is being held at a police station. The equivalent provision under section 57C(7) of the Crime and Disorder Act 1998 (as amended) requires the consent of the accused.

50. We consider that the provisions should not apply to initial hearings, as this is where instructions and advice are likely to be given for the first time. We wonder when a judge is going to give a live link direction and where the representations are to be made about a live link being unsuitable, other than at the initial hearing, where (as currently drafted) the person is going to appear on live link. If a lawyer has not yet had chance to speak with their client, they will still have to do this through the live link in order to make representations that a live link is not suitable. Even if a lawyer has been involved so far, they may not have had an opportunity to speak with the client (particularly where an interpreter is required) and if counsel is instructed to attend the hearing, they will need to take their own instructions.

51. Furthermore, at an initial hearing the judge is obliged to inform the defendant as to consent pursuant to section 8 EA. A lawyer must therefore explain this process to the defendant and take instructions upon whether they consent. If they do, the ten day period for surrender is triggered. It is not simply an administrative hearing. The initial hearing should accordingly be excluded from the reach of the provision. Otherwise, this hearing will simply be an exercise in adjourning the case off to a day when the defendant can be brought to the court, thereby delaying the surrender period and extending the time remanded in custody.

52. Nor should cases requiring an interpreter be dealt with through a live link. Finally, appeals should be excluded since these are akin to an extradition hearing, which are themselves excluded under proposed section 206A(1)(a).

Part 8: Miscellaneous

Clauses 96-98: Retention and destruction of samples etc

53. Clauses 96 to 98 propose that a new scheme for retention and destruction of DNA profiles, DNA and other samples, fingerprints, shoeprints and photographs should be made by secondary legislation. This follows the adverse judgment of the Grand Chamber of the European Court of Human Rights in *S and Marper v United Kingdom*,[9] which held that the scheme for retaining fingerprints, cellular samples and DNA profiles of people who have not been convicted of offences was a disproportionate interference with their right to a private life under Article 8 ECHR.

54. The relevant periods for retention of DNA and fingerprints are currently being consulted upon by the Home Office in a consultation which did not begin on 7 May 2009[10] – despite the fact that the date of the *S and Marper* judgment was 4 December 2008. The consultation closes on 7 August 2009 and JUSTICE intends to respond to it. We believe that it is extremely important that the new scheme should be properly scrutinised by Parliament and that it is therefore inappropriate to create such a scheme using secondary legislation where there will be limited opportunity for debate and where amendments cannot be made in the House. This is of particular concern in the light of the government's proposals in the consultation paper to retain DNA profiles of people not convicted of any offence for up to twelve years. We therefore believe that clauses 96 to 98 should not proceed in their current form.

JUSTICE

May 2009

[9] App nos 30562/04 and 30566/04, judgment of 4 December 2008.

[10] *Keeping the Right People on the DNA Database: Science and Public Protection*, Home Office, 2009.