Police Reform and Social Responsibility Bill

Briefing for Committee Stage

House of Commons

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. This briefing is intended to highlight JUSTICE's main concerns regarding the Police Reform and Social Responsibility Bill for House of Commons Committee Stage. Where we have not commented upon a certain provision in the Bill, this should not be taken as an endorsement of its contents.

3. We welcome the repeal of ss132-138 of the Serious Organised Crime and Police Act 2005 (demonstrations in the vicinity of Parliament) in clause 139 of the Bill. Our concerns about the Bill's provisions at this stage focus upon the following areas:

    - **There are insufficient checks on the powers of Police and Crime Commissioners, particularly in relation to their relationship with Chief Constables and any misconduct by Commissioners themselves;**
    - **Provisions relating to the restriction of activities in Parliament Square are overbroad; the need to seek authorisation to use a loudspeaker or loudhailer may interfere with the legitimate use of such devices by organisers to marshal peaceful protests;**
    - **Removal of requirements for representation on the Advisory Council on the Misuse of Drugs may compromise its independence and expertise;**
    - **The proposal that the Director of Public Prosecutions should consent to the issue of private arrest warrants in international criminal cases is unnecessary and contrary to the international rule of law.**

    We will put forward suggested amendments for Committee Stage in relation to our concerns in a separate document.

PART 1 - POLICE REFORM

Police and Crime Commissioners

4. The Bill provides for the election of police and crime commissioners (one for each force area, with the Mayor of London acting as commissioner in relation to the Metropolitan police) who would replace police authorities in holding chief constables to account in the exercise of their functions. Under clauses 5 and 6 of the Bill, commissioners would issue policing and crime plans, which would set out (as per clause 7), inter alia, 'the policing of the police area which the chief officer of police is to provide', 'the financial and other resources which the elected local policing body [ie the commissioner] is to provide to the chief officer of police' and 'the means by which the chief officer of police's performance in providing policing will be measured'. Commissioners will therefore have a very high degree of control over chief constables' functions and budgets.

5. Under clause 38 of the Bill, commissioners will appoint, and may suspend or call for the resignation or retirement of, the chief constable for the relevant force area. A policing and crime panel appointed by the local authority will have a veto over appointments of chief constables according to the provisions of Schedule 8 but will only be able to make recommendations in relation to calls for retirement or resignation and has no role in relation to suspensions.

6. JUSTICE is concerned that direct elections for police and crime commissioners could result in a competitive 'race to the bottom' on populist law and order policies which may not be effective to reduce crime and may result in the neglect of 'invisible' crimes such as domestic violence in favour of crimes which dominate public concern such as street crime and anti-social behaviour.

7. Further, we are concerned that misconduct by police and crime commissioners cannot effectively be addressed under the Bill's provisions. Clause 30 provides for the suspension of a commissioner in the event of his/her being charged with an offence carrying a maximum sentence of two years or above. By virtue of clause 67, the commissioner can only be disqualified from office if sentenced to three months in prison or above. The Bill also provides for disqualification on other grounds (eg corrupt practices, insolvency), while complaints procedures and investigation of complaints are left by Schedule 7 largely to regulations.

8. While elected officials must be protected from removal to a certain degree in order to safeguard the democratic process, we are concerned at the very limited circumstances in which a person with financial and political control over policing could be removed from office. Particularly because of their important strategic, oversight and representative functions in maintaining law and order, it might be thought that a criminal conviction of any kind – particularly one resulting in a community sentence or custody – would be inconsistent with the office of commissioner, particularly if the offence occurred during their period of office. Further, disqualification and a new election should also be available in the event of a sustained failure to comply with legal obligations in relation to human rights and non-discrimination in the performance of his/her duties. We therefore believe that disqualification should be available in a broader range of circumstances, perhaps with an enhanced role for the policing and crime panel which will also be made up of elected officials.

PART 3 - PARLIAMENT SQUARE GARDEN AND SURROUNDING AREA

9. JUSTICE strongly welcomes the repeal of the authorisation regime for demonstrations in the vicinity of Parliament under the Serious Organised Crime and Police Act 2005 and the recognition that this gives to the importance of peaceful protest in the vicinity of Parliament. When the Serious Organised Crime and Police Bill was going through Parliament we said that: '[i]n light of the weight given to the protection of political speech under Article 10 of the Convention, we are particularly concerned at measures that seek to inhibit public protest on the doorstep of Parliamentary democracy itself. It seems an unpleasant irony that, should these provisions become law, freedom of expression will be most at risk in the one place where it should be most protected.'[1]

10. We are concerned, however, that the Bill creates a prior authorisation requirement in relation to the use of loudspeakers and loudhailers. As we said when briefing on the Serious Organised Crime and Police Bill, such equipment can be necessary by organisers of larger demonstrations in order to marshal demonstrators and for example, keep a march on a prescribed route and therefore comply with conditions laid down by police under the Public Order Act 1986. We therefore question why it is necessary to seek authorisation from the Greater London Authority/Westminster Council in relation to use of such devices, and why a constable should be able to

[1] Serious Organised Crime and Police Bill, Briefing on Parts 3-6 for House of Lords Second Reading, March 2005.

direct that a person not use such devices under clauses 141-142 in circumstances where their use is not excessive in duration or unreasonably loud. Demonstrations in response to often fast-moving events sometimes have to be organised at short notice in order to be effective and the 21 day authorisation period provided for noise-making equipment in clause 145 is therefore too long. Further, there are no criteria in the clause for the grant of permission – if there is to be an authorisation requirement then we believe that criteria should underline the importance of freedom of expression and assembly in Parliament Square.

11. While we do not object in principle to the restriction of the use of tents and other sleeping equipment in Parliament Square, we do have some concerns about the methods by which the Bill restricts these activities. The power to seize property in clause 143, in so far as it applies to sleeping equipment, should not be used against homeless people lest it remove their only material for shelter. Further, the court's power on conviction under cl144 to make any 'such other order as the court considers appropriate for the purpose of preventing P from engaging in any prohibited activity in the controlled area of Parliament Square' is overbroad and could lead to disproportionate orders in breach of Articles 10 and 11 European Convention on Human Rights. In particular, the provision that the order 'may (in particular) require P not to enter the controlled area of Parliament Square for such period as may be specified in the order' gives rise to concern. The importance of freedom of expression and assembly near Parliament – at the heart of our democracy – is such that restricting access in this way will rarely be justified. Parliament Square is a public place well served by police officers and anyone attempting to carry out a prohibited activity can be quickly seen and apprehended. It is therefore hard to imagine when it would be necessary to prohibit entry to the square per se. Bearing in mind that these provisions will be targeted at demonstrators, it is of great importance to the democratic process that provisions aimed at preventing the setting up of camps do not have the by-product of silencing their protests all together. We therefore believe that orders under s144 should not be able to bar entry to Parliament Square.

PART 4 – MISCELLANEOUS

Byelaws

12. Clause 148 creates a new power for byelaws to include provision for the seizure and retention of property in connection with the contravention of a byelaw and the

forfeiture of that property on a person's conviction of an offence or contravention of the byelaw. This is an extremely broad power; byelaws by their nature cover relatively minor transgressions and the exercise of coercive powers of seizure, retention or forfeiture of property will therefore frequently be disproportionate. If the government contend that this power is necessary to promote compliance with byelaws we believe that they should explain this and give examples of how this power might be used. We further believe that statutory criteria should limit the exercise of the power and structure judicial discretion to ensure proportionality.

Advisory Council on the Misuse of Drugs

13. Clause 150 would amend the Misuse of Drugs Act 1971 in order to remove the requirement on the Secretary of State to appoint certain categories of person to the Advisory Council on the Misuse of Drugs – those with wide and recent experience in medicine, dentistry, veterinary medicine, pharmacy, the pharmaceutical industry and chemistry – and those with wide and recent experience of social problems connected with the misuse of drugs. We believe that the Advisory Council is an important independent expert body whose recommendations can provide a rational basis for the classification of drugs under the 1971 Act. We believe that the government should explain the reasons for the inclusion of this clause in the Bill. We were concerned by the sacking of Professor David Nutt in 2009 by the previous Home Secretary and seek assurance that clause 150 does not represent a further attempt to compromise the Council's independence and scientific acumen.

Arrest warrants

14. Clause 151 of the Bill seeks to remove the ability of private individuals to seek and obtain arrest warrants against those accused of international crimes including (inter alia) torture, war crimes, piracy and hijacking, unless the Director of Public Prosecutions gives his consent. Similar proposals were made by the Labour government before the general election. We believe that these proposals are misguided and are contrary to the international rule of law.

15. Two reasons have been cited for this change in the law. The first is that warrants have been sought against officials from states with whom the UK enjoys good

diplomatic relations. The Ministry of Justice consultation paper on the topic stated that:[2]

> There is reason to believe that some people, including people with whom the British Government needs to engage in discussion, may not be prepared to visit this country for fear that a private arrest warrant might be sought against them.

16. Concerns have also been raised at the evidential standard applied on applications for warrants. The consultation stated:[3]

> The issue of a summons or warrant means that criminal proceedings against the suspect have begun, and it can be done on the basis of far less evidence than the CPS would require in order to charge, or than would be needed before a jury could properly convict.

17. In relation to the 'friendly states' question it should firstly be born in mind that immunity from prosecution for war crimes and crimes against humanity applies in relation to government officials enjoy state immunity from prosecution for international crimes,[4] including sitting heads of state, and serving heads of government, foreign ministers, defence ministers and diplomats. A private application for the arrest of Israeli Defence Minister General Shaul Mofaz in February 2004 was refused by the Bow Street Magistrates for precisely this reason. Such officials are therefore free to visit the UK without let or hindrance.

18. In relation to evidence, it should be borne in mind that applications for private arrest warrants are scrutinised by specialist District Judges at the City of Westminster Magistrates' Court (who also deal with terrorism and extradition cases). In *R v West London Justices ex parte Klahn*, Lord Widgery CJ held that, when considering

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[2] *Arrest Warrants – Universal Jurisdiction. Note by the Ministry of Justice* (undated, 2010), p3.

[3] Ibid, p2.

[4] Save where the arrest warrant has been requested by the International Criminal Court: see article 27 of the Rome Statute and sections 2(3) and 23 of the International Criminal Court Act 2001.

whether to issue a summons or warrant, magistrates should 'at the very least ascertain':[5]

> (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are *prima facie* present; (2) that the offence alleged is not 'out of time'; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute. In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious …. Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. *Plainly he should consider the whole of the relevant circumstances.*

The Lord Chief Justice also made clear that the magistrate 'must satisfy himself that it is a proper case in which to issue a summons', and 'must be able to inform himself of all relevant facts' including hearing from a proposed defendant if he feels it necessary to do so.[6] Although the magistrate should not preempt any subsequent proceedings by holding a preliminary hearing on the evidence,[7] nonetheless the magistrate must 'decide whether or not on the material before him he is justified in issuing a summons'.[8]

19. While the test applied for the issue of a warrant is not the same as that applied when considering whether to charge or prosecute, this is true of all arrests and reflects the need for speed in executing an arrest before a suspect can flee or commit further offences. Private parties including solicitors and non-governmental organisations may be in a better position than the Metropolitan police and CPS units responsible for investigating and prosecuting these offences to both receive complaints from victims and build up dossiers of evidence in the first instance. Both the Metropolitan police Anti-Terrorist Unit and the CPS Counter-Terrorism Division responsible for dealing

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[5] [1979] 2 All ER 221 at 223. Emphasis added. See also e.g. *R (Green) v City of Westminster Magistrates Court* [2007] EWHC 2785 at para 35 per Hughes LJ: 'The decision whether or not to issue a summons is a judicial one; it calls for the exercise of judgment'.

[6] Ibid.

[7] Ibid: 'There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet; no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard'.

[8] Ibid, citing Lord Goddard CJ in *R v Wilson ex parte Battersea Borough Council* [1948] 1 KB 43 at 46-47.

with these offences are, as their names suggest, responsible for investigating and prosecuting terrorist offences and their resources are stretched in attempting also to deal with war crimes, crimes against humanity etc. There is a need to act quickly so that an arrest warrant can be issued in cases where intelligence is received that a suspect may be intending to travel to the UK. A requirement that the DPP consent to prosecution (meaning that the CPS would have to review the evidence) may slow down this process meaning that a suspect can leave the UK before the warrant can be issued.

20. Further, the right of private citizens to seek arrest warrants for suspected war criminals serves as a valuable corrective against what Lord Wilberforce described as 'inertia or partiality on the part of authority'.[9] A finding by a magistrate that there exists *prima facie* evidence that a suspect has committed war crimes,[10] sufficient to justify the issuance of a warrant for his or her arrest, must never be lightly dismissed. In particular, an independent judicial determination of this kind may serve as a spur to governmental action. More generally, it may also serve to promote the democratic accountability of the executive.

21. We therefore believe that this proposed change in the law is unnecessary and sends the wrong signal to the international community. The UK must not be allowed to become a safe haven for international criminals. We note further that the provisions of the Bill, while applying to many international crimes, are not extended to genocide and question why, if the DPP's consent is not needed for a genocide arrest, it should be needed in relation to torture, war crimes, or piracy?

22. We therefore believe that clause 151 should be removed from the Bill.

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[9] Lord Wilberforce, *Gouriet v Union of Post Office Workers* [1978] AC 435: 'Enforcement of the law means that any person who commits the relevant offence is prosecuted. The individual … who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. *This historical right … goes right back to the earliest days of our legal system…*' [emphasis added]. See also at 497 per Lord Diplock: 'In English public law every citizen still has the right, as he once had a duty (though of imperfect obligation), to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law by this procedure'.

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[10] Or the other offences for which there is universal jurisdiction under UK law, e.g. torture, genocide and crimes against humanity. For the sake of convenience, all references to 'war crimes' and 'war criminals' in this response should be read as a generic reference to any of the relevant offences of universal jurisdiction.

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