Crime and Security Bill

Briefing and suggested amendments for House of Commons Report Stage

March 2010

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Introduction and summary

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.

This briefing is intended to highlight JUSTICE's main concerns regarding the Crime and Security Bill for House of Commons Report stage. Failure to comment on a provision does not indicate support for it. If our suggested amendments are adopted, further and consequential amendments may be necessary.

Police powers of stop and search (clause 1)

Amendments

1

Page 2, line 5 [*Clause 1*], leave out 'and' and insert:

'(vi) if it appears to the constable that injury to a person or damage to property has resulted from the search, the nature of that injury or damage; and'

2

Page 2, line 5 [Clause 1], leave out 'and' and insert:

'(vi) except in the case of an unattended vehicle, the age of the person searched or the person in charge of the vehicle searched (as the case may be) I fit appears to the constable that they may be aged under 21; and

Page 2, line 13 [Clause 1], at end insert:

'(6B) The requirement in subsection (6)(a)(vi) above for a record to state a person's age is a requirement to state –

(a) the age of the person as given by the person, and

(b) if different, or if the person fails to give an age upon request, the age of the person as perceived by the constable.'

Briefing

These amendments would each add a piece of information to that required to be recorded by officers under s3 Police and Criminal Evidence Act 1984 (PACE) as prospectively amended by the Bill. Currently, section 3 requires that whether, and if so what, injury to a person or damage to property appears to the constable to have resulted from the search. The Bill would remove this requirement entirely. We propose that it be retained, but in amended form so that if no injury or damage is caused no record to that effect is necessary.

We expect that in the majority of cases, no injury or damage would result from a stop and search and therefore that the additional bureaucratic burden would be added by our amendment would be relatively small. Where injury or damage does occur, however, this may be the subject of a future police complaint or litigation, and in these circumstances it is important that the officer has recorded a contemporaneous account of the injury or damage concerned.

Our second amendment inserts a requirement that, if it appears to the constable that a person searched or who is in charge of a vehicle searched may be under the age of 21, their age should be recorded. This suggested amendment arises from our concern that the use of stop and search powers against children and young people under 18 should be monitored. According to a survey by 11 Million (the Office of the Children's Commissioner for England) published in 2009, 11% of white young people aged 12-17 and 22% of BME young people aged 12-17 have been stopped and searched.[1] Monitoring will help to discourage the disproportionate use of these against young people. Excessive use of stop and search against this age group risks creating distrust and/or hostility towards the police that may persist into adulthood. Further, we are aware of recent, disturbing media reports of the use of stop and search against younger children, including young children below the age of criminal responsibility (10).[2] The use of these powers against children should be subject to

[1] 11 Million & YouGov (March 2009) *Solutions to Gun and Knife Crime*.

[2] For example, BBC News website, 12 January 2010, 'Kent police admit unlawful stop and search of twins, 11'; Telegraph website, 15 August 2009, 'Police stop and search children as young as two'.

close scrutiny; we therefore believe that when a person is stopped and searched who is or appears to be a child, their age should be recorded.

Fingerprints and samples etc (clauses 2-23)

We reiterate the concerns expressed about this part of the Bill in our Briefing for House of Commons Second Reading (available on request, or by download from www.justice.org.uk). We will revisit this part of the Bill in our briefings for its stages in the House of Lords.

Domestic violence (clauses 24-33)

Amendments

Page 73, line 5 [*Clause 24*], at end insert:

"(9A) Where an authorising officer issues a DVPN containing provision under subsections (8)(b), (c), or (d), the authorising officer must inform P, as soon as is reasonably practicable, of sources of alternative accommodation in the local area and give him details of relevant services providing such accommodation"

Page 75, line 19 [*Clause 28*], at end insert:

(12) A court making a DVPO containing provision under subsection (8)(b), (c) or (d) must consider what, if any, alternative accommodation is available to P. If no other alternative accommodation is available to P the court shall, following the making of the DVPO, order the local authority in which P resides (or, if necessary in order to comply with the terms of the DVPO, a neighbouring local authority) to provide alternative accommodation for P that complies with the terms of the DVPO.

Briefing

Domestic violence protection notices (DVPNs) and domestic violence protection orders (DVPOs) can remove a person (P) from his or her home and therefore constitute an interference with Article 8 European Convention on Human Rights. These amendments are designed not to interfere with the making of the orders but to ensure that where an order is made that excludes a person from his or her home, consideration is given to the provision of alternative accommodation.

The first amendment would require an authorising officer making a relevant DVPN to, as soon as is reasonably practicable, provide P with information as to sources of alternative accommodation in the local area and details of relevant services providing such accommodation.

The second amendment would require a court making a relevant DVPO to consider what if any alternative accommodation is available to P, and if no other alternative accommodation is available to, after making the DVPO, order the appropriate local authority to provide P with alternative accommodation that complies with the terms of the DVPO (ie as to distance from the protected person's home if the DVPO contains an exclusion zone).

Gang-related violence (clauses 34-39)

Amendments

Page 77, line 3 [*Clause 34*], leave out '14' and insert '18'

Leave out clauses 35, 36, 38 and 39

Briefing

These amendments would prevent 'injunctions to prevent gang-related violence' under the Police and Crime Act 2009 from being applied to children and young people under 18.

When the Policing and Crime Bill was going through Parliament, JUSTICE made strong principled objections to the regime of 'injunctions to prevent gang-related violence', since such injunctions effectively provide for a criminal penalty equivalent

to a community sentence for a person alleged, but not proven to the criminal standard, to have participated, encouraged or assisted, gang-related violence (which can include violence against property, ie criminal damage). The Policing and Crime Act's provisions allow the guarantees of the criminal justice system to be bypassed in relation to some people suspected of gang-related crime.

We understand both the difficulties in successfully prosecuting some gang-related offences (in particular, reluctant potential witnesses and witness intimidation), and the need for swift action against gang-related crime, particularly where weapons are involved. There is nothing wrong with an injunction being imposed to prevent specified threatened unlawful conduct (as already occurs in ordinary injunction applications in the civil courts). However, there can be no excuse for subjecting an individual to what is in effect a community sentence, creating an individual code of behaviour for a person that can include serious interferences with fundamental rights, without their being proven beyond reasonable doubt in a criminal court to have committed a criminal offence. In the case of ASBOs (which allege less serious conduct and which can only impose prohibitions, not positive requirements), the House of Lords in *McCann*[3] found that even though they were civil orders, the criminal standard of proof (being sure/beyond reasonable doubt) should be used.

It is particularly inappropriate to use these injunctions against children and young people under the age of 18, for whom the procedural protections of the criminal process are particularly important in preventing unfairness. Children and young people accused of offending behaviour should be dealt with in a specialist forum accustomed to adapting its procedures to their needs and understanding, and not in an ordinary adult court. Further, under the UN Convention on the Rights of the Child, in all criminal proceedings concerning children (in which we would include these injunctions), the privacy of the child should be protected.

We believe that children who have become involved in gang activities should be dealt with by children's services (and if necessary the family courts) as children in need of protection/at risk of harm, and further that if offences are committed these should be dealt with by the specialist youth justice system. We therefore believe that these provisions should be removed from the Bill.

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[3] *R v Manchester Crown Court, ex p McCann and others* [2002] UKHL 39.

Breach of an injunction under this Bill can result in the imposition of a supervision order or detention order upon a child or young person for up to 3 months. Supervision orders may contain an activity element which enables to court to require participation in specified programmes or residential exercise. Again, these are equivalent to a community sentence but for a child/young person who may have committed no criminal offence, and certainly has not been proved to have done so.

We are especially alarmed at the proposal that civil detention orders should be imposed upon children and young people. This directly contradicts the government's stated policy, and the UK's obligation under the UN Convention on the Rights of the Child, that custody for children should only be imposed as a last resort. Further, short-term custody for children and young people of 14-17 inclusive normally includes a rehabilitative element – ie it is a detention and training order, not merely a detention order – whereas these orders are purely punitive (detention alone). Custody for children and young people under 18 should only ever be imposed – as a last resort – following criminal conviction and following the careful consideration of both sentencing guidelines and youth offending team reports by sentencers in courts accustomed to dealing with the sentencing of children and young people. Civil proceedings in the county court/High Court are an entirely inappropriate forum.

We therefore believe that these provisions should be removed from the Bill.

Ameliorating amendments

1 – ensuring proceedings for 14-17 year olds take place in the youth court

New clause

In section 49 of the Policing and Crime Act 2009 (interpretation), after ""court means" insert ", where the respondent is aged over 18 at the date of the hearing," and after "county court" insert "and where the respondent is aged 14-17 at the date of the hearing, a youth court".

Page 78, line 9 [*Clause 39*], after "Powers of" insert "youth"

Page 78, line 19 [*Clause 39*], after "of the" insert "youth"

Page 79 [*Clause 39*], leave out lines 15-20

Page 82, line 13 [*Clause 39*], leave out “appropriate”

Page 83, line 18 [*Clause 39*], leave out “appropriate”

Page 84, line 17 [*Clause 39*], leave out “appropriate”

Page 85, line 8 [*Clause 39*], leave out “appropriate”

Page 85, line 19 [*Clause 39*], leave out “appropriate”

Page 86, line 3 [*Clause 39*], leave out “appropriate”

Page 86, line 16 [*Clause 39*], leave out “appropriate”

Page 86, line 19 [*Clause 39*], leave out “appropriate”

Page 86, line 29 [*Clause 39*], leave out “appropriate”

[Further amendments would be required to Part 3 of the Schedule (Detention Orders) if these amendments were adopted alone but since we recommend the removal of Part 3 of the Schedule from the Bill below, we have not listed them here]

2 – inserting criminal standard of proof

New clause

In section 34 of the Policing and Crime Act 2009 (injunctions to prevent gang-related violence), in subsection (2), “on the balance of probabilities” is left out and there is inserted “beyond reasonable doubt”.

3 – aiming to ensure that injunction is measure of last resort

New clause

In section 34 of the Policing and Crime Act 2009 (injunctions to prevent gang-related violence), after subsection (3) there is inserted:

(3A) A court shall not think that it is "necessary" to grant an injunction under subsection (3) above unless it is satisfied that no alternative measure or measures, including criminal prosecution and other preventative and civil measures available to the police and the local authority, would be appropriate in this case sufficiently to accomplish the relevant purpose or purposes in subsection (3) above.

4 – removing power to impose custody on 14-17 year olds for breach of injunction/supervision order

Page 78, line 21 [*Clause 39*], leave out "or detention order"

Page 78, line 28 [*Clause 39*], leave out from "may make" to end of line and insert "a supervision order (see Part 2 of this Schedule)"

Page 78, line 30 [*Clause 39*], leave out sub-paragraph (2)

Page 79, line 6 [*Clause 39*], leave out sub-paragraph (7)

Page 86, line 40 [*Clause 39*], leave out sub-paragraph (b)

Page 88 [*Clause 39*], leave out from line 1 to end of line 2 on page 89

Briefing

While we strongly believe that these provisions should be removed from the Bill, we have here offered amendments that would go some way (although not sufficiently) towards ameliorating the worst aspects of these clauses if passed. We emphasise that the application of these amendments alone would not assuage our concerns about this regime and that we believe that these provisions be removed from the Bill.

The first amendments here (numbered 1) would provide that an application for an injunction against gang-related violence against a young person aged 14-17 should

be held in the youth court, not the civil courts. Further, breach proceedings would also be held in the youth court.

The amendment under (2) would provide that a respondent's involvement, encouragement or assistance of gang-related violence should be proved to the criminal standard (beyond reasonable doubt) before an injunction could be imposed.

The amendment under (3) aims to ensure that, as envisaged by the government, these injunctions would be used as a last resort. The experience of ASBOs and indeterminate sentences has shown us that courts and applicant agencies may pass/apply for far more of a relevant sentence or order than was envisaged by the government when creating them, because the legislative criteria are too loose and there is nothing to ensure that they are being used as a last resort. The amendment would require the applicant (police or local authority) to satisfy the court that other options including criminal prosecution, and other preventative/civil measures could not be used in this case effectively to address the risk posed by/towards the respondent.

The amendment under (4) would remove the possibility of custody for children who breach an injunction against gang-related violence. A Supervision Order, but not a Detention Order, could be made. If a respondent fails to comply with a Supervision Order, a new Supervision Order, but not a Detention Order, could be made.

Anti-social behaviour orders (clauses 40-41)

Amendment

Leave out clause 41

Briefing

This amendment would remove clause 41 (parenting orders on breach) from the Bill. This clause would provide that where an anti-social behaviour order (ASBO) is breached by a child or young person under 18, a parenting order must be made unless the court considers that there are 'exceptional circumstances' making this inappropriate. While we agree that parenting support services should be available to

parents whose children are behaving anti-socially, we are concerned that parents should not be made the subject of coercive orders because of their child's misbehaviour. In particular, this clause makes the order a presumption, unless exceptional circumstances exist. It is our understanding that a discretion already exists under s8 Crime and Disorder Act 1998 for the court to make a parenting order where a child is given an ASBO or convicted of an offence and this discretion is already directed where a child under 16 is convicted of an offence by s9 of the 1998 Act. We see no reason why the court's discretion should be directed and restricted by this clause. We therefore believe that this clause should be removed from the Bill.

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