Policing and Crime Bill

Briefing and suggested amendments for Report 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 at Report stage, bearing in mind the brevity of debate afforded at this stage of the 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;**
- **The new offence of paying for the services of a prostitute subjected to force etc should not be one of strict liability;**
- **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.**

Part 2 – Sexual Offences and sex establishments

Clauses 14 and 15: Paying for sexual services of a prostitute subjected to force etc.

Amendments

Page **17**, [*Clause 14*], leave out lines 1 and 2 and insert -

(c) A is aware, or ought to be aware, that C has engaged in exploitative conduct of that kind.

Page **17**, [*Clause 14*] leave out lines 38 and 39.

Page **17**, [*Clause 15*] leave out lines 18 and 19 and insert –

(c) A is aware, or ought to be aware, that C has engaged in exploitative conduct of that kind.

Page **17**, [*Clause 15*] leave out lines 23 and 24.

Briefing

Clauses 14 and 15 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, engaged in exploitative conduct of a kind 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 of the exploitative conduct of the third person.

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. We therefore welcome the amendments to the offences in clauses 14 and 15 meaning that they are now based on 'exploitative conduct'.

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 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. Consideration should also be given to making these offences either way rather than summary only (ie so that they could be tried in the Crown Court). 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 16 – Amendment to offence of loitering etc for purposes of prostitution

Amendment

Page **18**, line **36** [*Clause 16*] after 'person' insert 'aged 18 or 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 and the Standing Committee for Youth Justice, of which JUSTICE is a member, have also suggested this/a similar 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.

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

We draw attention in this context to the briefings on the Bill of the Standing Committee for Youth Justice (SCYJ). We therefore believe that even if the offence of loitering/soliciting is retained for adult prostitutes it should be repealed for children.

Part 3 – Alcohol misuse

Clause 28 – Increase in penalty for offence

Amendment

Clause **28**, page **28**, 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 30 – Confiscating alcohol from young persons
Clause 31 – Offence of persistently possessing alcohol in a public place

Amendments

Clause **30**, page **28**, leave out clause.

Clause **31**, page **28**, 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 30 that those young people from whom alcohol is confiscated should have to give their name and address to police, since it may then be sought to use this as evidence against them in proceedings under clause 31 in order to establish persistence. Children from whom alcohol is confiscated are therefore required under clause 30 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 32 - Directions to individuals who represent a risk of disorder

Amendments

Clause **32**, page **29**, leave out clause.

OR

Page **29**, line **31** [*Clause 32*], 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 32 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 as an alternative to our stand part amendment the second group of 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 34: Injunctions to prevent gang-related violence

Amendments

Page **30**, line **1**, [*Clause 34*] leave out 'on the balance of probabilities' and insert 'to the criminal standard of proof'.

Page **30**, line **4** [*Clause 34*], leave out from 'for either' to end of line.

Page **30**, [*Clause 34*] leave out line 8.

Page **30**, [*Clause 34*] leave out line 12.

Page **30**, line **16**, [*Clause 34*] 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 35: Contents of injunctions

Amendments

Page **30**, [*Clause 35*], leave out lines 31 to 42.

Page **30**, line **43** [*Clause 35*], leave out 'and requirements'.

Page **31**, line **4** [*Clause 35*], 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 36: Contents of injunctions: supplemental

Amendments

Page **31**, line **8** [*Clause 36*], leave out 'or requirement'.

Page **31**, line **11** [*Clause 36*], at end insert –

"except that

( ) no injunction made under section 34 of this Act shall remain in force for a period longer than 2 years from the date it is made."

Page **31**, line **17** [*Clause 36*], leave out from 'or' to end of line 19.

Page **31**, line **21** [*Clause 36*], 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 41: Interim injunctions: adjournment of without notice hearing

Amendment

Clause **41**, page **32**, leave out clause.

Briefing

Where an application for an injunction against gang-related violence is held without notice, under clause 39, 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 49: Interpretation

Amendment

Page **35**, [*Clause 49*], leave out line 22.

Briefing

Line 22 in clause 49 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 34, or specific provision should be made for these circumstances. Ordinary criminal damage is insufficient in our view to trigger these powers.

Part 6 – Extradition

Clause 73: Return to extraditing territory etc

Amendments

Page **92**, lines **19**-**20** [*Clause 73*] leave out 'Secretary of State is not satisfied that the return' and insert 'the return is not'.

Page **92**, line **22** [*Clause 73*] at end insert 'or the International Covenant on Civil and Political Rights'.

Page **92**, line **22** [*Clause 73*] at end insert:

(1A) In furtherance of subsection (1) the Secretary of State shall 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; and
(c) informed expeditiously of the Secretary of State's decision as to whether to give an undertaking.

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.[7]

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

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

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 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 76: Provisional arrest

Amendments

Clause **76**, page **93**, leave out clause.

OR

Insert the following new Clause –

Circumstances in which provisional arrest will be authorised

Section 5 of the Extradition Act 2003 (c.41) is amended as follows:

(1) Before subsection (1) insert,

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

(2) 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 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 Commons 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, not lesser, protection should be afforded to a suspect where a foreign request is being made; if the requesting state has not put its case together, it should not be making the request.

In *Commr of the Met v Raissi*[8] 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 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 against 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 s204 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 76 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.

[8] [2008] EWCA Civ 1237.

Clause 77: Use of live link in extradition proceedings

Amendments

Page **95** [*Clause 77*] leave out line 12 and insert:

( ) an initial hearing;
( ) an extradition hearing within the meaning of that Part;
( ) an appeal under section 26 or 32;

Page **95**, line **16** [*Clause 77*] at end insert:

', a hearing pursuant to section 75, or an appeal pursuant to section 103, 105, 108, 110 or 114.'

Page **95**, line **30** [*Clause 77*] at end 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:[9]

> *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

[9] 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).

JUSTICE, October 2009