Policing and Crime Bill

Briefing and suggested amendments for Committee Stage
House of Lords

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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. Further and consequential amendments may be needed if our suggested amendments are adopted.

3. In short, we are particularly 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, leading to a greater risk of violence against them;**
- **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 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;**
- **Persons 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 make representations in order to raise any human rights concerns. The Secretary of State should not be the sole decision-maker as to the compatibility of the return and decisions must be subject to judicial scrutiny;**
- **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.

Amendments

Page **16**, [*Clause 13*], leave out lines 1 and 2 and insert -

(c) A is, or ought to be, aware that C has used force, deception or threats.

Page **16**, [*Clause 13*] leave out lines 6 and 7.

Page **16**, [*Clause 14*] leave out lines 23 and 24 and insert –

(c) A is, or ought to be, aware that C has used force, deception or threats.

Page **16**, [*Clause 14*] leave out lines 28 and 29.

Briefing

Clauses 13 and 14 of the Bill 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 paying client is aware that the force, deception or threats have been used.

These offences were amended by the government following opposition in the Commons to earlier versions of the clauses 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 on the part of the prostitute. 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.

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 here, particularly considering the damage to reputation that would be done by a conviction for this offence. We therefore agree with the Joint Committee on Human Rights (JCHR), in its comments on the earlier versions of these clauses, that there should be a requirement that there should be a requirement that the client was 'aware or ought to have been aware' of the relevant circumstances.[1]

Once this requirement is introduced, however, it is in our view irrelevant whether or or not 'C' was acting for or in the expectation of gain and therefore we have in our suggested amendments also removed this extra hurdle for successful prosecution. If the offence is amended as we suggest it would also be appropriate to raise the maximum sentence for the offences by amending subclauses 13(3) and 14(3). Consideration should also be given to making these offences either way rather than summary only. This would allow a maximum sentence that would reflect the severity of the top end of the offence as amended and would also allow defendants to elect jury trial – particularly important in the case of an offence which could cause serious damage to reputation.

[1] Cf Joint Committee on Human Rights, *Legislative Scrutiny: Policing and Crime Bill*, Tenth Report of Session 2008-09, HL Paper 68, HC 395, p14.

Clause 15 – Amendment to offence of loitering etc for purposes of prostitution

Amendment

Page **16**, line **39** [*Clause 15*] after 'person' insert 'aged 18 and over'.

Briefing

This amendment is intended 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 also suggested this amendment.[2] Our suggested amendment would leave the government's changes to the offence of loitering or soliciting in place for those aged 18 or over (making loitering or soliciting an offence only if it is persistent), but would mean that section 1 of the Street Offences Act 1959 did not apply to children and young people under 18. 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:[3]

> *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:[4]

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

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 briefings on the Bill 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.

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

Clauses 18 and 19 - Soliciting

Amendments

Clause **18**, page **19**, leave out clause.
Clause **19**, page **19**, leave out clause.

New clause

Abolition of offences of soliciting and persistently soliciting for the purpose of prostitution

(1) Sections 1 and 2 and subsection 4(1) of the Sexual Offences Act 1985 (c. 44) are repealed.

Briefing

Clauses 18 and 19 of the Bill would create an offence of soliciting (ie by potential clients of street prostitutes) in England and Wales and Northern Ireland, respectively. While we recognise the negative impact that kerb crawling may have upon an area and the concerns that local residents may understandably have about it, we do not support the creation of these offences. Criminalisation of kerb-crawlers will not deter those with little respect for the law and is likely to lead to an increase in violence against sex workers. Like other prohibitory measures, it is likely to push street prostitution into more isolated areas. We believe that these provisions will make prostitutes less safe. We also emphasise that the measures against brothels in this Bill may lead more prostitutes to engage in street sex work, thus further undermining the intention of these provisions.

We therefore suggest this stand part amendment and also a new clause that would repeal existing criminal offences of persistent or nuisance kerb-crawling. We emphasise that we do not condone such conduct but are concerned that its criminalisation is counter-productive. We recognise that decriminalisation should be accompanied by powers to enforce appropriate zoning so that street prostitution and kerb crawling could take place only in designated areas.

Clause 20 and Schedule 2 - Closure orders

Amendment

Schedule **2**, paragraph **1**, page **141**, leave out lines 4-7.

Briefing

Under the provisions of Schedule 2 to the Bill the closure powers created could be applied not only for premises used for the sexual exploitation of children but also for brothels where adult prostitution takes place. Again, the legislation fails to distinguish between premises where violent or coercive pimps and traffickers are forcing people into sex work, and brothels where adult prostitutes are working of their own free will. In relation to trafficking and coercion, the appropriate remedy again lies in criminal proceedings against the pimps and traffickers concerned; undercover policing, surveillance and other techniques should suffice to facilitate 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).

Where a brothel is operating with the free consent of those working within it, a closure order 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 further connection with organised criminals and in 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-solely residential areas).

This suggested amendment would therefore leave the closure orders regime in place in relation to child sexual exploitation but remove adult brothels from the ambit of the provisions.

Part 3 – Alcohol misuse

Clause 27 – Increase in penalty for offence

Amendment

Clause **27**, page **25**, leave out clause.

Briefing

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 do not believe that this provision should form part of the Bill.

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

Amendments

Clause **29**, page **26**, leave out clause.

Clause **30**, page **26**, leave out clause.

Briefing

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.

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 represent a risk of disorder

Amendments

Clause **31**, page **27**, leave out clause.

OR

Page **27**, line **13** [*Clause 31*], at end insert –

'(2) In section 27 of the Violent Crime Reduction Act 2006, after subsection (2) insert –

"(2A) In making a direction under this section to an individual aged under 16, a constable in uniform must consider the effect of making the direction on the individual's welfare and safety.".'.

Briefing

Clause 31 extends the police's powers 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.

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.

We do not support the extension of this power to individuals in the 10-15 age group. However, if it is to be so extended then as a minimum there should be a requirement that their safety and welfare be considered before so doing. We therefore support the amendments above, which were suggested by the Joint Committee on Human Rights (JCHR).[5]

[5] JCHR, n2 above, pp26-27.

Part 4 – Injunctions: gang-related violence

Clause 33: Injunctions to prevent gang-related violence

Amendments

Page **27**, line **22**, [*Clause 33*] leave out 'on the balance of probabilities' and insert 'to the criminal standard of proof'.

Page **27**, line **26** [*Clause 33*], leave out from 'for either' to end of line.

Page **27**, [*Clause 33*] leave out line 29.

Page **27**, [*Clause 33*] leave out line 33.

Page **27**, line **37**, [*Clause 33*] at end insert –

( ) habitually engages in criminal activity;

Briefing

The first of these amendments addresses the standard of proof for a relevant injunction. In the well-known case of *McCann*[6] 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. Further, while ASBOs can only impose prohibitions, these 'gang' injunctions could include mandatory requirements of indefinite duration – equivalent or more serious than many community sentences following criminal convictions. The procedural guarantees of the

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

criminal process as guaranteed under Article 6(3) European Convention on Human Rights (ECHR) - and the criminal standard of proof – should therefore apply.

The second amendment here would prevent the use of an injunction against a person to protect him from gang-related violence. We do not believe that adults, outside the mental health or mental capacity context, should be the subject of compulsory protective interventions of this nature. We believe that there are no plans to use these injunctions against children and young people under 18 at present because of difficulties in enforcement but would welcome further ministerial clarification on this point.

The third amendment would remove the capacity of the injunction to impose positive requirements. This extremely open-ended power would allow courts to impose requirements equivalent to a community sentence, including curfews; attending certain programmes; etc. Such sentences should not be imposed without a criminal conviction; the fact that their stated purpose 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.

Finally, the fourth amendment addresses the definition of 'gang'. 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 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. According to this definition, it seems that a punch-up on the pitch between members of two football teams would be 'gang-related violence', as would criminal damage caused by a group of boy scouts. We have therefore suggested the inclusion of a requirement that the group 'habitually engages in criminal activity' in order to distinguish criminal gangs from legitimate groups, clubs and associations.

Clause 34: Contents of injunctions

Amendments

Page **28**, [*Clause 34*], leave out lines 12 to 23.

Page **28**, line **24** [*Clause 34*], leave out 'and requirements'.

Page **28**, line **29** [*Clause 34*], leave out 'or (3)'.

Briefing

These amendments would remove the references to positive requirements from the contents of the injunctions, for the reasons outlined above. They would therefore be able to contain only prohibitions.

Clause 35: Contents of injunctions: supplemental

Amendments

Page **28**, line **33** [*Clause 35*], leave out 'or requirement'.

Page **28**, line **36** [*Clause 35*], at end insert –

"except that

( ) no injunction shall remain in force for a period longer than 2 years from the date it is made."

Page **28**, line **42** [*Clause 35*], leave out from 'or' to end of line 2 on page 29.

Page **29**, line **4** [*Clause 35*], leave out 'or requirement'.

Briefing

The first, third and fourth of these amendments would remove the reference to positive requirements from this clause for the reasons given above. The second addresses the duration of these injunctions. There are no time limits in these provisions, raising the extremely worrying prospect of indefinite regimes of requirements and prohibitions being imposed upon people, with no recourse to the criminal courts. The amendment would provide that the maximum duration for such an injunction should be two years.

Clause 40: Interim injunctions: adjournment of without notice hearing

Amendment

Clause **40**, page **30**, leave out clause.

Briefing

Where an application for an injunction against gang-related violence is held without notice, under clause 38, it is in our view wholly inappropriate for an interim injunction to be granted if the hearing is adjourned. If a person is about to commit a criminal offence, or attempting or conspiring to do so, then they can be arrested and charged under normal criminal procedure. Prohibitions – and in particular requirements – made under the envisaged injunction regime can place severe restrictions on the liberty of an individual, equivalent to a community sentence, and are likely to engage several ECHR rights. In these circumstances, aside from our other objections to the envisaged regime of injunctions it is contrary to due process for the injunction to be granted, even in 'interim' form, unless the respondent has been given the opportunity to be present and make representations.

Clause 48: Interpretation

Amendment

Page **33**, [*Clause 48*], leave out line 6.

Briefing

Line 6 of this clause provides that 'violence' for the purposes of these provisions can include violence against property. The use of such extreme coercive measures, without recourse to the criminal courts, is particularly inappropriate if used to restrain not violence against people but property damage – or indeed the encouragement or assistance of property damage. If the concern is that property damage is used to intimidate victims of crime, then either this should be deemed to fall within the 'threat of violence' against the person for the purposes of clause 33, or specific provision should be made for these circumstances. Ordinary criminal damage is insufficient in our view to trigger these powers.

Part 6 – Extradition

This section of the Bill makes amendments to the Extradition Act 2003 (EA). The EA was the vehicle through which the European Arrest Warrant (EAW) Framework Decision[7] was implemented in the UK. On the 5th June, the Justice and Home Affairs Council of the European Union adopted the 'Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States' (the Report).[8] The report raised the lack of a union-wide agreement to exercise a proportionality test prior to issuing an EAW,

> *The expert teams widely considered that, in principle, the proportionality test was the right approach and that some provisions, guidelines or other measures should be put in place at European level to ensure coherent and proportionate use of the EAW. There seemed to be a wide consensus (although not unanimity) that no proportionality check should be carried out at the level of the executing authorities.*

The Council through the Report 'instructs' its preparatory bodies to continue to discuss the issue with a view to reaching a coherent solution. This is a particular area of concern to the UK. In the fiscal year 2007/2008, 1,274 EAWs were received by the Serious Organised Crime Agency. As of 27 August 2008, it had already received 1,255 for the year 2008/2009.[9] 37% of those received in 2007/2008 were for minor offences from Poland.[10] The number of warrants received in the UK have increased year on year since its inception. The large number emanating from Poland results from the absence of a public interest test in the decision to prosecute there, necessitating the prosecution of every alleged offence. The resource implications for the UK, as well as the possible interference with an individual's Article 8 ECHR rights through prosecution for *de minimus* offences, could be addressed by a proportionality requirement. JUSTICE calls upon the Government to ensure that every effort is made for the development of such a requirement at EU level. We suggest an 'Issuing state bears the costs' approach would assist in reducing the number of requests of this type.

Clauses 65 and 66: Alerts

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[7] 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

[8] Council of the European Union Presidency, 8302/2/09, REV 2, LIMITE, 18 May 2009 available here http://www.statewatch.org/news/2009/may/eu-eaw-final-reortReport-8302-rev1-09.pdf

[9] Figures provided by SOCA in R Davidson, A Sledgehammer to Crack a Nut? Should there be a Bar to Triviality in European Arrest Warrant Cases? Crim LR 1 [2009] 31, 35 at footnote 14.

[10] *Ibid.*

Clauses 65 and 66 deal with EAWs being made available electronically by way of the Schengen Information System (SIS), which will in the future be upgraded to SIS II. The Report raises concerns about how Article 95 of the Convention Implementing the Schengen Agreement (the Convention)[11] alerts are affected as a consequence of Article 111 claims. These are replicated by its successor, Article 26 of the Council Decision on the establishment, operation and use of the second generation Schengen Information System 2007/533/JHA (the Council Decision),[12] with resulting claims under Article 59.[13] The obligation to implement a national court's decision in paragraph 2 was found by the Report to be problematic where the court was not the Member State where the alert was entered. The Council recommends that this problem be addressed in its appropriate preparatory bodies.

By accepting electronic alerts as equivalent to EAWs, the UK must be alive to the problems inherent in the alert system. Whilst the UK is not a signatory to the Convention, the Council Decision is binding and will supersede the Convention once SIS II is implemented. JUSTICE hopes that the Government will ensure that any alerts it enters or accepts are maintained in accordance with the Convention/Council Decision and that it engages in the process recommended in the Report at EU level.

Clauses 67– 69: Deferral of extradition

Amendments

Clause **67**, page **81**, line **33**, after 'were a reference to six months' insert:

8C When proceeding under this section the judge must consider whether the extradition is barred under sections 11, 21, or 25.

Clause **68**, page **82**, line **33**, after 'were a reference to six months' insert:

[11] OJ L 239, 22.09.00, p 130, available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF

[12] OJ L 205, 7.08.07, p 63, available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:205:0063:0084:EN:PDF

[13] [13] Which in both instruments reads,

1. Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving him.

2. The Contracting Parties undertake mutually to enforce final decisions taken by the courts of authorities referred to in paragraph 1, without prejudice to the provisions of Article 116/Article 64.

76C When proceeding under this section the judge must consider whether the extradition is barred under sections 11, 21, or 25.

Clause **69(2)**, page **82**, line **38**, after 'in section 22(3) (power to adjourn extradition hearing in Part 1 case)' insert:

(a) for "the sentence has been served" substitute " the person is released from detention pursuant to the sentence (whether on license or otherwise)" , and

(b) after subsection (3) insert:

"(3A) When proceeding under this section the judge must consider whether the extradition is barred under sections 11, 21, or 25".

Clause **69(3)**, page **82**, line **43**, after '(whether on license or otherwise)' insert:

(c) after subsection (2) insert:

"(3) When proceeding under this section the judge must consider whether the extradition is barred under sections 11, 21, or 25".

Clause **69(4)**, page **82**, line **44**, after 'in section 88(3) (power to adjourn extradition hearing in Part 2 case)' insert:

(a) for "the sentence has been served" substitute " the person is released from detention pursuant to the sentence (whether on license or otherwise)" , and

(b) after subsection (3) insert:

"(3A) When proceeding under this section the judge must consider whether the extradition is barred under sections 79, 87, or 91".

Clause **69(5)**, page **83**, line **5**, after '(whether on license or otherwise)' insert:

(c) after subsection (2) insert:

"(3) When proceeding under this section the judge must consider whether the extradition is barred under sections 79, 87, or 91".

Clause **69(6)**, page **83**, line **6**, after '(power to defer decision on extradition)' insert:

(a) for "the sentence has been served" substitute " the person is released from detention pursuant to the sentence (whether on license or otherwise)" , and

(b) after subsection (3) insert:

(4) When proceeding under this section the Secretary of State must consider whether the extradition is barred under section 93, or in accordance with the person's Convention rights within the meaning of the Human Rights Act or any other treaty obligation.

Clause **69(7)**, page **83**, line **13**, after '(whether on license or otherwise)' insert:

(c) after subsection (2) insert:

"(3) When proceeding under this section the Secretary of State must consider whether the extradition is barred under section 93, or in accordance with the person's Convention rights within the meaning of the Human Rights Act or any other treaty obligation."

Briefing

The Bill's proposed amendments in clauses 50 to 52 deal with a gap in the application of the EA 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.

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: 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 ECHR infringements particular 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 should re-issue 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.

Our amendment obligates the judge or the Minister to consider bars or human rights implications at this stage where the current and proposed legislation does not allow them to do so.

Clause 72: Extradition to UK

Amendments

Clause **72**, page **90**, line **3**, leave out 'Secretary of State is not satisfied that the return' and insert 'the return is not'.

Clause **72**, page **90**, line **4**, after 'compatible with' insert 'human rights, including'.

Clause **72**, page **90**, line **6** at end insert ', the Refugee Convention and the International Covenant on Civil and Political Rights'.

Clause **72**, page **90**, line **6** at end insert new clause:

(1A) In furtherance of subsection (1) the Secretary of State must ensure that the person, or a representative acting on their behalf is,
(a) informed of the requested undertaking;
(b) given an opportunity to make representations in writing to the Secretary of State;
(c) informed of the decision expeditiously;

Briefing

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.[14]

The proviso in section 153D will be 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 the proposed section 153C 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.

Furthermore, in relation to EAW countries, it is disappointing that, despite the aims of the EAW Framework Decision 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

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

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

Amendments

Clause **75**, page **91**, leave out clause.

New Clause

Circumstances in which provisional arrest will be authorised

(1) Section 5 of the Extradition Act 2003 is amended as follows:
(a) Before subsection (1) insert,

An officer above the rank of inspector or higher officer may authorise the arrest of a person in accordance with this section.

(b) After subsection (1)(b) insert,

(c) the warrant relates to a specified offence.

Briefing

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 was evidence produced at the Commons Committee Stage.

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.*

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…*

At the point of provisional arrest, no warrant has been issued, and consequently, there are no established grounds for arrest. Section 5 of the Extradition Act (EA) simply requires an officer to arrest without a warrant if he has *reasonable grounds for believing that a warrant has been or will be issued*. The British police are making the arrest on the basis of mutual cooperation with the requesting Member State at this stage, yet Article 5(2) ECHR requires every arrested person (irrespective of whether it is an extradition matter) to be informed promptly of the reasons for his arrest and charges against him.

The Minister suggested at Committee Stage that the provision was to grapple with the time it takes to get a case together prior to issuing a warrant, during which a person may leave the jurisdiction. It goes against the fundamental principle of legal certainty to suggest that arrest can be effected even if a case cannot be founded on the evidence available at that time. The Police and Criminal Evidence Act 1984 (PACE) requires an officer to hold reasonable suspicion in order to effect an arrest. JUSTICE considers that greater protection should be afforded to a suspect where a foreign request is being made and not less; if the requesting state has not put its case together, it should not be making the request.

In *Commr of the Met v Raissi*[15] 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

[15] [2008] EWCA Civ 1237.

for suspicion on the information he himself held. Here, officers are already making arrests without reasonable suspicion, in circumstances that JUSTICE considers could already infringe Article 5 ECHR. To extend the current power past 48 hours is completely unjustified.

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 arbitrary, excessive and discriminatory to suspects of foreign as opposed to domestic crimes.

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

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.

Finally, 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 currently allows a constable to make a decision as to arrest. A senior officer should make this decision in order to ensure that it is being used sparingly. Equally there is currently no restriction on the type of offence to which the warrant relates. We have including a probing amendment to the restrict the section to 'specified offences' which we hope will produce evidence from the Government as to the type of offences the provision is necessary for.

Clause 76: Use of live link in extradition proceedings

Amendments

Clause **76**, page **92**, line **37**, leave out lines 37 and 38 and insert:

(i) an initial hearing;

(ii) an extradition hearing within the meaning of that Part;

(iii) an appeal under section 26 or 32

(iv) a hearing under section 54 or 56

Clause **76**, page **92**, line **41** after 'that Part' insert: ', a hearing pursuant to section 75, or an appeal pursuant to section 103, 105, 108, 110 or 114.'

Clause **76**, page **93**, line **14** after 'to give the direction' insert 'and an interpreter is not required.'

Briefing

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.

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:[16]

> *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 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".*

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

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

persons who require an interpreter. The technical difficulties of attempting to interpret with a live link are numerous.

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.

We consider that the provisions should not apply to the initial hearing 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 further instructions.

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.

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

Amendments

Clause **96**, page **120**, leave out clause.

Clause **97**, page **121**, leave out clause.

Clause **98**, page **122**, leave out clause.

Briefing

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*,[17] 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.

The relevant periods for retention of DNA and fingerprints are currently being consulted upon by the Home Office in a consultation that did not begin on 7 May 2009[18] – 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, which we believe is greatly excessive. We therefore believe that clauses 96 to 98 should not proceed in their current form.

JUSTICE, June 2009

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

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