



Police and Justice Bill

Briefing on Second Reading House of Lords

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Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. 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 and Justice Bill. Where we have not commented upon a certain provision in the Bill, that should not be taken as an endorsement of its contents.
3. Our concerns about the Bill's provisions centre upon five areas:
 - **The governance and supervision of police forces and the need to prevent politicisation**
 - **'Street bail' – whether it is appropriate for a constable at the scene to determine bail conditions**
 - **Conditional cautions – how to ensure conditions are set on the right basis**
 - **Anti-social behaviour injunctions (ASBIs) and parenting orders – functions being carried out by landlords and other private entities**
 - **Inspectorate reform – the impact upon human rights in places of detention**
4. In addition, we support the amendment of the Bill to bring about:
 - **An end to the use of Prison Service accommodation for children in custody, and**
 - **Better safeguards against wrongful extradition**

Policing – governance and supervision

5. The Bill contains a number of amendments to the methods by which police chief constables and police authorities are supervised. We have particular concern about the fact that a number of matters previously governed by statute are proposed to be governed now by an order-making regime – for example, in paragraph 10 of Sch 2, it is proposed that the Secretary of State can confer additional functions on police authorities by order. While we appreciate that Parliamentary time is currently stretched, we are not convinced that all these powers need to be exercised by order rather than according to a statutory regime.

6. We are also concerned by the proposed power for the Secretary of State to give directions to a police force and/or a police authority in relation to failings, under para 26 of Schedule 2. We share the concerns of the Association of Chief Police Officers with regard to the effect upon the tri-partite relationship of a power to direct chief officers of police. The previous power to direct forces rested upon an unfavourable report by Her Majesty's Inspectorate of Constabulary. While we acknowledge that urgent or evident systemic failings should be addressed directly, and that it may be necessary to do so as a matter of urgency rather than waiting for a report to be prepared, there is a danger in this provision that political reaction to high-profile cases or investigative failings may influence the Home Secretary and the government to institute inappropriate remedial changes. Greater safeguards may be necessary to prevent this.

7. We are also concerned at the changes to the procedure for policing plans in Schedule 2. Under the Police Act 1996 the chief constable drafts the plan, is consulted on any changes made by the police authority and can depart from the plan where necessary in practice.¹ The Bill provides an order-making power for the Home Secretary to require police authorities to issue plans. We are concerned that this, combined with the introduction of the duty in para 9(2) of Sch 2 to hold the chief officer of the force to account for the exercise of his functions, could lead to the politicisation of policing functions through excessive control by what could be (especially if magistrate members are no longer to be part of police authorities) a politicised body.

¹ See sections 8 and 10, Police Act 1996 (as amended).

Street bail - Clause 8 and Schedule 4

8. We agree that the use of 'street bail' is in some cases a sensible and expedient measure, preventing the unnecessary detention of a suspect at the police station pending charge. The power to bail elsewhere than at the police station, therefore, is in the interests of proportionality and also frees up officers to go about other duties rather than undertaking unnecessary escorts into detention.
9. We therefore support the existence of a power to bail someone to return to the police station on a given date. However, we are not convinced that individual officers – including inexperienced police constables – should be able to impose conditions upon bail elsewhere than at the police station. The decision-making process – whether the conditions are necessary in the interests of witness protection; preventing absconding; etc, does not lend itself well to the street setting. In the magistrates' court or the police station, time can be taken to consider whether conditions are necessary and if so, which. If an arrested person is taken to the police station it will also be more likely that they see a legal adviser, who could make representations on conditions to the custody sergeant.
10. By contrast, the officer at the scene may often have scant if any information about the suspect other than their identity; the details of the alleged offence may still be emerging and the strength of the evidence will often be difficult to assess. In many cases, the officer will simply not be in possession of sufficient information properly to perform the decision-making exercise in relation to conditions. This leads to the danger that the imposition of conditions upon street bail may become something of a matter of routine – one can imagine non-contact, residence and curfew requirements being imposed as a matter of course, for example – even where the consequent restrictions upon liberty are not justified in the individual case.
11. The use of street bail is presumably unlikely in cases where the suspect is thought to present an imminent danger to the public or where the offence is a particularly serious one. Conditional street bail may be most often used, therefore, for relatively minor offences. This means that the restrictions upon liberty entailed may be severe in relation to the likely outcome of a conviction for the offence alleged (which may, for example, be a fine or a caution). Since it will often be difficult to assess the strength of the evidence, conditional street bail may be imposed in some cases that may never proceed to charge.

12. We are particularly concerned about the imposition of conditions upon children. In many cases, an appropriate adult will not be present. The child or teenager in question may not understand the conditions that are imposed, nor be well-equipped to make representations if, for example, there is a good reason why he will not be able to fulfil them. The safeguards inherent in the appropriate adult framework will be lost. We therefore recommend that if this clause becomes law, it be disapplied to people under 17.

Conditional cautions – *Clauses 15 and 16*

13. Conditional cautioning can sometimes, we believe, be an expedient alternative to prosecution where a person would otherwise offer a guilty plea. Important safeguards must, however, be present, the most important being legal advice, by which a person must understand the implications of his consent to the caution.
14. We emphasise, however, that there are dangers inherent in the system proposed. Firstly, a conditional caution is available only where the person admits to the offence in interview. While we understand why this requirement was imposed (because of the danger of inducement), people from some cultural backgrounds are less likely to admit to an offence because of distrust of the police. The existence of conditional cautions may therefore exacerbate the differential in outcomes in the criminal justice system for different ethnic communities. This should, in particular, be considered when amendments are made to the CPS Code of Practice.
15. Secondly, the prosecutor should be furnished with information that allows him to decide appropriate conditions. This is particularly important in relation to means, and to underlying factors influencing offending, such as drug and alcohol addiction and mental health problems.
16. In the magistrates' court a means form would be filled in by the defendant so that the bench could order a financial penalty, compensation or costs award with knowledge of the defendant's means, and so that appropriate payment arrangements (for example by instalments) could be made. This is not a time-consuming process and should be done when it has been decided that a conditional caution should be imposed. We are concerned that conditional cautions should not provide a way for relatively affluent offenders to 'buy themselves out' of court. This would be

discriminatory and contrary to social justice. Fines and compensation payments imposed should reflect means and payment arrangements should be possible (eg payment by instalments), as they would be in the magistrates' court.

17. It is also essential that the prosecutor can be made aware of underlying factors such as drug or alcohol addiction or mental health problems. Otherwise, it will be impossible for any rehabilitative conditions to be appropriately tailored. Secondly, some circumstances may make other conditions (for example, an unpaid work requirement) inappropriate.
18. Similarly, the prosecutor should be made aware of any other circumstances (eg caring responsibilities, physical illness) that may affect the person's suitability for certain conditions. Ideally, therefore, if the prosecutor is considering the imposition of any non-financial conditions, the person should be seen by the National Offender Management Service so that a brief report can be prepared. If this is impossible due to resource constraints, at the very least the person's legal adviser should be able to inform the prosecutor, in writing or orally, before the conditions are imposed of any factors that would make certain conditions more or less appropriate. This would not involve 'bargaining' but simply the provision of information to the prosecutor.

ASBIs and parenting orders – *Clauses 21 - 24*

19. The Bill contains provision for bodies other than local authorities to seek and obtain parenting orders and anti-social behaviour injunctions, through the introduction of contracting out, and through specific powers re parenting orders given to registered social landlords (RSLs).
20. We do not believe that RSLs should be able to apply for parenting orders. Parenting orders deal with sensitive issues of a person's parenting skills and the behaviour of children and its causes. They can be imposed against the parent's will, can include residential programmes, and the ultimate sanction for non-compliance is imprisonment. If they are to be imposed, those applying for them should, in our view, be the local authority – who firstly, will have access to relevant information about the family such as social services records; secondly, are directly publicly accountable; and thirdly, should be familiar both with dealing with sensitive cases involving children and families, and with their duties under, for example, Article 8 of the European Convention on Human Rights.

21. The function of RSLs is to manage housing, not parenting, and their staff are unlikely to have the appropriate training or expertise to carry out these functions. Although the court is there to provide a check upon badly drafted orders or orders applied for in inappropriate circumstances, the number of cases appealed to the higher courts in which inappropriate ASBOs have been granted shows that this check alone is not sufficient. In particular, most ASBOs are granted in the form drafted – showing the importance of proportionality at the drafting stage.
22. Safeguards are particularly important in this process because of the breadth of the term ‘anti-social behaviour’. A child behaves anti-socially by acting in a manner that is likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. It is therefore clear that most children in the country will be guilty of anti-social behaviour at some stage before reaching adulthood.
23. It is particularly important, therefore, that those applying for orders exercise a sensible measure of restraint. However, the primary interest of RSLs rests, understandably, in maintaining good order and a pleasant and safe environment for those who live in their housing stock, and of course in protecting that housing itself. This could, in our view, lead them to apply for parenting orders wherever possible as a measure of caution.
24. The move to use RSLs in our view highlights one of the key deficiencies of the Respect agenda/anti-social behaviour strategy. While it is laudably aimed at improving the lives of poor people, it also targets them for coercive interventions. It is unclear to us why people in RSL accommodation, rather than those living in private rented or, indeed, privately owned accommodation should be targeted for parenting orders.
25. Clauses 23 and 24 also provide the for contracting out of local authority obligations in relation to anti-social behaviour injunctions and parenting orders and parenting contracts. Our concerns re RSLs regarding the appropriate training and ethos for applying for such orders also apply to private sector entities to whom these powers might be contracted out. In particular, when selecting candidates for such orders the entity in question must avoid doing so on any arbitrary, irrelevant or discriminatory grounds, and it must be properly accountable. We are concerned that private sector

bodies to which these functions may be contracted out will not comply with these standards.

Inspectorate reform

26. We are very concerned by the proposal to merge the prisons/custody inspection regime with that for the police, prosecuting authorities and courts administration. We note the concerns of the Joint Committee on Human Rights and both Anne Owers and Sir David Ramsbotham in this regard.²
27. On one level, it could be argued that the merging of inspectorate functions for the entire criminal justice system could enable better systemic criticisms. However, the independent inspection of places of detention, required under the Optional Protocol to the UN Convention Against Torture,³ has a function that is distinct from inspection regimes based upon improving the performance of public services and encouraging the attainment of government targets. It focuses upon the treatment of those in custody, ensuring that international human rights standards are complied with and that safety is maintained in places of detention. It is necessary, in order to carry out this function, that the custody inspectorate is well-resourced; able to make unannounced visits; and able independently to set its own criteria, grounded in human rights principles, for custodial institutions.
28. We are concerned that the new Chief Inspector for Justice, Community Safety and Custody will have insufficient functional independence from government, and will be awarded insufficient funds, to maintain the internationally lauded high standards of our current prisons inspection regime. In particular, we are concerned that:
- the Bill, at subclause 27(8), allows ministers to specify functions, organisations or matters that should not be subject to inspection, either in whole or in part;
 - clause 28, dealing with custody inspections, does not provide that the Inspector may inspect secure training centres or local authority secure children's homes, or secure NHS premises;

² Joint Committee on Human Rights, Twentieth Report of Session 2005-2006, plus letters annexed thereto.

³ The UK signed and ratified the Optional Protocol in 2003.

- clause 28 provides that it shall not apply to military facilities – despite the fact that the military prison at Colchester has been inspected by the current Chief Inspector of Prisons, and important findings made.⁴

29. The Optional Protocol to UNCAT requires the government to

set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment,⁵

and to allow such body or bodies, as well as the international Subcommittee on the prevention of torture, access to

any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.⁶

It is essential if the Protocol is to be effective that no places of detention be exempt from the inspections regime. The omissions and exclusions in clause 28 are therefore of serious concern, and, unless other suitable visiting bodies are designated for the purposes of these institutions, raise the question of the UK's compliance with the Protocol.

30. We are also concerned at clause 30. While it is sensible for ministers to be able to bring to the attention of the chief inspector a particular institution or local force etc which has given rise to concerns, and to request an inspection upon it, it is imperative that ministers do not control the time and resources of an independent inspectorate. A direction that one institution shall be inspected may, for example, delay the unannounced inspection of another prison about which the inspectorate has concerns. We are particularly concerned at clause 30(4), which mandates the Chief Inspector to 'have regard to aspects of government policy as the responsible ministers may direct.'

⁴ See lecture by Anne Owers, appended to JCHR report, *ibid*.

⁵ Article 3.

⁶ Article 4(1).

31. We note that the Joint Committee on Human Rights has made a number of recommendations⁷ for specific guarantees to be inserted into the Bill without which, it says, the single inspectorate regime would not be compatible with the Optional Protocol to UNCAT and would give rise to a greater risk of breaches of the human rights of prisoners. We endorse these recommendations. It should not be forgotten that 173 people died in prison last year, including 78 self-inflicted deaths and 10 others comprising homicide, other non-natural causes or awaiting classification;⁸ that chronic prisoner overcrowding daily affects human rights standards in prisons; that our children in custody have experienced practices that would be called child abuse in any other setting.⁹ It is entirely wrong, in our view, that we should risk losing the good practice of independent custody inspections at such a time in the interests of cost saving.

Children and custody

32. As a member of the Standing Committee for Youth Justice, JUSTICE is very concerned at the high numbers of children in custody in England and Wales and at the prevailing use of Prison Service accommodation – young offender institutions and private secure training centres – in preference to local authority secure childrens' homes. The deaths of 29 children in custody since 1990, and the recent concerns regarding the use of physical force against children in secure training centres, have highlighted the inappropriateness of a prison regime for children. As long ago as 2004, the Joint Committee on Human Rights, in its report on deaths in custody, said that

local authority secure accommodation should be used wherever possible for children, with use of prison service custody reduced to an absolute minimum.¹⁰

33. We therefore support the amendment of the Bill to ensure that custody for children is, in deed as well as in word, a last resort. This has been for too long a policy commitment in name that has not been applied in practice. The UN Convention on the Rights of the Child requires that '[t]he arrest, detention or imprisonment of a child

⁷ At para 1.56, Twentieth Report of session 2005-06.

⁸ Statistics from INQUEST, www.inquest.org.uk

⁹ Lord Carlile of Berriew QC (2006), *The Carlile Inquiry*.

¹⁰ Joint Committee on Human Rights, Third Report, 2004-2005, *Deaths in custody*

shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.¹¹ The UK has been criticised by the UN Committee that monitors compliance with the Convention: in its concluding observations on the UK in 2002, it said

... the Committee is deeply concerned at the increasing number of children who are being detained in custody at earlier ages for lesser offences and for longer sentences imposed as a result of the recently increased court powers to issue detention and restraining orders. The Committee is therefore concerned that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time, in violation of article 37 (b) of the Convention. The Committee is also extremely concerned at the conditions that children experience in detention and that children do not receive adequate protection or help in young offenders' institutions (for 15- to 17-year-olds), noting the very poor staff-child ratio, high levels of violence, bullying, self-harm and suicide, the inadequate rehabilitation opportunities, the solitary confinement in inappropriate conditions for a long time as a disciplinary measure or for protection, and the fact that girls and some boys in prisons are still not separated from adults.¹²

We also support the amendment of the Bill to ensure that those children for whom custody is genuinely necessary are detained in local authority secure accommodation where their safety is not compromised.

Extradition

34. The latest US-UK Extradition Treaty was signed in March 2003 but has yet to be ratified by the US Senate. The Treaty provides that the US does not have to produce evidence against a person in a UK court in order to extradite them to the United States. Although the treaty is not yet in force as a matter of international law, this provision has been given effect due to a statutory instrument under the Extradition Act 2003.¹³
35. We believe that this arrangement exposes UK citizens and residents to a significant risk of wrongful extradition. The obligation to provide a prima facie case is not an onerous one for a requesting government; in some cases, we believe, one or two witness statements could suffice. It is, however, an important safeguard to allow our courts to examine whether the request is manifestly ill-founded. The case of Lotfi

¹¹ Article 37(b).

¹² CRC/C/15/Add.188, 9 October 2002, para 59.

¹³ Designation of Part 2 Territories Order 2003, SI 2003/3334.

Raissi provides a telling example: Senior District Judge Workman, who refused the extradition, told the Home Affairs Select Committee last November that:

*'Raissi...was a defendant the United States required in relation to issues surrounding the bombing of the Twin Towers. In essence, the offences for which he appeared before me were nothing to do with that other than that he had failed to provide information which led to an allegation that he had misled the authorities to obtain a pilot's licence. In fact, having heard the evidence, I established that was not the case, but he was required by the United States at that time in relation to terrorist offences.'*¹⁴

When asked by Nick Herbert MP 'Is it not the point that under the new Treaty a prima facie case would not have to be made and you would not have been able to refuse that extradition?' the District Judge replied:

*'There were two charges, one of which I could have refused because that was purely on the basis of legal argument. The second charge, which related to an alleged deception in failing to notify a knee injury to the doctor, I think you are right, that that would have been difficult to have done anything other than to extradite.'*¹⁵

36. Section 137 of the Extradition Act 2003 allows UK citizens and residents to be extradited for offences that are alleged to have taken place substantially within the UK. This means that a UK citizen or resident could spend long periods of pre-trial custody in the US, or subject to the conditions of US bail, even though most of the alleged criminal activity took place here in the UK. This can apply even where the UK authorities considered prosecution against someone but declined to prosecute – either because they believed the evidence against the person was insufficient or because they decided that prosecution was not in the public interest.
37. By contrast, Article 7.1 of the 1957 European Convention on Extradition, which governs at an international level our extradition relations with a number of Council of Europe states, provides that an extradition request can be refused where the UK

¹⁴ Home Affairs Select Committee: UK-US Extradition Treaty, Oral Evidence given by Senior District Judge Tim Workman, 22 November 2005, in answer to Q28.

¹⁵ Ibid., Q33.

considers that it was committed 'in whole or in part in its territory or in a place treated as its territory'. Similar provisions have been included in the EU Framework Decision on the European Arrest Warrant.

38. The failure to include such provision in the Extradition Act is of particular concern with regard to the US because of the expansive interpretation of jurisdiction there in relation to some crimes. In some cases a single email passing through an ISP in the United States, or the publication of a company's annual reports to a single shareholder in the US, can trigger jurisdiction.
39. A person can be removed from their family by extradition and detained abroad – perhaps for years – awaiting trial. We therefore believe that proper safeguards should be in place so that this is only done in cases where extradition is justified and appropriate. In particular, we believe that where a crime is alleged to have been partly committed in the UK, the court should be able to determine whether it would be in the interests of justice for the person to be tried in the USA.
40. We therefore support the amendment of the Police and Justice Bill to amend the Extradition Act 2003, to provide that:
 - the US should produce evidence amounting to a prima facie case against someone in order to extradite them from the UK
 - the UK court should be able to block an extradition to the US where the crime allegedly took place partly in the UK, and where it would not be in the interests of justice for the person to be tried in the USA.

Sally Ireland

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