Public Bill Committee

CRIMINAL JUSTICE AND COURTS BILL

WRITTEN EVIDENCE

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS
LONDON—THE STATIONERY OFFICE LIMITED

PBC (Bill 169) 2013 –2014

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General point

The proposed changes to judicial review will privatise public law. Public law, and judicial review, is different to private law. Private law is about resolving disputes between individuals. A court looks back, i.e. at something that has happened in the past, and awards a remedy if that is required. Judicial review, by contrast, looks forward. That is, a judicial review will only succeed if there remains an *outstanding* issue of importance. That may be a policy, practice or decision that is unlawful and which needs changing for the future. A disabled person may be entitled to services, a school admissions panel may be required to look again at a case, a piece of government guidance may get the law wrong.

This "forward looking" aspect of judicial review is important for a number of reasons:

1. Judicial reviews may be perfectly valid at the outset, but become academic because a situation changes, perhaps through the action of a third party (the UKBA granting leave to remain, for example, so an individual need no longer look to a local authority for services). The need for the judicial review therefore falls away, but a claimant was right to have brought it. Should the work preparing it not be funded, even though permission is not granted?
2. Judicial reviews are not just concerned with the interests of the parties, but also non-parties who will also be subject to the policy or practice. Everyone has an interest in ensuring good quality decision-making. Everyone has an interest in ensuring that government action is lawful. Everyone has an interest in ensuring that officials do what Parliament intended them to do (hence the point that the organisation Justice is making: ministers often tell Parliament that if there is a problem with the detail in a bill, "there is always judicial review"). This remains true even when the parties are no longer interested in the outcome, and so the matter has become academic so far as they are concerned. This goes to the "materiality" point in Clause 50 of the Bill. It also goes to the importance of interveners, who are there when the court recognises that there is an interest beyond that of the parties, and where it needs to get its wider "forward-looking" function right (Clause 53 of the Bill).
3. For these and other reasons, private law concepts, including costs-incentives, do not translate well into judicial review. Judicial reviews are not "binary". They are not "win or lose" for an individual. There are cases that individuals will not support, and which solicitors' firms cannot risk assess, because they are affected by interests beyond the individuals immediately involved. The private market will not therefore step in to fund judicial review, or all judicial reviews. Privatising public law will therefore mean this crucial constitutional function will be seriously undermined. It may be lost altogether, and in respect of the most important, far-reaching cases.

Legal aid

A further general point is that the current reforms, contained in Part 4 of the Bill, are part of a much wider raft of measures including, in particular, the *Transforming Legal Aid* changes, the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which has not yet been in force a year and whose effects have not yet worked through), and the judicial review changes already introduced. I have been involved in civil justice reform for more than 20 years. Lawyers usually oppose change. Things are not usually as bad as they first appear. But after a year of meetings on the legal aid changes in particular, I think I can safely say I have never seen anything like this before. There is usually someone who can be found to say "I think this can be found to work". There is no such person this time. The meetings I attend are, frankly, and without risk of overstatement, full of despair. Any one of the current proposals would present problems. Take as a whole, the unanimous view is that the reforms may well derail the essential constitutional protection of judicial review altogether. Few good solicitors will be able to continue. Few judicial reviews will then be brought. Even fewer interventions will be possible. Unlawful decisions and practices will go unchallenged. Make no mistake: these reforms, which the Justice Secretary has said, more than once, to be "ideological", go much further than anything that has gone before.

It is of note that the particular proposal for restricting legal aid for judicial review, which is that lawyers will not be paid unless permission is granted, is not contained in this Bill. They will be, it is said, in secondary legislation. This is despite the fact that of all the current proposals that is the most dangerous. A top quality firm I spoke to in preparing this paper told me that they had assessed all the cases they had run during 2012. 25% would not now be paid. This was not because they had been refused permission, but because other things had changed as a case progressed. That firm cannot take a pay cut of 25%; it cannot survive it. This would be the effect of the judicial review proposal alone. The 25% figure takes no account of the effect of other legal aid reforms, including the residence test that is due to be introduced shortly.

The affected cases

One of the cases run by the firm mentioned above, and which the firm says it could now bring, concerned an action by 12 homeless teenagers who alleged that a local authority procurement process had been unlawful. The

authority agreed, and restarted the process, but on condition that there be no order as to costs. The solicitors had to accept that "deal", because it was in their clients' best interests. No doubt it would now be said that the firm could still do the work, and rely on Legal Aid Agency ("LAA") discretion to pay them in the circumstances. But the firm cannot rely on that. The ambit of LAA discretion is uncertain at the best of time, and particularly so when with this new proposal. The firm says that simply could not prepare 12 separate cases, however meritorious, at risk of not being paid. So these important cases would not be brought.

That same firm has also brought about changes to the law so that people are entitled to legal representation in specific, highly charged, circumstances (more than one case of this kind has been brought in the past 12 months, concerning a variety of situations). These are also important cases that could not now be brought: the costs risks would be too great.

This is just one firm, and there are many examples of cases like these that could not now be brought because, for example, the start-up costs would be too great to take the risk of non payment. Social welfare cases such as those challenging the lawfulness of the bedroom tax is an example. Not all will agree with the outcome of that case, but all should agree that it is one of the most difficult issues of recent times, and so worthy of a court's attention. The case concerning the lawfulness of the policy of refusing the Gurkhas the right to settle in the UK is another. In the case of *Begum v Governing Body of Denbigh School*, schools were told that provided they properly assessed their community needs, taking into account relevant matters, then their school uniform policies would achieve great things and be effectively immune from challenge.

It would now be very difficult to bring all of these cases. To repeat, public law is different, and one cannot rely on the private legal market to step in to cover cases that bring a benefit to society as a whole, particularly where that wider public aspect means that the costs rules and dynamics of this kind of litigation are very different.

One last example: the case of *YL v Birmingham*, which was concerned with whether private care providers were public authorities and so caught by the Human Rights Act 1998, the government was so concerned about the potential implications that it invited, and funded, interventions from the care sector. Should only interventions in which the government is interested be permitted?

The Bill

Against that general background, some brief points on the Bill itself:

Clause 50: Likelihood of substantially different outcome for applicant

The key points here are:

1. Whether the applicant will achieve a different outcome or not, everyone has an interest in correcting illegality.
2. It is impermissible—it is not their role—for courts to decide what a public authority, now properly directed as to the law, would decide. That is for the public authority.
3. Even if a remedy is denied to the individual, but a court has, in its reasoning, cast doubt on the lawfulness of a decision or practice, then denying a remedy will simply mean that another litigant will have to bring the same case, but where the outcome will impact on him or her. This will therefore produce additional litigation.
4. What happens with cases such as those seeking a declaration of incompatibility (under s.4 Human Rights Act 1998)? These are obviously hugely important cases, dealing the lawfulness of primary legislation. But how can a court determine the effect, for an individual, when that depends on what Parliament decides to do in order to rectify (or not) an incompatibility?

Clauses 51 and 52: Information about financial resources

This will prevent cases, not now eligible for legal aid, which are group-funded. Will a daughter now contribute £5,000 to a case concerning the care requirements of her mother, when there is a risk that may make her liable for the defendant's costs should the case fail? Will a group consider donating £1,000 per person to a judicial review designed to check whether the Environment Agency is pursuing lawful policies in Somerset if similar risks arise? The Justice Secretary says he wants to stop interest groups hiding behind an individual, but does Parliament really want to stop these cases, in which many people have such an interest that they are prepared to privately part-fund? Those are by definition cases that matter to people.

Clause 53: Interveners

This clause threatens to stop interventions completely, or at least, those interventions that are not on behalf of powerful financial interests, or funded by the government (see the *YL v Birmingham* example above). Small charities cannot afford to pay the costs of defendants, and the clause is in mandatory terms (Clause 53(4): "the court *must* order…"). Note also that this seems to apply, i.e. an intervener must pay, even if the relevant party has lost the case (perhaps because the intervener's submissions were preferred. This therefore threatens to introduce a concept wholly alien to English common law: "winner pays").

Clauses 54 and 55: Capping of costs

The biggest problem here is Clause 54(3), which prevents costs-capping orders being imposed in respect of pre-permission costs. Defendants often incur enormous costs at the pre-permission stage. Clause 54(3) will leave recognised (because they will have satisfied the rest of the test, including Clause 54(7)) public interest litigants exposed to those costs. The result will be, I and others think, that charities and others involved in this kind of litigation simply won't bother applying. The risks will be too great. This is yet another very serious chilling effect.

The other significant problem here is the power to introduce by regulation further matters to which the court must have regard: see Clause 54(9). That is enormously powerful, and risks being mis-used.

Conclusion

This paper has had to be prepared within a very tight time limit, and may be expanded on orally. It may however be worth concluding by reference to the speech given by Lord Neuberger last month ("The British and Europe"), and where he touched on the fragility of the rule of law. People in this country, he suggested, were not as conscious of that fragility as perhaps others such as those in mainland Europe who had experienced invasion, revolution and other turbulence.

There are reasons why senior judges are currently expressing themselves in such terms. The current proposals are extremely dangerous. Difficult to understand, perhaps. Also technical, and concerning superficially boring matters of legal procedure and costs. But no less dangerous for that.

March 2014

Written evidence submitted by The Howard League for Penal Reform (CJC 02)

The Howard League for Penal Reform is the oldest penal reform charity in the world. We campaign, lobby, publish research and through our legal team, represent children and young adults in custody. We work towards less crime, safer communities and fewer people in prison. For more information about the Howard League please visit www.howardleague.org.

1. Introduction

1.1 **The Criminal Justice and Courts Bill attempts to tackle a myriad of tenuously connected issues in the criminal justice system and must be seen in the context of the forthcoming general election**. The majority of changes proposed in the Bill are unnecessary and seek to reduce professional discretion and lengthen a relatively small number of custodial sentences without discernible cause. Described by the Lord Chancellor as a "tough package of sentencing measures", the Bill as a whole is reminiscent of the kind of legislative activism seen under the last government, which has been much criticised by the Coalition parties.

1.2 **There are particular areas of the Bill where the Howard League for Penal Reform believes the changes could be deeply damaging to public safety and the integrity of the criminal justice system:** (1) the proposed changes to judicial review, (2) changes to the parole system and increased responsibilities placed on an already overstretched Parole Board, (3) plans to build the largest children's prison in Europe, termed a 'Secure College', and (4) the proposal to use force against children in custody to enforce 'good order and discipline', a practice that the courts have deemed illegal and inquests have found as a contributory factor to the deaths of children in custody.

1.3 **There are also a concerning number of areas where the Bill grants excessive additional powers to the Lord Chancellor**, to exercise as a carte blanche under secondary legislation. These changes are unspecified, uncosted and in some cases could allow the Lord Chancellor to make substantial changes affecting people's liberty and access to justice. For instance, the Lord Chancellor proposes to authorise himself to:

1.3.1 Change the test for release that the independent Parole Board should apply in determining release. (Clause 8)

1.3.2 Mandate that certain groups of people, that he shall determine at a later date, should be subject to mandatory GPS tracking. (Clause 6, subsection 3)

1.3.3 Set out rules concerning what the Court must take into account when deciding something is in the public interest for the purpose of protecting costs. (Clause 54, subsection 9)

2. Changes to judicial review

2.1 *Changes to judicial review are a removal of a final safety net left by legal aid cuts*

2.1.1 The changes to Judicial Review in this Bill cannot be viewed in isolation. Legal aid has been cut to the bone over the past five years and much of the work by lawyers that would have prevented judicial reviews being necessary is no longer available. For instance, in the field of prison law, the Howard League has helped hundreds of children to secure the accommodation and support they need to turn their backs on crime simply by writing letters to local authorities, reminding them of their statutory duties. This is no longer funded under

legal aid (at a cost of £220 per case), so situations are likely to deteriorate to a point where only the safety net of a judicial review remains.

2.1.2 On the same day the Bill was introduced, the government announced it would put forward a Statutory Instrument to impose financial constraints on lawyers bringing judicial review cases, so they would have no certainty of being paid unless and until the High Court grants permission, i.e. that the case is arguable and should proceed. The majority of cases are resolved by agreement before that stage is reached. It will be difficult or impossible for lawyers to take the risk of weeks of work without any certainty of payment. As such, these changes would have a chilling effect on access to the High Court, especially for vulnerable people, who are the victims of illegal state action.

2.2 *Changes to rules on intervenors undermine public interest*

2.2.1 Clause 53 of the Bill makes sweeping changes to neutral interventions in judicial review cases. It is an established principle that the loser pays the winner's costs. However, when experts receive permission to address the court to provide argument or evidence, they are doing so neutrally to assist the court by adding value to the case. As such, they are unable to win or lose in a way that a party might do so—and are almost always unable to recoup their costs. These proposals reinforce that position, presenting a statutory bar on intervenors recouping costs. Moreover, other than in 'exceptional circumstances', the court will be forced to make the intervenor pay the costs of any additional legal work undertaken to address matters arising from the intervention, in the likely event a party requests it. It also creates perverse incentives: the more useful, thorough and pertinent the intervention, the more work is required to answer it, leading to a greater costs risk to the intervenor. Last year, the Howard League intervened in a successful case brought by Just For Kids Law, which established the right of 17-year-olds to see an 'appropriate adult' on being taken into police custody, following the deaths of two 17-year-olds who were denied this right. In this case, the court recognised that many of the important arguments emerged from the intervenors' submissions. It would have been perverse for the charity to be saddled with the costs of the government in responding to our legitimate and expert legal argument that was designed to aid the court in its decision making.

2.2.2 These changes to the cost rules on interventions go directly against the advice of senior judiciary in their response to the consultation.[1] They explained that the court can already impose cost orders against third parties, but the fact that such orders are made rarely shows that the court 'benefits from hearing from third parties'. Indeed, part 44 of the Civil Procedure Rules provides the court with a very broad discretion to award costs orders against parties to judicial review proceedings. The senior judiciary has warned that 'caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court.'

2.2.3 Given that the government took on the advice of the judiciary not to bar third sector organisations from bringing claims by changing the rules on standing, the decision to introduce onerous cost consequences for those seeking merely to assist the court defies logic.

2.3 *Making judicial reviews in the public interest unaffordable*

2.3.1 Clauses 54, 55 and 56 amend the circumstances in which cost-capping orders can be made in judicial review, which can only be awarded in cases where the court agrees that the subject matter is of 'general public importance', the public interest requires the issue to be resolved and judicial review is appropriate. These clauses introduce wide-ranging restrictions on the court's ability to grant these orders. First, the court will be prohibited from granting these orders at the early stage of this case, before permission to argue that case has been granted. This deprives less wealthy individuals and organisations from accessing the court, for fear that the cost risk at this stage will be too great. Second, these clauses outline the specific factors the court must consider and, alarmingly, clause 54 (9) authorises the Lord Chancellor to add to the list of factors to court must consider prior to granting a Protective Cost Order. It is no coincidence that the Lord Chancellor is often the defendant against whom claimants are seeking cost protection.

2.4 *Forcing courts to second-guess the impact of a lawful decision which never took place*

2.4.1 Clause 50 represents an attack on the fundamental basis of administrative law: that the legality of the process by which a decision was reached is open to challenge. This clause will prevent the court from overturning an illegal decision, or making other orders to reflect this illegality, if it is believed to be highly likely that the result of the decision being made in a legal manner 'would not have been substantially different'. This reduces the current test from one of inevitability to requiring the court to engage in the impossible exercise of second-guessing the results of a lawful decision. The Howard League believes this proposal is wrong in principle.

[1] Paragraph 37 http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

2.5 **CASE STUDY The right of 17-year-olds to see an 'appropriate adult'**

Last year, the Howard League intervened in a successful case brought by Just For Kids Law, which established the right of 17-year-olds to see an 'appropriate adult' on being taken into police custody. The case was brought on behalf of an individual young person, HC, who had been arrested and denied an appropriate adult at the police station. He challenged this decision.

As interveners, the Howard League was able to draw on its experience of representing children in detention for many years and develop legal arguments around the common law duties to ensure access to justice that would not otherwise have been before the Court. The Howard League's intervention supported the contention that all 17 year old children are required by law to the same assistance as children under the age of 17.

In this case, the court recognised that many of the important arguments emerged when one delved into the interveners' submissions.

Under the provisions in the new Bill, the Howard League would have been at risk of having to pay for any work undertaken by the other parties as a result of its submissions. It would have been perverse for the charity to be saddled with the costs of the government in responding to our legitimate and expert legal argument that was designed to, and clearly did, assist the court in its decision making. The new rule would deter many organisations from assisting the Court as interveners for fear of fear of having to pay other parties costs. As the rules for interveners are that they must add real value in order to be permitted to contribute to the case, the new rules would unduly penalize those who add real value by raising new and innovative points.

3. Changes to parole

3.1 *The Parole Board is already overstretched and under-resourced*

3.1.1 The Parole Board is currently stretched to breaking point. A Supreme Court ruling in October 2013 (Osborn, Booth and Reilly v The Parole Board) entitled prisoners to face-to-face hearings, meaning the Parole Board anticipates thousands more oral rather than paper-based hearings. This has exposed its lack of manpower after staff numbers have been reduced by nearly one in five in recent years.

3.1.2 On 17 December 2013, Claire Bassett, Chief Executive of the Parole Board, told the Justice Committee that 'Last year we had about 4,500 oral hearings. We are estimating that we could have to have upwards of 12,000 or 14,000 in the future because, essentially, the judgment has removed from us the ability to insist on paper decisions in the vast majority of our cases.'

3.2 *Additional unfunded burdens on the Parole Board*

3.2.1 The proposals to end automatic early release for people who have committed certain offences will result in the Secretary of State sending extra cases to the Parole Board where he believes that the prisoner who has been recalled is unlikely to comply with licence conditions. These, and other proposed changes, will add further to the burdens on the Parole Board.

3.2.2 The Howard League for Penal Reform recommends that the opportunity of this legislation is taken to put the Parole Board, currently a non-departmental public body, on a statutory footing. This would strengthen its independence and give it access to increased resources to deal with its increased workload following the Osborn judgment and the passage of this Bill.

3.3 *Changes to the test for release could leave the vulnerable languishing in prison*

3.3.1 Clauses 7 and 8 affect the arrangements for the re-release of people who have been called back to custody during their licence period. Two thirds of Parole Board cases involve decisions about whether prisoners serving fixed term sentences can be released again on licence from prison following a return to prison. Clause 8 empowers the Lord Chancellor to change the test for release that the Parole Board must apply at any time of his choosing through secondary legislation. The current test for release is focused squarely on the risk of harm to the public and only allows the Parole Board to release a prisoner if it is 'satisfied that it is no longer necessary for the prisoner to be detained to protect the public from serious harm'.

3.3.2 Clause 7 will dramatically change to the focus of the circumstances in which a prisoner can be re-released. Rather than focusing squarely on the likelihood of serious harm to the public, the Lord Chancellor and Parole Board will be required to also focus on how likely it is that a prisoner will stick to their licence conditions. The Lord Chancellor will be required to send prisoners that are currently automatically re-released after 28 days to the Parole Board if he thinks they are highly unlikely to comply with a licence condition, irrespective of whether such a breach would actually present a threat to the public. This will further increase the burden on the Parole Board. In all recall cases of fixed term prisoners, the Parole Board will also be required to consider the likelihood of compliance, detracting from its current focus of risk of harm and ensnaring the board in the impossible task of second guessing how life will pan out for the prisoner on licence. It is hard to see how Parole Board members could apply this test consistently.

3.3.3 This new focus on the likelihood of breaching conditions will disproportionately affect those with complex licence conditions that do not allow for the realities of day-to-day life, such as being required to notify someone of your whereabouts five times a day. In particular, it will affect those prisoners who are deemed to be less likely to be able to comply, such as children, the mentally ill and people with learning disabilities.

3.3.4 There is a very real risk that these changes will lead to a significant increase in the number of people in prison, who live chaotic lives and are some of the most difficult to manage, but may not pose a risk of serious harm to the public.

3.3.5 The Bill also changes the powers of the Parole Board in determinate cases. Currently, the Parole Board has the power to order release at a fixed date in the future. This will be replaced by a power to direct release as soon as conditions are met. There is a real risk that this will result in a large number of prisoners languishing in jail while statutory agencies fail to meet conditions for release. In complex cases, there will be a perverse incentive for local authorities and other agencies responsible for putting together a rehabilitation package not to do so in a timely fashion, leaving the Ministry of Justice and the taxpayer to foot the bill for an extended period in custody.

3.4 **CASE STUDY Peter's story**

The Howard League legal team represented 'Peter', a young man who had been recalled to prison while on licence. It fell to the Parole Board to consider whether or not he could be safely release back into the community again on licence—which they judged to be the case. His probation officer had prepared a release plan, part of which was for Peter to live at 'approved premises'—sometimes called bail hostels. The Parole Board directed his release for a certain date, four weeks after its decision to allow the probation service to source a bed in a bail hostel for him. The current law is that Peter could not be lawfully detained past that date. The date of Peter's release arrived and he was geared up to make a fresh start in the community on licence. But on the day of his release, he was told that he would not be released because a bed had not been found for him.

Peter contacted our expert legal team at Howard League to ask for help. The absence of any bed meant that, if he was released with nowhere to live, he would immediately be in breach of licence conditions. As the Parole Board had set the condition that he live in a bail hostel, he would be recalled to prison.

The legal team sent a letter to the authorities that day asking them to find Peter a place in approved premises as a matter of urgency to enable the Secretary of State to release him from custody. The letter put the authorities on notice that the Howard League would issue a judicial review in the High Court, as Peter was being detained unlawfully.

As the authorities were aware that Peter was being detained unlawfully, they responded quickly without the need for the team to issue a judicial review. A placement was found and Peter was released the following day on licence.

Without the impetus of the continued stay being illegal, it is likely that Peter would not have been found a place quickly and he would have remained in prison at great personal and financial cost, while the probation service continued to struggle to find a place.

4. The 'Secure College', Europe's largest children's prison

4.1 *Undermining four years of progress*

4.1.1 **The government should be praised for its record in reducing the numbers of children in custody, which have fallen from 2,136 children in May 2010 to 1,168 in December 2013**. This, coupled with the refreshing approach of police forces across England and Wales to reduce the number of unnecessary child arrests, has allowed a renewed focus on crime prevention and alternatives to custody. Youth justice reinvestment pilots in Manchester and inner London boroughs have also shown how investment in diversion rather than criminal justice can yield benefits in terms of public safety.

4.1.2 The government should continue this strategy to reduce the number of children in prison, addressing in particular the high number of children held on remand, the majority of whom do not go on to receive a custodial sentence and the excessive number of children in prison for non-compliance. For the small fraction of the existing children's prison population who truly require custody, the network of small, localised Secure Children's Homes represents the best model for success. These homes put the welfare of the child first and provide an education that offers a wide curriculum. In addition, given that almost all children in custody have been excluded from school, more support should be given to these children long before they come into contact with the criminal justice system. **Deploying the money intended for a Secure College on Secure Children's Homes and crime prevention would produce significantly more effective outcomes for the taxpayer and children.**

4.2 *Secure Colleges reinvent a broken wheel*

4.2.1 Part 2 of the Bill introduces the 'Secure College' as a form of imprisonment for children in England, with the first such college or 'fortified school' to be built at Glen Parva in Leicestershire. This 'college',

presented as 'putting education at the heart of custody', is intended to be a pathfinder for what will eventually become the main custodial setting for children.

4.2.2 The government is right to focus on the staggeringly high reoffending rates for children who leave custody, as well as their poor educational performance. However, their Secure College strategy differs in no meaningful way from the failed Secure Training Centres, launched two decades ago, other than in the scale of the institution (the Secure College will be more than six times larger) and spend per inmate (less than half that of STCs).

4.2.3 There is a very real danger that sentencers will now see youth custody as entailing positive educational outcomes, encouraging them to sentence children to schooling. The construction of Secure Training Centres in the late 1990s, along with the introduction of the Detention and Training Order, provides a cautionary tale on the effect of such an approach: the promise of training and education saw the number of children in custody rise dramatically, so that by 2007 over 3,000 children were behind bars.

4.2.4 Secure Training Centres failed to reduce reoffending because, like the Secure College plan, they fail to take account of the realities of why children offend. Children in prison have a range of complex needs, including mental health problems, learning difficulties, self-harm, and histories of abuse and neglect. Low levels of education must be seen as symptoms of these underlying problems. **Constructing vast custodial institutions that do not have welfare at their heart will always fail to reduce outcomes for vulnerable children and will inevitably be centres of violence and self-harm.**

4.3 *A lack of realism*

4.3.1 The government plans to fund Secure College places at a similar level to existing Young Offender Institutions. These existing prisons are unable to meet even their derisory target of 15 hours of education per week, averaging just 12 hours. As such, the government's assertions that the Secure College will be able to offer specialist provision seem wholly unrealistic, given that nothing close to it is achieved at similar institutions.

4.3.2 Further claims that the size of the institution will make it easier to offer a broad curriculum fly in the face of all evidence. Secure Children's Homes are able to offer this support already with fewer than 30 children in their care, while far larger Young Offenders' Institutions are unable to do so. Whatever their intentions, large custodial institutions for troubled children always end up focusing on maintaining order rather than any other outcomes.

4.3.3 These plans for renewed focus on education, without any additional money available, come against a backdrop of significant staff cuts across the custodial estate, which has led to falls in opportunities for education and training. This is evident from almost every report from Her Majesty's Chief Inspector of Prisons in both the adult and youth estate.

4.3.4 The plans are not clear as to whether very young girls will be held alongside boys. Secure Children's Homes are able to care for girls safely because they are intensively staffed whereas a massive institution with mixed girls and boys would put girls at risk.

5. Use of force on children in Secure Colleges

5.1 Paragraphs 8 and 10 of Schedule 4 of the Bill make provision for the use of restraint on children in Secure Colleges. Included within this, is the ability to use restraint to enforce 'good order and discipline', which allows officers to use force against children simply for not doing as they are told, in addition to actions which are genuinely harmful to themselves or others.

5.2 Using force against a child in the care of the state is a very serious matter that can have lasting consequences. As Lord Carlile has argued, in any other setting an adult or groups of adults assaulting a child would lead to a child protection inquiry.[2] As such, force must only be used where the state can justify its absolute necessity, and that is why the current legal position for children in Secure Training Centres is that restraint cannot be used to make children do as instructed.

5.3 The inclusion of this provision in primary legislation opens the door to authorising restraint for good order and discipline in Secure Colleges. The Prisons Minister has insisted that this will not be the case, as the Secure College rules will not allow for it, but there is no guarantee this will be the case or justification for its inclusion in the Bill.

5.4 As Mr Justice Blake observed in his judgment on the need for a second inquest into the death of Adam Rickwood, a 14-year-old boy who took his own life following a restraint for good order and discipline, 'hurting children as a disciplinary measure is a controversial subject in any sphere of social life, but especially in newly privatised training centres to be established for the youngest class of offenders.' The Howard League believes a Bill that paves the way for this kind of risk is unacceptable.

5.5 Paragraphs 8 and 10 of Schedule 4, which appear to allow for restraint to make children do as they are told, mirror the provisions of a 1994 Act. These provisions were linked to Secure Training Centre rules,

[2] The Carlile Inquiry, Page 9 https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Publications/Carlile_Report_pdf.pdf

introduced by secondary legislation, as is the intention with the new Secure College rules. These rules said the opposite of the primary legislation and prohibited the use of force for disciplinary reasons.[3] When the government tried to change the rules to allow restraint for 'good order and discipline' in STCs, the Court of Appeal struck them down as unlawful, in light of Article 3 of the European Convention on Human Rights. The new legislation therefore risks making the same mistake by leaving it to the Lord Chancellor to introduce the Secure College rules which could purport to allow restraint for discipline.

5.6 The inclusion of restraint for good order and discipline is wholly unnecessary and creates an ambiguous situation where the government's stated intention is the opposite of the letter of the law. The Youth Justice Board's review into the deaths of children in custody, released on 20 February 2014, included a previously unpublished letter from the coroner presiding over the first inquest into the death of Adam Rickwood, highlighting the dangers of such a lack of legislative clarity:

> *An urgent review should be undertaken to clarify the inter-relationship between the Criminal Justice and Public Order Act 1994 (s9), the STC Rules issued thereunder and the Directors Rules to avoid any confusion whatsoever. It must be seen as essential that there must be no ambiguity in anyone's mind, young person, staff, management or those in the YJB or indeed government as to when the use of restraint or force to maintain good order and discipline or for compliance reasons is authorised.*

5.7 **CASE STUDY Kevin's story**

The Howard League legal team represented Kevin, a vulnerable 15 year old with ADHD and learning difficulties. He was restrained four times in a Secure Training Centre.

Kevin was involved in an incident where several young people, feeling aggrieved about the loss of privileges, sat down with linked arms in the association area and refused to go to bed.

The staff tried to persuade them to leave, but when they refused to co-operate, the senior officer gave the order to use restraint to move the boys to their rooms. As there was no risk of the young people escaping, injuring anyone or damaging property, the use of force was unlawful. In the course of the restraint, Kevin's arm was broken.

The use of restraint for good order and discipline has been scrutinised by the Courts. The provisions in the Bill mirror provisions that, in conjunction with the Secure Training Centre rules, have been put forward as justifying this inhumane practice.

March 2014

Written evidence submitted by UK Lawyers for Israel (CJC 03)

1. This submission is made by UK Lawyers for Israel, a voluntary association of lawyers who seek to support Israel in relation to legal matters.

2. We would like to propose an amendment to the Criminal Justice and Courts Bill in order to give a clear civil right of action to those adversely affected by an aggravated trespass, such as the disruption of an artistic performance. Specifically, we propose the addition of a further subsection to section 68 of the Criminal Justice and Public Order Act 1994 as follows:

> *(6) A contravention of subsection (1) shall be actionable in civil proceedings at the suit of a person adversely affected by it, subject to the defences and other incidents applying to actions for breach of statutory duty.*

3. Performances by Israeli performers and talks by Israeli lecturers have regularly been disrupted in recent years. The disruption of a performance by the Israeli Philharmonic Orchestra at the Royal Albert Hall in September 2011 was a typical example. Eye-witness accounts and videos posted on the Internet convey the threatening and dangerous atmosphere of such occasions:

4. A BBC report quoted Theartsdesk.com music reviewer, Igor Toronyi-Lalic, saying: *"The whole hall was groaning and trying to slow clap them out. It had the atmosphere of a riot":* see http://www.bbc.co.uk/news/uk-14756736 .

5. Another eye-witness wrote: *"This created a most tense and hostile atmosphere throughout the several disruptions. Each time the chanting and shouting broke out, my eleven-year-old grandson became very upset, and kept saying he wanted to go home. The reaction of the vast majority of music-lovers, who wanted to hear the music in peace, created an understandable sense of frustration and anger throughout the Hall and posed a significant threat to public order. From where I was sitting in the circle, it occurred to me how easily an enraged member of the audience could have pushed one or more of those protesting in the front row over the balcony."*

[3] Clause 9 (3c) http://www.legislation.gov.uk/ukpga/1994/33/part/I/crossheading/secure-training-orders

6. Another wrote: *"We witnessed elderly gentlemen who wished nothing else, but to enjoy an evening of music by one of the most prominent orchestras led by its distinguished maestro, having to argue with Neanderthals to such extent that one of them felt the need to physically try to remove them from the seats resulting in slaps on the heads."*

7. Another wrote: *"I felt extremely intimidated by the whole experience"*.

8. Video recordings of these incidents can viewed on the Internet at

http://www.youtube.com/watch?v=uIrLrGVfcr4

http://www.youtube.com/watch?v=NlHWiykc-24

http://www.youtube.com/watch?v=mrfH9GMM_iE&NR=1

http://richardmillett.wordpress.com/2011/09/02/why-did-the-bbc-pull-last-nights-live-transmission-of-the-israeli-philharmonic-orchestra-at-the-proms/

http://hurryupharry.org/2011/09/02/mashing-together-philistinism-with-israel-intolerance

9. We have no doubt that such conduct amounts to aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994. This offence is committed where a person trespasses on land and does anything there which is intended by him to have the effect of disrupting a lawful activity in which persons are engaging on that land. Even if those disrupting the performance had tickets, they were trespassers because they were permitted to enter the Hall for the purpose of listening to and watching the performance, not for the purpose of disrupting it.

10. It is well established that a person is a trespasser if he is permitted to enter premises for one purpose but enters them for a different purpose: *R v Jones and Smith* [1976] 1 WLR 672. In *Geary v Wetherspoon* [2011] EWHC 1506 the Court quoted the well known dictum of Lord Justice Scrutton in *The Calgarth* [1927] P 93: *"When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way in which it is used."*

11. However, despite a considerable number of complaints from members of the audience, and a letter from ourselves identifying several of those who led the disruption, the police declined to prosecute, on the ground that the Royal Albert Hall management had not asked them to act.

12. Disruption of various subsequent performances by Israeli artistes was reduced (but not prevented) by a large (and no doubt expensive) police presence outside the venues together with private security inside the venues. The cost of private security is normally borne by the venue or promoter and it appears that this led to the cancellation of a performance by the Israeli dance company, Batsheva, in Brighton (http://www.thejc.com/news/uk-news/88066/security%E2%80%99-scuppers-israel-dance-event-brighton). Again, despite the disruption of several performances, the police forces concerned have not prosecuted those responsible.

13. Lectures by Israelis have also been disrupted in various cities around the UK.

14. We respectfully submit that a civil right of action would enable those affected by this kind of disruption, such as members of the audience, to obtain a remedy, whether or not the police prosecute, and this would in turn lead to a reduction of the disruption and the threat of disruption, and less need for special security arrangements. Although our association's concern is with the impact on matters connected with Israel, the issue is of course a broader one, applying to disruption for any political or other purpose.

15. We would emphasise that we are not seeking to prevent demonstrations outside a venue, or even inside a venue, where they do not disrupt a performance or other lawful activity. We are merely seeking to provide a civil right of action for what is already a crime. We have no objection to protesters communicating their criticism of Israel or any other country or organisation in a lawful way; but disrupting an artistic performance or lecture crosses a red line, and we suggest that there should be an effective remedy available to those affected.

16. We would add that the legitimacy of the prohibition in section 68 was emphatically affirmed by the Supreme Court in the recent case *Richardson v DPP* http://supremecourt.uk/decided-cases/docs/UKSC_2012_0198_Judgment.pdf.

March 2014 (Revised)

Written evidence submitted by End Violence Against Women Coalition (CJC 04)

1. About the End Violence Against Women Coalition

1.1.1 End Violence Against Women (EVAW) is a UK-wide coalition[4] of women's organisations, frontline service providers, survivors, human rights organisations, academics and activists who came together in 2005 to

[4] Members include Child and Woman Abuse Studies Unit, Object, Rape Crisis England and Wales, Amnesty UK, Women's Institute, Imkaan, Women's Aid, Eaves, Zero Tolerance, Equality Now, Fawcett, Platform 51, Respect, Refuge, Rights of Women, TUC and others.

campaign for strategic approaches to all forms of violence against women and girls in the UK. We work to the UN definition of violence against women and girls (VAWG) as "violence directed at a woman because she is a woman or acts of violence which are suffered disproportionately by women"[5].

1.1.2 Our members campaigned successfully for the Westminster, London and Wales Violence Against Women and Girls (VAWG) strategies and we run a network of experts on preventing VAWG. We campaign to end the prejudicial and sexist treatment of women across the media, and gave evidence to the Leveson Inquiry in 2012 with other women's groups.

2. Clause 16—including rape and assault by penetration in the definition of extreme pornography

2.1 There is very clear evidence about the harm of pornography, in particular to boys' and men's attitudes to women and to gender equality, and the clear correlation with sexual violence. We therefore supported Rape Crisis South London's important campaign to include rape in the extreme pornography law and were very pleased at the Prime Minister's announcement in July 2013. It is an anomaly that Professors Clare McGlynn and Erika Rackley at the University of Durham have been raising since the legislation was first introduced in 2008.[6] A Change.org petition attracting over 73,000 signatories in a matter of weeks showed the huge public support for this change. Moreover, research and polling[7] shows that pornography is an issue that women and girls in particular are extremely concerned about.

2.2 We therefore warmly welcome Clause 16 in the Criminal Justice and Courts Bill which amends the Criminal Justice and Immigration Act 2008 to include rape and assault by penetration with an object in the definition of 'extreme pornography'. We believe that this change, and robust enforcement, needs to be explicitly linked into the government's strategy to end violence against women and girls, which has a key objective of prevention.

2.3 The Prime Minister said in his speech of July 2013 *"Put simply: what you can't get in a shop, you shouldn't be able to get online."*[8] We note that the proposed reform does not bring a consistent approach to pornographic material online and offline, for the following reasons;

- It would not criminalise possession of harmful pornographic images that promote sexual violence or coercion more broadly. For example, images depicting incest currently available online titled 'Real Siblings Hardcore Incest' and 'Daughter Sucking Her Father's Dick' would still be lawful to possess and download so long as the actors are over 18.
- The requirement for the image to be 'explicit and realistic' will exclude a great deal of imagery that is, nevertheless, harmful in that it promotes sexual violence.
- It excludes images that are not of 'real people' eg Hentai cartoons with titles such as 'School fuck with pretty chick' that are currently available online.
- The number of prosecutions will be severely limited by 16 (7b) which states: For the purposes of subsection (7A)—(a) penetration is a continuing act from entry to withdrawal.

2.4 Currently we have a wholly inconsistent approach to restricting and regulating harmful images across the media. We support the BBFC's[9] approach to classifying films, including R18 rated films, whereby the following images will be cut that (p28):

- material which makes sexual or sadistic violence look normal, appealing, or arousing
- material which reinforces the suggestion that victims enjoy sexual violence
- material which invites viewer complicity in sexual violence or other harmful violent activities

2.5 Specifically in relation to pornography, the BBFC will not classify the following content:

- material which is in breach of the criminal law, including material judged to be obscene under the current interpretation of the Obscene Publications Act 1959
- material (including dialogue) likely to encourage an interest in sexually abusive activity which may include adults role-playing as non-adults
- the portrayal of sexual activity which involves real or apparent lack of consent. Any form of physical restraint which prevents participants from indicating a withdrawal of consent
- the infliction of pain or acts which may cause lasting physical harm, whether real or (in a sexual context) simulated. Some allowance may be made for moderate, non-abusive, consensual activity
- penetration by any object associated with violence or likely to cause physical harm
- sexual threats, humiliation or abuse which do not form part of a clearly consenting role-playing game. Strong physical or verbal abuse, even if consensual, is unlikely to be acceptable.

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[5] Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19 (eleventh session, 1992)*.
[6] McGlynn & Rackley, 'Criminalising Extreme Pornography: a lost opportunity' (2009) 4 Criminal Law Review 245-260.
[7] http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/xnzsm6ut1l/YG-Archive-Pol-Sunday-Times-results-140613.pdf
[8] https://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action
[9] http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_0.pdf

2.6 We recognise that there are many complex issues, including how far the criminal law should reach, and the distinction between publishing and possessing harmful images. We would welcome a wider debate about these issues.

2.7 Parliament may want to debate whether it is practical or desirable to widen Clause 16 to include images that portray other sexual offences under the Sexual Offences Act 2003.

3. Evidence about pornography and violence against women and girls

3.1 Research shows that violence against women and girls in the UK is widespread and routine:

- Sexual bullying and harassment are routine in UK schools. Almost one in three 16-18 year-old girls has experienced 'groping' or other unwanted sexual touching at school (EVAW).
- Pornography is widely accessed by children, boys in particular, and negatively affects their attitudes towards sex and relationships, women's equality and is linked to risky sexual activity.[10]
- 'Sexting' (eg sending sexually explicit images via mobile phones) is often coercive and linked to harassment, bullying and even violence. (NSPCC). Girls are disproportionately affected.[11]
- One in six children aged 11-17 (16.5%) have experienced sexual abuse (NSPCC).
- One in three teenage girls has experienced sexual violence from a partner (NSPCC).
- Children affected by gangs experience high levels of sexual violence (OCC).[12]

3.2 The Home Office leads a cross-government Violence Against Women and Girls Strategy and policy to restrict violent pornographic images should be explicitly linked into this agenda. Professor Hagemann-White's model of perpetration of violence for the European Commission[13] identifies the culture of violence in the media and the sexualisation of women and girls as major factors operating at a structural level that contribute to the perpetration of VAWG. There is now much evidence to show that children increasingly have access to pornography online, whether through smartphones, laptops or other devices, and that this is linked to negative attitudes towards women and relationships, risky and earlier sexual activity. Furthermore, that there is a clear correlation between children, boys in particular, accessing pornography and violent attitudes. Boys are more likely to deliberately seek out pornography than girls who feel very uncomfortable about their exposure to it (Children's Commissioner, 2013)[14]. There is increasing evidence about the way that some boys use 'sexting' in a coercive and abusive way and this needs to be seen in the context of boys' access to pornography.

3.3 Portman Clinic psychotherapist John Woods has written[15] about the growing number of young patients referred to the clinic by social services, youth offender services and police for their use of pornography. This includes boys as young as 12 who have convictions for looking at child pornography, as well as children who have committed rape or sexual assaults. There are a steady flow of highly disturbing media reports of such cases, including a recent case of a 12 year old boy who had raped his 7 year old sister after watching hardcore pornography.[16]

3.4 This is confirmed by the practice-based experience of frontline service providers such as Rape Crisis Centres who are increasingly dealing with the impact of sexually harmful behaviour in boys at younger and younger ages, often linked to use or exposure to pornography. Rape Crisis Centres also see the impact of the way in which pornography is used as a 'grooming' tool by perpetrators of child sexual abuse. It is used as a coercive tool to normalise behaviours in young survivors who are shown pornography to prepare them for what they are told is normal, consensual behaviour.

4. Other responses to pornography

4.1 **Support for survivors**—Most victims/survivors do not report what has happened to them. It is therefore vital that there are specialist sexual violence and other support services in the community for victims/survivors of abuse, whether or not they report to the police. Such provision is currently extremely patchy, especially for children and young people. There is very little support for boys exhibiting harmful behaviour, or girls who are being sexually abused.

4.2 **Education**—There is clear evidence from Ofsted[17] as well as our own research that currently children and young people have patchy access to adequate PSHE/SRE provision in schools and that this is leaving young people vulnerable to abuse and exploitation. As a matter of child protection, all schools should be required

[10] "Basically... porn is everywhere" A Rapid Evidence Assessment of the Effect that Access and Exposure to Pornography has on Children and Young People, Office of the Children's Commissioner, 2013

[11] Coy, M., Kelly, L., Elvines, F., Garner, M. & Kanyeredzi, A. (2013) *Sex without consent, I suppose that is rape: how young people in England understand sexual consent* London: Office of the Children's Commissioner; Ringrose, J., Gill, R., Livingstone, S., & Harvey, L. (2012) *A qualitative study of children, young people and 'sexting'* London: NSPCC

[12] *"It's wrong... but you get used to it"* A qualitative study of gang-associated sexual violence towards, and exploitation of young people in England, University of Bedfordshire, Office of the Children's Commissioner, 2013

[13] http://ec.europa.eu/justice/funding/daphne3/multi-level_interactive_model/understanding_perpetration_start_uinix.html

[14] Young Men Using Pornography' by Michael Flood in *Everyday Pornographies*, 2011, ed K Boyle

[15] http://www.dailymail.co.uk/news/article-2135203/Jamie-13-kissed-girl-But-hes-Sex-Offender-Register-online-porn-warped-mind-.html#ixzz22xJMIIem

[16] http://www.bbc.co.uk/news/uk-england-lancashire-26418508

[17] http://www.ofsted.gov.uk/resources/not-yet-good-enough-personal-social-health-and-economic-education-schools

to equip young people with the tools they need to understand issues such as sexual consent and respectful relationships, online safety and gender stereotyping. As the research on sexual consent for the Office of the Children's Commissioner showed, young people's understanding of consent is informed by gender stereotypes and this means that targeted interventions and policies are needed. Boys and girls need to be given support to address their different needs and behaviours. The Home Office's ThisisABUSE campaign is excellent because it is based on evidence about harmful sexual and other behaviour perpetrated by some boys and seeks to address this.

4.3 **Public campaigns**—As a comprehensive response to the harms of pornography, we would urge the Government to work with experts in the women's sector and beyond to develop public campaigns and deliver awareness raising messages, linked in with materials for young people and others.

March 2014

Written evidence submitted by The Prison Reform Trust (CJC 05)

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. We welcome the opportunity to make a submission to the consultation.

Summary

The Criminal Justice and Courts Bill is the fourth Ministry of Justice-led criminal justice bill introduced by the Coalition Government. The Prison Reform Trust is concerned that many of the provisions of the Bill are unnecessary and will increase the size of the prison population. They will raise public costs and add significantly to the work of criminal justice agencies in general, and the Parole Board in particular, at a time when resources and budgets are already overstretched. Many of the provisions involve significant transfers of powers to the Secretary of State, limiting the discretion of operational managers and reducing scope for effective Parliamentary scrutiny.

Plans for secure colleges could drive up the numbers of children in custody following a welcome period of decline both in youth imprisonment and youth crime. While education is vital, provision for children must take account of mental health needs, learning disabilities and difficulties, addictions and childhood abuse or neglect. This requires cooperation across government and not just another criminal justice-led response to tackling entrenched social problems.

Our submission focuses on key areas of concern in the Bill including:

Part 1

- Dangerous offenders and other offenders of particular concern (Clauses 1-5 and Schedule 1)
- Mandatory electronic monitoring (Clause 6)
- Release test for recalled prisoners (Clauses 7 and 8)
- Offence of remaining unlawfully at large (Clauses 10 and 11)
- Restrictions on the use of simple cautions (Clauses 14 and 15)
- Possession of extreme pornographic images (Clause 16)

Part 2

- Detention of young offenders (Clauses 17-19)

Part 3

- Costs of criminal courts (Clauses 29 and 30)

Part 4

- Likelihood of substantially different outcome for applicant (Clause 50)

Part 1

Dangerous offenders and other offenders of particular concern (Clauses 1-5 and Schedule 1)

1. It is unclear why these provisions are necessary or whether the government has taken proper account of the impact of the proposals on under resourced criminal justice agencies. There is already provision for courts to impose long determinate and indeterminate sentences on people who commit the most serious offences. The Prison Reform Trust is concerned that these proposals will increase the size of the prison population and add significantly to the work of the Parole Board at a time when resources and budgets are already overstretched.

2. Clause 4 amends existing release arrangements for people serving an Extended Determinate Sentence (EDS). People will no longer be entitled to automatic release at the two-thirds point, but will require the Parole Board to direct release in order to be released into the community on licence before the completion of their

sentence. The Extended Determinate Sentence has only recently been enacted following its creation in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is surprising that the government has chosen to make amendments to such a new sentence, and ones that could have a significant impact on both the Parole Board and National Offender Management Service.

3. We are concerned that the proposals could undermine the very purpose of the EDS—to provide people who have committed serious offences with an extended period of supervision in the community to better aid their rehabilitation. As Elfyn Llwyd MP said during the Second Reading debate:

> *"Extended determinate sentences from the outset increased the minimum tariff a person was required to spend in custody from half of their sentence to two thirds. By stipulating that offenders will also have to satisfy the Parole Board before being considered for release, the amount of time that is available for supervision and rehabilitation back into the community is further decreased."*[18]

The Committee will want to be sure that the changes to the EDS are proportionate and necessary and do not undermine the purpose of the sentence.

4. Clause 5 and Schedule 1 introduce a new sentence for adults convicted of certain listed terrorism-related and sexual offences as well as existing Schedule 18A offences included in the Criminal Justice Act 2003. People convicted of these offences will be required to apply to the Parole Board in order to secure release from custody before the end of their sentence, rather than being automatically released at the halfway point. If no decision to release is taken, they will remain in prison until the end of their custodial term and required to have an additional mandatory 12 months of supervision upon release.

5. The government has estimated in its Impact Assessment that these proposals (Clauses 1-5 and Schedule 1) will result in an increase in the prison population of around 1,000 places, in the long run, with the full impact reached by 2030, with no increase in this spending review period, an increase of fewer than 10 prison places in the next Spending Round period (ending March 2016), and an increase of around 300 prison places by March 2020.[19]

6. In addition it anticipates an increase of around 1,100 Parole Board hearings per year, in the long run, with the full impact reached by 2030. With no increase in Parole Board hearings in this Spending Review period (ending March 2015), there would be an increase of less than 50 hearings per year in the next Spending Round period (ending March 2016), and an increase of around 400 hearings per year by March 2020.

7. This current assessment underplays the potential impact of these changes on the Parole Board. MPs will want to seek clarification from the government on the calculation of these figures. It is worth noting that the introduction of the Indeterminate Sentence for Public Protection (IPP) saw a significant underestimate by the Ministry of Justice of the number of people likely to receive the sentence, and the Parole Board is still dealing with the consequences of this. When the legislation introducing the IPP sentence was debated in Parliament the government estimated that the sentence would increase the prison population by 900 places. At the end of June 2013 there were 5,620 people serving an IPP sentence in prison with 3,549 held beyond their tariff expiry date.[20]

8. As the Chair and Chief Executive of the Parole Board, Sir David Calvert-Smith and Claire Bassett, highlighted at a recent meeting of the All Party Parliamentary Penal Affairs Group, the Parole Board continues to face challenges with decreasing budgets, as do many government departments.[21] However the Board is also faced with increasing pressures on its workload as it tries to work through their backlog of cases, with IPP sentenced prisoners accounting for a significant proportion of these. As of August 2013 the backlog stood at 1,352, with IPP prisoners accounting for 61% of indeterminate review cases.[22]

9. The government anticipates that this backlog will be dealt with by the time these new cases need to be heard by the Parole Board, and so existing resources will be sufficient. We remain concerned that this does not sufficiently consider the additional impact of the recent Osborn judgement.

10. The Osborn, Booth & Reilly Supreme Court judgement means that the Parole Board will be required to hold more oral hearings, and the effects are already starting to be felt. Prior to the judgment the number of indeterminate review cases progressing to oral hearing following the first paper review was usually around 65% (approx. 298 cases per month). In December this rose to 89% (391 cases), and there was also a rise in determinate recall cases resulting in an additional 90 cases being referred for oral hearing.[23]

11. The Parole Board has acknowledged that if this trend continues it is likely to see delays of at least three months over and above the usual timeframe for cases waiting to secure an oral hearing date.[24] Claire Bassett,

[18] Hansard HC, 24 February 2014, c72
[19] http://www.parliament.uk/documents/impact-assessments/IA14-03A.pdf
[20] Table 1.4, Ministry of Justice (2013) Offender Management Statistics (Quarterly) January to March 2013, London: Ministry of Justice
[21] All Party Parliamentary Penal Affairs Group (2014) The Parole Board—Meeting the challenges of an ever changing criminal justice system—February 2014. Available at http://www.prisonreformtrust.org.uk/PressPolicy/Parliament/AllPartyParliamentaryPenalAffairsGroup/February2014RobinCorbettAwardParoleBoard
[22] Hansard HC, 2 September 2013, c182W
[23] http://www.justice.gov.uk/offenders/parole-board/osborn,-booth-and-reilly-supreme-court-judgment
[24] http://www.justice.gov.uk/offenders/parole-board/osborn,-booth-and-reilly-supreme-court-judgment

the Parole Board's chief executive, told MPs in evidence to the Justice Committee in December 2013 that the Osborne ruling has "huge" implications and will lead to the number of oral hearings increasing from about 4,500 a year to 12,000 to 14,000.[25]

12. This increase in workload comes at a time when Parole Board staff numbers have been reduced by nearly one in five. Many of those staff supported 232 Parole Board members who are paid per hearing and include psychiatrists and psychologists. To cope with the sudden surge of oral hearings, many are now taking place by video link from the Parole Board's Grenadier House headquarters in London to prisons around the country. However, according to recent reports, since the introduction of the video link, problems of reliability have dogged the system.[26]

Given the existing backlog of cases and the demands of meeting the requirements of the Osborn judgment, we are concerned that the government has not taken account of the potential impact of these provisions on the workload of the Parole Board. The Committee will want to seek assurances that these provisions are necessary and that the prison service and Parole Board have sufficient resources to meet the demands placed upon them.

Mandatory electronic monitoring (Clause 6)

13. Clause 6 introduces a GPS electronic monitoring condition for people released from custody on licence. Whilst electronic monitoring can be an effective tool when used appropriately, particularly when coupled with good quality supervision, we are concerned that subsection 3 gives new powers to the Secretary of State to make monitoring mandatory for certain groups of offenders, either by type of offence or type of sentence, limiting practitioner discretion. Furthermore, these powers can be exercised by order, limiting the role of Parliament in scrutinising who will be subject to mandatory monitoring.

14. Whilst there appear to be mechanisms to safeguard against inappropriate use, these are currently vague with only illustrative examples used in the explanatory notes.[27]

> *"It also allows the Secretary of State to make provision by reference to whether a person specified in the order is satisfied of a matter. For example, it might refer to cases in which the Secretary of State is satisfied that the offender has a physical or mental health problem which renders the offender unsuitable for the licence condition, or cases in which a person is satisfied that it is impossible to make arrangements for the offender to recharge the battery in the tag."*

15. During the Second Reading debate, Nick Herbert MP and Guy Opperman MP both encouraged greater local involvement and accountability, including Police and Crime Commissioners, in the use of new technology. This runs counter to the centralising of power within the Ministry of Justice and the Secretary of State.[28]

We are concerned that this clause transfers a significant amount of power to the Secretary of State, allowing changes to be made without affording sufficient Parliamentary scrutiny. A blanket approach which limits the discretion of operational managers and practitioners could lead to the inappropriate use of electronic monitoring and curfews, for instance, on offenders who may be at risk of committing domestic violence. The Committee will want to ensure that sufficient safeguards are in place and that flexibility is maintained to operate on a case by case basis.

Release test for recalled prisoners (Clauses 7 and 8)

16. Clause 7 introduces a new provision which would allow for recalled determinate sentence prisoners to serve the remainder of their sentence in custody (a standard recall), rather than for a fixed period of 28 days with automatic release (a fixed term recall) as currently exists, if it appears to the Secretary of State that the person is highly likely to breach a condition on their licence. It introduces a new statutory re-release test for recalled determinate sentence prisoners to be conducted by the Parole Board. They will make a decision for release based on their risk to the public, and whether there is a likelihood of subsequent breach.

We are concerned that the proposals place too much emphasis on the likelihood of breach at the expense of ensuring effective supervision. This could have a disproportionate impact on offenders with learning disabilities and mental health needs who often need greater help and support to comply with licence conditions. **The Committee will want to ensure sufficient emphasis on effective supervision is built into the new release test.**

17. Furthermore, as with clauses 4 and 5, we are concerned about the implications this could have for an already overstretched and under-resourced Parole Board through increased workload, as well as for NOMS with additional population pressures. The current Impact Assessment suggests that these changes will have a minimal impact on both these areas, but expectations seem unrealistically low. It estimates that this policy will have an impact on an additional 75 offenders per year and require up to an additional 50 prison places at a cost of around £1.5m per annum.

[25] http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidencePdf/4733
[26] http://www.independent.co.uk/news/uk/crime/exclusive-parole-system-failing-prisoners-and-close-to-be-overwhelmed-lawyers-warn-9085487.html
[27] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/en/14169en.pdf
[28] Hansard HC, 24 February 2014, c78

18. The recall population grew rapidly between 1993 and 2012, accounting for 13% of the overall increase in the prison population. This reflected a higher recall rate caused by changes to the law making it easier to recall prisoners, and changes introduced in the Criminal Justice Act 2003 which lengthened the licence period for most offenders.[29]

The Offender Rehabilitation Bill currently before Parliament will introduce 12 month mandatory statutory supervision for short sentenced prisoners. The updated impact assessment of the Bill estimates that the changes will lead to around 13,000 offenders being recalled or committed to custody per year, resulting in a prison place increase of around 600 places. The impact assessment of the Criminal Justice and Courts Bill assumes no impact from the Offender Rehabilitation Bill, despite the fact that short sentenced prisoners recalled on licence would seem to be included in the new arrangements. **The Committee will want to seek clarification on how the combined impact of the Offender Rehabilitation Bill and Criminal Justice and Courts Bill is anticipated to affect so few people.**

19. Clause 8 gives the Secretary of State an additional power to change the release test for recalled prisoners serving determinate sentences, subject to the affirmative resolution procedure. This proposed mechanism affords too much power to the Secretary of State. As Elfyn Llwyd MP said during the second reading debate:

> *"I am worried that the Government are proposing to use secondary legislation to implement such a significant change, and I hope that they will reconsider this provision ahead of the Bill's Committee stage."*[30]

Primary legislation and not statutory instruments remain the most appropriate mechanism for such measures.

Offence of remaining unlawfully at large (Clauses 10 and 11)

20. Clauses 10 and 11 introduce a new statutory offence of remaining unlawfully at large following recall to custody and whilst on release on temporary licence. The offence is triable either way and can be tried in either the magistrates' or Crown courts and could be sentenced to a period of imprisonment of less than two years, a fine, or both in the Crown Court; or a period of less than a year, a fine, or both in the magistrates' court.

We are concerned that there is currently an insufficient distinction between those who wilfully abscond to evade detection, and those who fail to report as they are unaware they have been recalled, either because they have no fixed abode or do not understand due to a learning disability or difficulty. **It would be helpful for this distinction in regard to deliberate intent, or lack of it, to be made within legislation to ensure that people are not prosecuted inappropriately.**

21. This new offence could act as a driver to custody, putting pressure on an already challenging environment for the prison service. People subject to recall proceedings are already expected to spend an additional period in custody. By prosecuting them for an additional offence it is unclear what the government is hoping to achieve.

22. Furthermore it could lead to people being imprisoned for a considerable period due to technical breach of licence conditions, particularly those with learning disabilities who may not fully understand what is expected of them. Between 20 and 30% of offenders are estimated to have a learning disability or difficulty which interferes with their ability to cope with the criminal justice system.[31] However, provision of services for this group is patchy and people are often let down by a failure to recognise and meet their needs. The government's commitment to the roll out of a national liaison and diversion service in police stations and courts has been delayed from 2014 to 2017, and resources reduced.

23. While we welcome the government's commitment in the House of Lords debate on the Offender Rehabilitation Bill to produce easy read version of licence conditions, vulnerable people caught up in the justice system often need greater help and support to meet the conditions of licence requirements which they may not fully understand or know how to comply with. For instance, many offenders with learning disabilities have problems with telling the time. This can lead to them missing appointments and being recalled for technical breach of their licence conditions.

24. Elfyn Llwyd MP raised his concerns over the lack of safeguards currently included in the Bill:

> *"Once again, the Government seem to have omitted any safeguard for vulnerable offenders with learning disabilities or mental health problems that would impair their ability to understand the full terms of their release. It would be beneficial if the Government inserted such a safeguard ahead of the Bill's later stages. For example, it would be useful if the Bill made a distinction between offenders who abscond wilfully and those who do not report as a result of a misunderstanding or a miscommunication."*[32]

The Committee will want to ensure that there are adequate safeguards in place so that vulnerable defendants are not set up to fail.

[29] Ministry of Justice (2013) Story of the prison population: 1993-2012 England and Wales, London: Ministry of Justice
[30] Hansard HC, 24 February 2014, c73
[31] Loucks, N (2007) No one knows: Offenders with learning disabilities and difficulties: review of prevalence and associated needs, London: Prison Reform Trust
[32] Hansard HC, 24 February 2014, c73

Restrictions on the use of simple cautions (Clauses 14 and 15)

25. Clause 14 introduces new restrictions on the police for the use of simple cautions. This includes limiting their use:

- for indictable only offences unless there are exceptional circumstances as well as approval from the Director of Public Prosecutions;
- in triable either way offences where the offence is specified in an order by the Secretary of State; and
- in summary and non-specified triable either way offences where the person has committed a similar offence in the last two years, unless there are exceptional circumstances.

26. Exceptional circumstances will be determined by a police officer of a rank to be determined by the Secretary of State. Reducing the discretion of the police and a further transfer of powers to the Secretary of State raises serious concerns. As ACPO lead on out-of-court-disposals, Chief Constable Lynne Owens said in response to the recent Out of Court Disposal review:

> *"It is important that there is room for officer discretion in any system to ensure the punishment is proportionate to the offence. I'm pleased that the Simple Cautions Review showed that where discretion is being used it is being done so properly, and in my view this is important to maintain."*[33]

27. In the second reading debate on the bill, Sir Alan Beith MP, Chair of the Justice Committee, spoke on the importance of police discretion in the use of cautions. While he agreed that *"magistrates were right to be concerned about the dangers of inconsistency around the country"*, he said *"there is real value in police officers' ability to exercise discretion in many circumstances, and that out-of-court disposals, as a broad group, open up numerous possibilities, including possibilities for simple restorative justice."* He added: *"I do not want us in any way to undermine the scope for out-of-traditional-court disposals in matters of this kind, because they may offer the best opportunity to enable young people, in particular, to move away from crime rather than becoming institutionalised into it."*[34]

28. It is unclear why the government feels that it needs to restrict the discretion of trained professionals in deciding when a caution would be appropriate. Cautions provide an opportunity for early stage diversion and latest government figures show that reoffending rates for adults given a caution remains low, with only 18% reoffending within 12 months.[35]

29. Limiting discretion could have the unintended consequence of drawing people further into the criminal justice system unnecessarily. The government should learn from the experience of the youth reprimands and warnings scheme's inbuilt escalator, which as the consultation acknowledged led to minor cases being drawn into more a formal court process.

30. There are many misconceptions surrounding Out of Court Disposals (OOCDs). They are often portrayed as a soft option and that people are being 'let off' after committing an offence, with political rhetoric and media coverage playing a significant part in fuelling this. However, Ministry of Justice data shows that use of OOCDs has already fallen significantly in recent years, with a 42% decrease between 2007 and 2012, with falls across all disposals and notably the use of cautions for indictable offences.[36]

Possession of extreme pornographic images (Clause 16)

31. Clause 16 adds a new offence to Part 5 of the Criminal Justice and Immigration Act 2008 to cover depictions of rape and other non-consensual sexual penetration following concerns raised by Rape Crisis South London to the Prime Minister last year. The new offence carries a maximum sentence of three years imprisonment.

32. **We would urge the Committee to seek assurances from the government about the availability of treatment programmes for people convicted of sexual offences both in prison and the community**. The I-SOTP (Internet Sex Offender Treatment Programme) does not take place in prison at the moment, despite the increased number of people given custodial sentences for internet based offending. The course is only available in the community and many probation areas run this course as part of community sentences. Provision of accredited sex offender treatment programmes is also very limited and currently under review. These programmes can reduce the risk of further offending and increase understanding of the impact of the offence on the victim.

33. As of July 2012 Sex Offender Treatment Programme (SOTP) courses were available in 21 prisons although people convicted of sex offences can be held in 120 prisons. This means that someone convicted of a sex offence has a one in six chance of being held in a prison where they can complete a programme. A recent National Audit Office report found shortcomings in the availability of SOTP courses. At HMP Whatton, "a centre of excellence for work with sex offenders", recorded waiting times stood at 14 months. The closure of HMP Shepton Mallet also led to a drop of 34 places, or 3 per cent, in the number of SOTP places across the

[33] Association of Chief Police Officers website, available at http://www.acpo.presscentre.com/Press-Releases/Out-of-court-disposals-review-27a.aspx
[34] Hansard HC, 24 February 2014, c87
[35] HM Government (2013) Consultation on out of court disposals, London: Ministry of Justice
[36] Ibid.

system. MPs may also wish to note that NOMS has recently reduced its target for the number of completed SOTPs from 1,129 in 2010-11, to 886 in 2013-14.[37]

34. Not everyone will be eligible for the SOTP and low risk prisoners may be assessed as not needing to do a programme. There are currently no published figures of how many people have been assessed as suitable and are waiting for a place on a course. However, Prison Reform Trust's advice and information service is often contacted by people waiting to be assessed for a course or for a place on a course. It is not uncommon to hear of waiting lists of 18 months for places on SOTP courses. This has been the subject of a number of legal challenges, where prisoners have taken successful cases about the failure of the Prison Service to provide courses and the impact this has had on their indefinite detention.

35. In the community CirclesUK provides support to people who have committed sexual offences with the aim of rehabilitating and reintegrating them back into society.[38] This close supervision of the 'core member', together with the support of statutory agencies, can help to reduce the feelings of isolation and emotional loneliness which can lead to an increased risk of reoffending. We believe that this approach allows people to take a greater sense of responsibility and reduce their level of risk in a safe and supportive way, and would like to see this model extended to more people who have committed sexual offences.

Part 2

Detention of young offenders (Clauses 17-19)

36. These clauses build on plans in the recent government consultation, Transforming Youth Custody, to introduce new secure colleges for children aged 12-17. Whilst we welcome the commitment to using education and skills provision in custody to encourage change and improve outcomes, a focus on education in the community, including reducing school exclusions, would also bring dividends. The Prison Reform Trust is concerned that an unintended consequence of the proposals to develop secure colleges could be an increase in custodial sentencing and greater use of longer sentences.

37. It will require cooperation and shared ownership across all areas of government, including education, health and local government, to ensure that this is not simply another criminal justice-led response to tackling entrenched social problems.

38. While education is vital, provision for children must take account of mental health needs, learning disabilities, addictions and childhood abuse or neglect. **Small, local, intensively staffed units with a focus on taking responsibility, making amends to victims, gaining skills for employment and having a home to go to are safer and more effective than putting hundreds of teenagers together in over-large institutions.**

39. Sir Alan Beith MP, Chair of the Justice Select Committee, raised a number of practical concerns during the second reading debate which will need to be addressed.

> *"The first problem, which was identified by my Committee, is that the average length of custody is 79 days. That is not a period in which a programme of education can be developed, and greatly extending periods of custody is not part of the Government's policy. Secondly, people going into custody do not do so neatly at the beginning of a term or an academic year; they go when the courts have sentenced them. It is difficult to provide a range of basic educational courses for people who go into custody for relatively short periods and at different times, and it involves paying a price. Some of those people will be much further away from their local communities than they would have been if they had been dealt with under the previous system, especially if the college has been created at the expense of, for example, secure children's homes. I should be very concerned if those ceased to be available because a college was being opened in a much more distant place."*[39]

40. The recently published inspectorate report on HMYOI Hindley paints a vivid portrait of a prison where violence, self-harm and restraint by staff are commonplace. We are not convinced that the government's vision of secure colleges, with its emphasis on 'self-discipline' and 'responding with safe methods to control behaviour where necessary', places sufficiently rigorous expectations on potential providers to deal proactively with a population characterised by the Chief Inspector as "very unhappy young people".[40]

41. We are concerned at plans for secure colleges to hold such a diverse age group, holding children as young as 12 with 17 year olds. **We urge the government to limit the use of secure colleges for 15-17 year olds to ensure that the vulnerability of younger children is taken into account. The government should also clarify what provision it intends for girls as there is currently no mention of them in either the bill or explanatory notes.**

42. The reduced provision of places in Secure Children's Homes (SCHs) under the government's proposals gives cause for concern. Currently, young and vulnerable children are detained in SCHs. However, 28 SCH beds

[37] National Audit Office (2013) Managing the prison estate, London: The Stationery Office

[38] See CirclesUK's presentation to the All Party Parliamentary Penal Affairs Group in February 2010 http://www.prisonreformtrust.org.uk/PressPolicy/Parliament/AllPartyParliamentaryPenalAffairsGroup/CirclesofsupportFebruary2010

[39] Hansard HC, 24 February 2014, c89

[40] HM Inspectorate of Prisons (2013) Report on an unannounced inspection of HMYOI Hindley 19-23 November 2012 The Stationery Office: London

have recently been decommissioned. The government is clear that secure colleges will accommodate some of the children currently detained in SCHs.[41] The government has made an ambiguous commitment to maintaining some SCH places for the most vulnerable.[42] **The Committee will want to ensure that SCH places are still available for vulnerable children.**

43. Subsection (4) sets out which sections of the Prison Act 1952 do not apply to children. Section 5, which outlines the functions of Her Majesty's Chief Inspector of Prisons, is excluded. **It is therefore unclear what inspection arrangements will be established for secure colleges**. Given the development of joint inspections between HM Inspectorate of Prisons and OFSTED in the past year, and that secure colleges will be places of detention, it would make sense to build on these arrangement to ensure that they are subject to appropriate independent scrutiny.

44. Schedule 4 sets out the powers available to the Secretary of State in contracting out provision and running of secure colleges. Whilst secure college custody officers do not have the same powers as constables, as afforded to prison officers in the Prison Act 1952, it is a matter of great concern that section 10 authorises staff to use 'reasonable force' to ensure good order and discipline within the establishment. The courts have made clear that restraining a child for 'good order and discipline' is illegal and inquests into the deaths of children have shown that such methods have, in some cases, contributed to their deaths.

45. The UN Committee on the Rights of the Child, in its 2007 general comment on children's rights in juvenile justice said:

> *"Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment."*

46. The Prison Reform Trust has been informed by officials that it is the intention for rules governing the secure colleges to outline cases in which restraint can be legitimately used. However, we are concerned that this does not provide adequate protection and that primary legislation remains the best place to ensure that restraint is only used as a last resort.

47. As the recently announced independent review into the deaths of young people (18-24) in custody seeks to learn lessons, it would be a tragedy if the government proceeds with plans which could put children at greater risk of suicide and self-harm. Before the government reverses improvements made in the treatment and conditions of the most vulnerable children in the justice system, **we urge the Committee to seek further reassurance that force will only be used in exceptional circumstances when children pose a direct and immediate threat to the safety of themselves or others. The government should also bring under 18s within the scope of this independent review on deaths in custody.**

Part 3

Costs of criminal courts (Clauses 29 and 30)

48. Clause 29 and 30 will require courts to impose a charge on all adult offenders who have been convicted of a criminal offence. The level of the charge will be set by the Lord Chancellor. In setting the charge the Lord Chancellor expects to have regard to factors likely to affect the cost of proceedings, such as whether the offender pleaded guilty, whether their case was dealt with in the magistrates' or Crown Court, and the offence type. It will be collected after other financial impositions—compensation, victim surcharge, prosecution costs and fines—have been paid off, at a rate the offender can afford. Offenders will be able to apply to pay by instalments and to vary the rate of payment if they are not able to afford it.

49. It was encouraging to hear during the second reading debate that the government accepts the need to ensure that fines are set at a rate according to their ability to pay, based on an accurate assessment. Robert Buckland MP, speaking in the debate said:

> *"Will my right hon. Friend ensure that when this streamlined procedure is adopted, pre-hearing consultations take place with defendants about their ability to pay a fine? A proper written means test would enable realistic fines to be imposed, and to be much easier to collect than fines imposed by means of an exercise that would be theoretical without such information."*[43]

The Secretary of State, Chris Grayling agreed to take this "on board".

50. Despite the safeguards built into the provision, we are concerned that many offenders will not be in a position to afford court costs in addition to paying the costs of compensation, victim surcharge, prosecution

[41] Ministry of Justice (2013) Transforming Youth Custody, paragraph 33.

[42] Paragraph 34 of TYC states: "We accept that there is always likely to be a small number of the very youngest, most vulnerable and most challenging young people who will be unsuited to the mainstream provision in a Secure College and will require specialist custodial services. To cater for this population we are continuing to provide sufficient places in SCHs, while seeking to secure improvements in service and reductions in cost."

[43] Hansard HC, 24 February 2014, c55

costs and fines. The provision could lead to injustice as defendants could end up entering a guilty plea rather than face the possible financial penalties of proceeding to trial.

51. Many offenders are on low incomes, have high levels of debt and rely on benefits for support. The Legal Services Research Centre (LSRC) has highlighted some of the correlations between people who offend and wider social factors. They found that people who had been recently arrested were significantly more likely to report civil law problems concerning, for example, employment (10% v 5%), rented housing (11% v 3%), homelessness (13% v 1%), and money/debt (21% v 6%). They were also more likely to have themselves been victims of crime (38% v 20%).[44]

52. The Social Exclusion Unit's 2002 report, Reducing Re-offending by Ex-Prisoners, recognised the importance of finance, debt and benefits as one of the nine social factors involved in promoting successful resettlement. Research has shown that 68% of prisoners were unemployed in the four weeks prior to custody while just 7.7% of the economically active population are unemployed.[45] 13% of prisoners have never had a job compared to 3.9% of the general population.[46] 15% of prisoners were homeless before custody while just 4% of the general population have been homeless or in temporary accommodation.[47]

53. Research by the Prison Reform Trust and UNLOCK found that people in prison were ten times more likely to have borrowed from a loan shark than the average UK household, and a third of people in prison did not have a bank account.[48]

The Committee will want to ensure that the new provision does not increase debt and hardship or distort criminal justice practice.

Part 4

Likelihood of substantially different outcome for applicant (Clause 50)

Concerns about the government's proposals to limit the use of Judicial Review have been raised by respected Peers, the legal profession, NGOs and MPs during the second reading debate. Lord Pannick, a very experienced Queen's counsel who has taken judicial review cases on many occasions and defended Governments in such cases, wrote in The Times to highlight his concerns.

> *"Over the past 40 years, judicial review has helped to prevent abuse of power by governments of all complexions. It is ironic that judicial review now needs protection from a politician whose reforms would neuter its force by the use of political slogans that have no factual basis and are ignorant of legal and constitutional principle."*
>
> *"All governments come to resent the power of the judiciary to identify and remedy unlawful conduct. But until now they have, with greater or lesser enthusiasm, recognised the value of what is central to the rule of law. After all, they will not be in power indefinitely…It tells the Government, and the world, that what has been done is unlawful. Ministers and civil servants know that they must change their conduct for the future, and they do so."*

We would urge the committee to remove clause 50 from the Bill.

March 2014

Written evidence submitted by Feona Attwood (Professor, Middlesex University), Martin Barker (Emeritus Professor, University of Aberystwyth) and Clarissa Smith (Professor, University of Sunderland) (CJC 06)

Section 16—Offence of possession of extreme pornographic images

1. We write as academics with considerable experience in the research of pornography and other controversial media. In our submission we draw the Committee's attention to the absence of robust evidence for the proposed extension of the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 to cover the possession of extreme images depicting rape and non-consensual sexual penetration.

2. Feona Attwood is Professor of Cultural Studies, Communication and Media at Middlesex University, UK. Her research focuses on onscenity; sexualization; sexual cultures; new technologies, identity and the body; and controversial media. Professor Attwood is the editor of *Mainstreaming sex: The sexualization of Western culture* (2009) and *porn.com: Making sense of online pornography* (2010) and the co-editor of *Controversial images: Media representations on the edge* (2013, with Vincent Campbell, I.Q.Hunter and Sharon Lockyer). She co-edits the journal, *Sexualities* and is the founding co-editor of the journal, *Porn Studies*.

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[44] Pleasance, P. (2009) Criminal Offending, Social and Financial Exclusion and Civil Legal Aid, London: Legal Services Research Centre

[45] Prison Reform Trust (2013) Bromley Briefings Prison Factfile (Autumn 2013), London: Prison Reform Trust

[46] Ibid.

[47] Ibid.

[48] Bath, C & Edgar, K (2010) Time is Money: financial responsibility after prison, London: Prison Reform Trust

3. Martin Barker is Emeritus Professor at the University of Aberystwyth. He began researching moral campaigns against 'dangerous media' in the 1980s including a study of the 1950s campaign against 'horror comics' and the so-called "video nasties". His published works include 'Audiences and Receptions for Sexual Violence on Screen'—co-authored report funded by BBFC, 2006; *The Crash Controversy: Censorship Campaigns and Fim Reception* (with Jane Arthurs and Ramaswami Harindranath, 1998) and *Ill Effects: the Media-Violence Debate* (with Julian Petley, 1991).

4. Clarissa Smith is Professor of Sexual Cultures at the University of Sunderland, UK. Her research focuses on sexual cultures, practices and representations. In particular, she is interested in pornography and other sexually explicit media, their institutional practices, representational strategies, uses and meanings. Her publications include *One for the girls! The pleasures and practices of pornography for women* (2007), *Studying sexualities: Theories, representations, practices* (2013, with Niall Richardson and Angela Werndly). She is the founding co-editor of the journal, *Porn Studies*.

5. Two of us (Attwood and Smith) have been involved as expert witnesses in a number of prosecutions—*R v Holland*, *R v Webster* and *R v Walsh*—on charges of possession of extreme pornography. In each of these trials we presented testimony exploring the textual formations and histories of specific pornographic genres and their production as well as investigations into audience interests in sexually explicit media and particular sexual practices such as BDSM (Bondage, Domination, Submission, Masochism). Such testimony is not presented as a *defence* of pornography but as a means of guiding members of the Court towards an understanding of the specificities of particular texts as *representations* and how and why they might fail to meet the provisions of the legislation, particularly around questions of *realism* and *likelihood* rather than *risk* of serious injury.

6. All three of us have been involved in research into various kinds of sexual media, their contents, production histories and their consumption[49] and have designed and undertaken research projects in order to find ways to hear and understand the thoughts and responses of the *actual* audiences of pornography and other 'taboo' media. We are currently undertaking analysis of more than 5,000 responses to a questionnaire hosted at www.pornresearch.org. This research indicates that current understandings of sexual fantasies as essentially unproductive, deficient, and dangerous, are, at best, flawed.[50]

Previous Submission Regarding Extreme Pornography

7. During 2008, along with more than fifty academics in Media & Cultural Studies,[51] we made representations to the Committee considering the original proposals on Extreme Pornography. At that time we pointed out that the proposed legislation was driven by an amorphous 'increasing public concern'; couched in languages of concern and with little acknowledgement of a vast body of work on a variety of media, including pornography, and their audiences, which would significantly complicate the picture of effects which underpinned the proposed legislation. Furthermore we suggested that the definitions of what counted as 'extreme' were vague and that the intention to criminalise images which 'appear to be real' demonstrated ignorance of the ways in which people relate to the media which interest them.

8. At that time the government relied on a Rapid Evidence Assessment[52] which surveyed a range of research predominately informed by American Psychological traditions and which ignored the considerable research tradition into 'extreme' (be they violent or sexually explicit) materials within the UK's Humanities and Social Sciences. We suggested that a law drafted on such foundations could not be reliable.

9. The provisions have been in operation for five years and have resulted in prosecutions far in excess of the numbers predicted in 2008. From our own experiences of the current extreme pornography law (S63 (7 CJIA 2008), we know that some prosecutions have been deployed against sexual minorities and with scant regard to the particular provenance or contexts of the materials on the charge sheet (*R v Holland*; *Webster*; *Walsh*). While the provisions on bestiality may be transparent, the first two provisions are absolutely not.

10. The amendment to ban 'rape pornography' risks adding to the number of prosecutions for possession of images which offend particularly normative ideas of what constitutes 'good or healthy sex', including representations of sexual acts which are entirely legal to engage in. The new amendments risk criminalising many more otherwise law-abiding people, while proponents of the amendments have not provided robust evidence of benefit to the public.

[49] Between us we have published more than 50 peer-reviewed books, chapters and journal articles on pornography/sexual media, as well as presenting our research at national and international conferences. Publications can be provided to the Committee.

[50] For detailed discussion see Barker, M. (2014) 'The 'problem' of sexual fantasies', *Porn Studies*, Vol.1 No.1/2

[51] Memorandum available at http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/memos/ucm34102.htm

[52] Itzin, C., Taket, A., & L.Kelly, 'The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic material: A Rapid Evidence Assessment (REA)', (2007), *Ministry of Justice Research Series* 11/07. We (Attwood & Smith) explore the problems with the REA in 'Extreme concern: regulating 'dangerous pictures' in the United Kingdom' (2010) *Journal of Law and Society, 37*(1). The very notion of a 'rapid' assessment is of course that the situation is so suddenly urgent, so new and expanding, that there is no time for reflection. Actually, rapidity is the last thing needed right now; rather, some self-critical thinking about the state and status of evidence and understanding is essential.

Widespread Engagement with Fantasies of Submission

11. A project undertaken by psychologist Brett Kahr[53], using a representative survey of 19,000 UK adults, found: 90% of men and 60% of women have viewed pornography at some time. 29% fantasise about playing a dominant role during sex; 33% fantasise about playing a submissive role during sex; 4% fantasise about being violent towards someone else; 6% fantasise about violence being done to them by someone else.[54]

12. Thus many people enjoy submissive fantasies but the reasons for such enjoyment are complicated.[55] It is unreasonable to prohibit such imagery when its meanings and significances are disparate and the numbers of people who could be caught by any such law are potentially so large.

13. There is little systematic academic research on consumers of 'mainstream' or 'ordinary' pornography, and even less on the particular interests in fantasies of rape, even as such fantasies form the basis of many kinds of narrative from formula romances (such as Mills & Boon) through cinema and television, and 'high culture' literature. Representations of rape and sexual violence constitute a significant part of the phenomenon of 'extreme cinema'. Understanding audience pleasures and engagements with these is, thus, a fraught and risky business. The idea of showing sexual violence carries with it a host of perceived worries. A key one is the fear that depictions of rape may cause sexual arousal.

14. Our culture maintains a pretty tight line on this—any depiction judged likely to arouse viewers, and especially male ones, is *per se* dangerous. There is however a powerful discourse of 'redemption' for representations of sexual desire (especially in 'arthouse' cinema), whereby critics and regulatory bodies, such as the BBFC, redefine unusual and/or dangerous images as 'unerotic' in order to make them 'safe'. To admit to films being sexually arousing is to attach a smell of danger to them, because arousal is seen as basic, compulsive, overriding.

15. Equally, representations explicitly targeted to female audiences are often justified as 'safe explorations' of rape—interesting to women precisely because they allow them to experience the possibility of 'giving in' to kinds of sex they would avoid in 'real life'. Men are not given the same 'excuse': for a man to fantasise rape, or to enjoy a rape fiction, is to be complicit in actual violence against women.

16. The recognition of female rape fantasies has generated its own difficult concerns. Brought to prominence by Masters and Johnson's (1966)[56] research and made concrete by the Hite Report (2003)[57] and Nancy Friday's (1973, 1975, 1991, 2009)[58] work into women's sexuality, 'force fantasies' are enjoyed by a substantial proportion of women.[59] But that has aroused powerful fears that this might be misread in for instance judgments by the BBFC on films containing 'sexual violence'.

Making Women Safer?

17. Arguments in favour of criminalising extreme pornography are presented as a matter of protecting women and eradicating violence against them. The research indicating that large numbers of women engage with fantasies of rape also suggests that women viewers may well be criminalised by these new proposals: making many women's most private thoughts the subject of public criticism and even prosecution will not operate in women's best interests.

18. It is true that many people understand the viewing of fantasy rape to be de facto problematic behaviour but there is no robust evidence that such viewing leads to actual harm to others, thus banning fictional pornographic depictions of rape is not justified. Arguments by, amongst others, the Rape Crisis Centre have made much of the fact that pornography was found in the possession of two convicted murderers, Mark Bridger and Stuart Hazell—making the association of their viewing of pornography with the commission of their crimes. These sad cases do not in themselves justify prohibition. As academic Brian McNair has recently argued 'Porn, like the knife in every household kitchen, is used by the vast majority of people in ways which cause no harm to others. Only a small minority will use it to injure another, which is why we do not ban kitchen knives (although some jurisdictions restrict possession outside the domestic zone).'[60]

Misunderstanding the Technology

19. Many images designated as 'extreme' are not used solely for the purposes of sexual arousal, but can be viewed out of curiosity or distributed amongst friends as 'bad taste' jokes. In this era of social networking, cookies, internet caches, and malware, such images often come into someone's possession without their

[53] Kahr, B. *Sex and the Psyche: The Truth about Our Most Secret Fantasies* (London: Penguin, 2008.
[54] Ibid., 588
[55] See for instance a recent publication which explores the incredibly complex interplay of women's involvement in BDSM rape-play and experiences of sexual assault, Corie Hammers, 2013, 'Corporeality, Sadomasochism and Sexual Trauma', Body and Society, Vol. 20, No.1. Also, Bergner, D. 2013, *What Do Women Want? Adventures in the Science of Female Desire*, London: Canongate.
[56] Masters, W. H & V. E. Johnson (1966) *Human Sexual Response*. NY: Bantam Books
[57] Hite, S. (2003) *The Hite Report: A Nationwide Study of Female Sexuality*, New York: Seven Stories Press.
[58] Friday, N. *My Secret Garden: Women's Sexual Fantasies*, Simon & Schuster, 1973; *Forbidden Flowers: More Women's Sexual Fantasies*, Simon & Schuster, 1975; *Women on Top: How Real Life Has Changed Women's Sexual Fantasies*, Simon & Schuster, 1991; *Beyond My Control: Forbidden Fantasies in an Uncensored Age*, Sourcebooks, Inc., 2009
[59] A recent meta-study concludes that between a third and half of all women experience rape fantasies (Critelli, J. W. & J. M. Bivona (2008) 'Women's erotic rape fantasies: an evaluation of theory and research', *Journal of Sex Research*, February, 57–70.).
[60] McNair, B., 2014, 'Rethinking the effects paradigm in porn studies', *Porn Studies*, vol.1 no.1/2

knowledge or intention while browsing on the Internet for entirely 'innocent' material. Thus the range of people affected by the amendment will probably extend to ordinary Internet users, not just the minority of viewers of 'aberrant' pornography.

Not *Only* Fantasy

20. Our own research with more than 5,000 self-identifying consumers of pornography is too complex to distil for this submission, but our findings demonstrate that there are multiple reasons for accessing pornography and that such consumption is significant for many people, not least in enabling exploration of the possibilities and opportunities for sexual feeling; finding out about what interests and arouses and excites. Pornography is not 'only fantasy', it is much more than that: it speaks to the relations between bodies, selfhood, and social and cultural permissions and forbiddings. As researchers in this field for more than 20 years, we know that 'pornography' is *not* a singular media form, with an inherent tendency to become more extreme, and more gross, nor is it the case that what happens there can be read as a sign of what men and heterosexual masculinity are veering into. The picture is much complex than that. We would be happy to meet with the Committee to discuss this more fully.

Problematic Evidence Base For the Legislation

21. In May 2013, we asked a PhD researcher to investigate some of the rape porn titles cited in Rape Crisis London & EVAW's research.[61] Despite extensive searching, almost all of the titles were either not found or lead to 'deadlinks'. This may mean that they have been picked up by IWF and removed or that their titles are simply 'click-bait' to attract websurfers to other material. We should note that RCL & EVAW do not discuss the actual content of images in their presentation—giving only site names, titles and tags. If those videos did exist, they do not seem to now, which renders the validity of the claims of forever availability suspect, and moreover undermines McGlynn and Rackley's assertion that 'pornographic images of rape are everywhere'.[62]

22. Other Google searches to query the claims made in McGlynn and Rackley's briefing document[63] lead to the site, 'Heavy-R' which does host some clips of what could be considered 'exploitative' and 'unpleasant' material. Many of these have their genesis in exploitation cinema rather than being produced as pornography (indeed one clip was from the BBC production *The Tudors*). Perhaps that does not matter to the Committee and proponents of the legislation as the clips are displayed on Heavy R as 'rape porn', however testing these clips in the Crown Court may well lead to acquittal, because their provenance as clips from exploitation films/television drama/consensual fantasy commercial porn content is easy to ascertain, and their consensual nature, ie that they were filmed by consenting adults and featuring consenting adults, will be easily verifiable.[64]

23. It should be noted that if images are available which record actual sexual assaults, rather than scripted and/or acted performances of rape or coerced sex, then these are prima facie evidence of crimes having been committed—there are sufficient existing laws to prosecute the offenders. If such images have been posted without the consent of those involved then other offences may have been committed. Some proponents of the current amendment have suggested that demand for images of actual rape creates the conditions for such images to be produced, again we would suggest that existing legislation should be used to prosecute those who have incited such attacks. There is no credible evidence to suggest that criminalizing possession of images of staged/fantasy rape will prevent actual sexual assault.

No evidence of cultural harm

24. Arguments in favour of the proposed provisions insist that the existence of representations of rape and/or forced sex constitute 'cultural harm' to women. The dimensions and scope of such harm are not spelt out in any

[61] 'Ending Simulations of Rape, Incest and Childhood Sexual Abuse in/as Pornography' presented at *Criminalising Pornography: Five Years On* Conference, University of Durham, 8th May 2013, available at http://inherentlyhuman.wordpress.com/2013/05/24/criminalising-extreme-pornography-five-years-on-dustin-and-elvines-on-ending-simulations-of-rape-incest-and-childhood-sexual-abuse-inas-pornography/

[62] Rackley, E. & McGlynn, C. 'Rape should be "extreme" enough for English porn laws', *The Conversation*, 10 June. Available at http:/www.theconversation.com/rape-should-be-extreme-enough-for-english-porn-laws-15048

[63] McGlynn, C. & Rackley, E. (2013) 'Criminalising Extreme Pornography Lessons from England & Wales' briefing document, available at https://www.dur.ac.uk/resources/law/research/CriminalisingExtremePornography-LessonsfromEnglandandWales.pdf

[64] We are aware that the current provisions explicitly refuse this potential defence, the guidance notes state: 'Section 64 of the Act excludes from this offence persons who possess a video recording of a film which has been classified by the British Board of Film Classification (BBFC), even if the film contains an image or images, considered by the Board to be justified by the context of the work as a whole, which nevertheless fall foul of the offence in section 63. The fact that the images are held as part of a BBFC classified film takes them outside the scope of the offence. The exclusion does not apply in respect of images contained within extracts from classified films which must reasonably be assumed to have been extracted solely or principally for the purposes of sexual arousal.' Available at http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/#an08 This explanatory note suggests that Courts will need to explore whether or not a collection of images taken from their original contexts were extracted in order to facilitate some solely and, by implication, noxious sexual purpose. Many BBFC approved films include scenes of illegal activity which individuals may extract from the original whole but we do not infer from such 'archiving' that an individual intends to commit, for example, murder or bank robbery, or that they condone or otherwise fail to understand the illegality of such acts. Some might suggest that it is perfectly reasonable to test these issues in the Courts however in practice this means that an accused can be subjected to the considerable stress of a lengthy prosecution process—up to a year awaiting trial, considerable expense, the loss of employment, estrangement from family and friends etc—only to be acquitted because their specifically sexual interests in the images were not proven.

of the arguments by, amongst others McGlynn and Rackley[65] (key proponents of this legislation) nor are they based on any robust or extensive research.

25. Proponents of the provisions have suggested that the new legislation will bring England and Wales into line with the law in Scotland. We would draw the Committee's attention to the following: 1) the law in Scotland is drafted more explicitly with regard to the provisions on realistic representations and injury. Thus any intention to follow the Scottish model should include redrafting of the existing provisions relating to Extreme Pornography. 2) The Scottish statute has been in operation since 2011 and yet proponents of changes to English law do not make any reference at all to successful prosecutions in Scotland, or to any (however small) changes in the status of women, reduction in violence towards women or to the prevention of sexual assault as a result of those prosecutions. 3) If changes are to be made, they should draw on detailed monitoring and assessment of the number and nature of prosecutions across the border. The necessity for the changes to the law in England and Wales has not so far been evidenced.

Proposals for amendment

26. While the legislation could be focussed more narrowly on genuinely abusive images where there is evidence of real non-consensual abuse and harm, we would suggest that criminalisation of possession is not the most appropriate way to prevent these abuses.

27. When S63 CJIA 2008 was debated in the Lords concerns were raised regarding the absence of proper definitions of the law; at that time, assurances were given that full guidance would be made available to the public, especially on two categories (S63 (7)(a) and (b)—this was never issued. In practice (for example in R v Walsh), the legislation has been used in ways never intended by Parliament. This consultation presents the opportunity to revisit the two categories S63 (7)(a) (life threatening) and (b) (serious injury) to offer clear guidelines as to the scope and definitions of these provisions and we would urge the Committee to do so.

28. In its current form the amendment is unclear. We suggest it should be rejected because it has no evidence base and ignores research which demonstrates a much more complex terrain. If not rejected, then the amendment should be improved to limit its scope to images where it can be shown that the acts depicted are of actual assault, or where dissemination of those images has occurred without the consent of their participants.

29. If the legislation is enacted, absolute clarity in the meaning of the law will be required. The proposed penalties—up to three years imprisonment—are such that citizens must be clear about what is legal to possess and what is not.

March 2014

Written evidence submitted by the Bar Council (CJC 07)

1. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad. This memorandum, which is submitted in advance of the Chairman of the Bar's oral evidence to the Bill Committee on Tuesday 11 March, summarises the Bar Council's key concerns about this measure. These focus on Part 4 of the Bill which deals with Judicial Review. If it would be helpful to the Committee, we shall submit further observations setting out the grounds of our concern in more detail.

2. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

3. The Bar Council has the unique advantage of representing advocates appearing on all sides of judicial review proceedings—for claimants, for the public bodies whose decisions are under challenge, for interested parties whose position is affected by the outcome of the case, and for interveners. So we are able to bring a global perspective to the issues raised by this part of the Bill.

Judicial review and the Rule of Law

4. Judicial review plays an important role in our constitutional arrangements. The ability of courts to examine the legality of decision-making by the Executive and public authorities—and in particular to ensure that power is exercised within the scope of powers conferred by Parliament—is a cornerstone of democracy and the Rule of Law. From that standpoint we are concerned that the combined effect of the Bill and other Government

[65] McGlynn, C. & Rackley, E. 'The Extreme Pornography Provisions: A Misunderstood and Misused Law' presented *Criminalising Pornography: Five Years On* Conference, at University of Durham, 8th May 2013, available at http://inherentlyhuman.wordpress.com/2013/05/21/criminalising-extreme-pornography-five-years-on-mcglynn-and-rackley-on-the-extreme-pornography-provisions-a-misunderstood-and-misused-law/

proposals for changing the law of judicial review will inevitably raise the bar to challenging the Executive and other public authorities.

5. The Government's proposals appear in the wake of another set of reforms of judicial review, some of which (especially the new rules on time limits) have potentially far-reaching, adverse impacts on access to justice. We believe it would make much more sense to await and assess the effects of those changes, having gauged their impact against stated policy aims, before implementing further reforms with their additional potential to stifle the effectiveness of judicial review. We are very concerned that there has been no time to undertake the necessary evidence-based appraisal of the recent round of changes. Judicial review is much too important to be placed at risk by legislating in haste.

6. Nor should the Government introduce legislation because it finds judicial review to be a nuisance. We believe that a number of the Government's proposals about costs in judicial review proceedings will have the effect of inhibiting people from ventilating proper concerns in court. Measures designed to make a party (acting against the Government) bear a greater costs risk may inhibit legitimate challenges to public decisions. The Bill and other measures on which the Government has consulted have a constitutional—not just financial—effect. They affect the ability of ordinary citizens and of civil society to hold the executive to account.

7. In particular, it is very important that every party appearing before the courts is treated equally. Fairness, equality and the Rule of Law are essential hallmarks of our judicial system. They will be damaged if the Government and other public authorities become immune from penalties or provisions that may be imposed against those who challenge them. Costs measures that benefit only one party to proceedings raise the hurdles for individuals and organisations seeking to make public authorities accountable for their actions and their policies. We are also concerned that, if implemented in their present form, these proposals will increase the risk of bad practice in decision-making being created among public authorities if such bodies believe that opportunities open to others to challenge the legality of their decision-making have become more restricted. This will result in weaker policy development and less efficient decision-making. It will also reduce the opportunities for parties in these circumstances to reach settlements of their differences.

Provision of information about financial resources

8. *Clause 51* will mean that an application for judicial review cannot proceed unless the applicant has provided information about financing the application as specified in rules of court. The terms of *clause 51* mean that a judge will have no discretion to waive the requirement to provide specified information about sources of finance, irrespective of the urgency, seriousness or importance of the case to the applicant; and irrespective of whether it was the applicant's fault that information had not been provided in accordance with any rules of court. An applicant who cannot satisfy a requirement to provide information will be shut out of a remedy from the court. That is wholly unsatisfactory, as it may immunise the Government from challenge. We urge the Government, at the very least, to introduce an element of discretion into primary legislation.

9. We also have grave concerns about the extent and intrusive nature of *clauses 51* and *52* as currently drafted. *Clause 51(2)* and *(4)* raise the prospect that an applicant for judicial review will be compelled to give information not only about sources of finance, but also about likely sources of finance. *Clause 52(2)(b)* appears to enable rules to be made to "supplement" the required financial information in a manner that is not constrained—or even spelt out—in the Bill. *Clause 52(3)* will enable the courts to order a person to pay the costs of judicial review proceedings not because they are a party to proceedings but merely because they are "likely or able to do so". It is entirely opaque as to how these sweeping provisions will operate in relation to legally aided claimants. But it is also of serious concern that the provisions open the way to scrutiny of a claimant's private life, and the private life of his or her family and/or other potential sources of financial support. The Bill does not seem to be concerned with constraints on the intrusive use of statutory powers. It lays down no safeguards against disproportionate interference with a party's or a non-party's private life. It seeks to achieve a policy aim (openness about funding litigation) without proper checks and balances.

Interveners and costs

10. *Clause 53(4)*, when read together with *53(5)*, places a mandatory duty on the court to make an order for costs against an intervener where a party to the litigation has incurred costs as a result of the intervention, unless there are exceptional circumstances. The position that the Bar Council took in its consultation response was that there was no need to make any change to the present position, and some real disadvantage because of the likelihood that NGOs would not be willing to run the costs risk that the proposed regime would expose them to; and would not intervene at all. This result, if it came about, would be contrary to the public interest because of the value the courts have placed on the assistance of interveners. The present position is that interventions require permission, and are always under the tight control of the court. There is undoubted jurisdiction to make an award of costs against an intervener, particularly if it behaves unreasonably, and to refuse permission to introduce particular evidence if a party to the litigation is going to have to incur expense in rebutting it. The problem with the present proposal is its chilling effect on NGOs and charities contemplating intervention. These bodies may be very nervous about exposure to cost risks, and the creation of a presumption that they will indeed have to bear the costs of any additional time considering their intervention may well deter them from intervening at all. Further, there is no evidence of a problem that needs to be addressed. If one were to emerge, the existing powers of the court are more than adequate to enable them to be addressed.

Equality of representation

11. The provisions of the Bill cannot be assessed in isolation. The Government's response to its recent consultation exercise shows that it intends radically to overhaul the principles for paying legal aid lawyers who bring cases against it. We believe that the Committee should be alert to this proposal, as being part of a package of measures which will in our view have an impact on access to justice.

12. The Bar Council takes no side as between claimants and defendants, or their respective lawyers. Our concern is with access to justice and with promotion of high standards of conduct by advocates regardless of which party they find themselves representing. Anything which makes it unviable for practitioners to bring claims for judicial review or which discourages them from doing so will likely impede access to justice and the ability to take action to prevent wrongs by public bodies. We have no doubt that the proposals will have such an inhibiting effect which will not be in the public interest.

13. The Government proposes to bring forward measures so that legal aid lawyers taking cases against the Government will not be paid in cases where permission to bring proceedings is not granted, save where the Legal Aid Agency exercises its discretion. The Bar Council disagrees strongly with the proposal to deny payment to legal aid lawyers in cases where permission to apply for judicial review is refused. We will end up in an undesirable situation whereby the advocates defending a claim at permission stage will be paid, but those bringing the claim may not.

14. Judicial review is one of the main ways in which citizens may vindicate their rights and hold the Executive to account. Threatening the viability of carrying out judicial review work will therefore have serious consequences for access to justice and the ability of individuals to challenge the actions and/or decisions of public bodies. Those decisions often have significant and serious consequences for the everyday lives of people in Britain.

15. It is important to recall why, in contrast with ordinary civil litigation, there is a permission stage in judicial review proceedings in the first place. Its purpose is precisely to provide a filter to protect public bodies against unarguable claims. That represents a satisfactory balance between the public interest in access to justice and the public interest in administrative certainty. There is simply no evidence that unarguable claims are routinely permitted to proceed beyond the permission stage. In other words the existence of the filter amply serves its intended purpose. A claim is either arguable or it is not, and the permission stage is the appropriate mechanism for determining that question. It is wrong in principle to impose additional, specific disincentives to accessing the permission stage itself. That does not "rebalance" judicial review; rather, it risks fatally undermining it.

Further issues

16. The Bar Council also has concerns about *Clause 58*, which appears to provide the Government broad consequential amending powers, which are much too widely drafted.

17. This Bill also provides an opportunity to provide for the possibility of appeal from the Administrative Court to the Court of Appeal in civil appeals from the Magistrates or Crown Court; an anomaly which ought now to be rectified.

18. The position of the Bar Council to date can be seen in the submission to the Joint Committee on Human Rights on the proposals.[66]

March 2014

Written evidence submitted by Backlash (CJC 08)

RELEVANT SECTION: SECTION 16—OFFENCE OF POSSESSION OF EXTREME PORNOGRAPHIC IMAGES

About Backlash

1. Backlash is an umbrella organisation composed of volunteers, which provides academic, legal and campaigning resources in defence of sexual freedom of expression. We support the rights of competent adults to participate in consensual sexual activities; and to watch, read or create an actual record or fictional interpretation of this in any media. We were established in 2005.

2. Our core legal work has focused on clarifying and challenging the law which prohibits the possession of 'extreme pornography'. Alongside our legal adviser Myles Jackman (a solicitor advocate at Hodge, Jones & Allen LLP), we provided support in the successful defences in *R v Holland*, *R v Webster* and *R v Walsh* against such charges. Mr Jackman was awarded the Law Society's Junior Lawyer of year 2012-2013 award in recognition of his work challenging the legal framework imposing regressive sexual morality in obscenity cases.

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[66] The Bar Council responded to a call for evidence on the implications for access to justice of the Government's proposed legal aid reforms from the Joint Committee on Human Rights. The Bar Council's response is available at: http://www.barcouncil.org.uk/media/229037/2013.09.27_jchr_call_for_evidence_-_bar_council_response_final.pdf

Summary

3. The amendment to ban 'rape pornography' risks criminalising more than a million otherwise law-abiding people in the United Kingdom. Nonetheless, there is no evidence of any corresponding public benefit from the proposed prohibition. Conversely there is a strong risk (based on our experience with the present extreme pornography offences contained within S63 (7) of the Criminal Justice and Immigration Act 2008), that any such prosecutions will be disproportionally deployed against sexual minorities; at significant cost to public funds that could be spent investigating crimes that provably harm the general public.

4. There is a significant amount of bondage themed material catering for those who enjoy submissive fantasies. Fantasy and fictional portrayals of 'forced' sex, which are likely to be the vast majority of images criminalised under the proposed amendment, are too commonly enjoyed to be reasonably subject to prohibition.

5. Hence we propose the amendment should either be rejected, or limited in scope to only prohibit images that are provably produced in circumstances where there is an absence of consent (either to the acts portrayed in the images or dissemination of the images themselves).

6. Should the legislation be enacted, we would therefore appeal for absolute clarity in the meaning and operation of the law: to enable the public to identify the difference between an "act which 'realistically' depicts rape" and the huge quantity of material that depicts sex and bondage.

Evidence of widespread impact on law-abiding citizens

7. Systematic academic research of the consumption of pornography and the prevalence of violent sexual fantasies in the population of the United Kingdom is lacking. However, the most persuasive recent evidence is taken from the British Sexual Fantasy Research Project: 2007.[67] Based on a representative sample survey of 19,000 adults in the United Kingdom, it found that: 86% of men and 56% of women had viewed pornography.[68] 29% fantasise about playing a dominant or "aggressive" role during sex; 33% fantasise about playing a submissive or "passive" role during sex; 4% fantasise about being "violent" towards someone else; 6% fantasise about violence being vested on themselves by another person.[69]

8. Thus around 2.2 million men and women have violent sexual fantasies of some kind, and nearly a third of all British adults fantasise about sexual domination and submission.

9. These statistics indicate that the number of men and women interested in fantasy pornographic depictions of non-consensual sexual encounters is likely to be very high. A central, perhaps conservative, estimate might be around 930,000 men and 640,000 women. There is no evidential link to suggest that any of these individuals pose a risk of committing sexual offences.

10. Crucially, fantasy rape scenarios are shared by both men and women, in which neither of whom are established as the passive or dominant participant in such a fantasy sexual encounter. Hence both men and women fantasise about aggressive sex in both the dominant and submissive role.

11. Yet the argument in favour of criminalising extreme pornography has been characterised as a means of "protecting" women and supporting women's interests and standing in society. The above figures suggest that these claims ignore the impact of criminalisation on a large number of female viewers of pornography. Since it is widely held that the prosecution and possible resulting punishment of women within the criminal justice system can be particularly damaging, the committee might be well placed to consider whether exposing the private sexual fantasies of women in Court proceedings could actually lower their social standing.

12. As it can be psychologically and personally destructive for an individual of any gender to have their private consensual fantasies exposed for public scrutiny; such prosecutions should need to be justified only to combat extra-ordinary threats to the general public.

13. Our work in defending innocent people facing prosecution and trial for offences under S63(7) CJIA 2008 has revealed that a large proportion of defendants give serious consideration to suicide.

14. By way of comparison with existing legislation, fewer than 0.5% of individuals surveyed acknowledged fantasising about necrophilia (S63(7)(c) CJIA 2008), and only 3% acknowledged fantasising about bestiality (S63(7)(d) CJIA 2008.[70] Hence the proposed ban on 'rape pornography' extends the reach of this legislation to much more commonly held sexual fantasies.

15. When the criminalisation of possession of extreme pornography was first proposed, Ministers predicted a handful of cases. The Regulatory Impact Assessment that accompanied CJIA 2008 predicted around 30 convictions per annum (at Appendix 1 we set out MoJ and CPS data on the number of prosecutions). With 1,348 prosecutions in the year 2012/13 alone, we now know that far more cases have been prosecuted than Parliament or the public were led to believe would proceed, with an implied cost of more than £13 million to the criminal justice system in 2012/2013 (about the same as the total annual budget of the Government Equalities Office).

[67] Brett Kahr, *Sex and the Psyche: The Truth about Our Most Secret Fantasies* (London: Penguin, 2008).
[68] Ibid., 88.
[69] Ibid., 588.
[70] Ibid., 590.

16. Given the fact that far more people enjoy submissive and domination themed fantasises and the material depicting this, than those who seek the four categories of material prohibited by S63(7) CJIA 2008, the Committee should consider whether many thousands more people will fall foul of the proposed "rape" category alone.

17. Furthermore, certain 'extreme images' are not possessed for the purpose of sexual arousal (and are therefore not 'pornographic' under the act) but are viewed as jokes in bad taste. Also, they can come into an individual's possession unintentionally (and sometimes without knowledge) while browsing the Internet for unrelated material (for example via pop-up webpages or malware). Thus the range of people affected by the amendment extends to ordinary Internet users, not just viewers of pornography with particular themes.

No evidence of harm to public

18. Milton Diamond is an international expert on human sexuality. In a recent evidence review of the effects of pornography on society, he concluded: *'objections to erotic materials are often made on the basis of supposed actual, social or moral harm to women. No such cause and effect has been demonstrated with any negative consequence. It is relevant to mention here that a temporal correlation between pornography and any effect is a necessary condition before one can rationally entertain the idea that there is a positive statistical correlation between pornography and any negative effect.'*[71]

19. While the claim that access to pornography harms women is very poorly evidenced, there is some evidence that pornography may have some beneficial effects. Increased access to pornography is associated with decreases in sexual assaults.[72] The evidence for no harmful effects on society or women from pornography is a strong finding in the academic literature. The evidence for positive benefits is weaker but indicative. There is a risk that extending the definition of extreme pornography could lead to more violence against women rather than less.

Evidence of harm to protected minorities

20. The most prominent prosecution under extreme pornography legislation was of barrister Simon Walsh, a former aide to Boris Johnson, whose legal practice had included investigating corruption within British police forces. His career in public life was severely impaired by a prosecution. His intimate life as a gay man was revealed to the public without his consent.

21. Such prosecutions threaten the reputation of the Crown Prosecution Service as an impartial public servant by showing that gay men risk having their lives destroyed in court over intimate acts which are consensual, safe and commonly practiced within the LGBT community.

22. The proposed amendment will criminalise material that depicts same-sex material. It will not only criminalise material that depicts women, but also a huge amount of material available that depicts gay sex and sexual penetration with themes of domination and submission.

23. This highlights a particular problem with defining 'extreme pornography' around the concept of obscenity. Obscenity is not a useful concept for directing how police and prosecutors should make use of the law. The requirement that obscene material 'deprave or corrupt' the viewer is arcane, and not based on any scientific or psychological test. As a result, law enforcement risks ending up treating 'extreme' as simply a synonym for 'marginal', or non-mainstream material used by sexual minorities. The Government has not presented adequate evidence showing that sexual minorities will not be subject to a disparate and disproportionate impact from this amendment.

Experience of aberrant use of legislation

24. Backlash arranges advice for members of the public facing charges of possession of extreme pornography under the existing legislation. As we have suggested, the number of people technically in breach of the law is orders of magnitude higher than those actually prosecuted. The police could not realistically hope to have the resources necessary to investigate this. Instead, cases are passively acquired, often through police investigations of other unrelated allegations; and malicious allegations.

25. In our experience, women are at least as likely as men to become the subject of police investigations which threaten to expose their private sex lives in personally damaging ways. We have encountered former partners making malicious allegations to the police regarding possession of pornography. People who have suffered a falling out in the workplace or in a business arrangement have been subject to abusive threats and allegations regarding their pornography usage and sexual interests.

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[71] Milton Diamond, "Pornography, Public Acceptance and Sex Related Crime: A Review," *International Journal of Law and Psychiatry* 32, no. 5 (September 2009): 304–314, doi:10.1016/j.ijlp.2009.06.004.

[72] Christopher J. Ferguson and Richard D. Hartley, "The Pleasure Is Momentary…the Expense Damnable?," *Aggression and Violent Behavior* 14, no. 5 (September 2009): 323–329, doi:10.1016/j.avb.2009.04.008; W. Wongsurawat, "Pornography and Social Ills: Evidence from the Early 1990s," *Journal of Applied Economics* 9, no. 1 (2006): 185–213; Berl Kutchinsky, "Pornography and Rape—Theory and Practice: Evidence from Crime Data in 4 Countries Where Pornography Is Easily Available," *International Journal of Law and Psychiatry* 14 (1991): 47–64.

26. In such cases, the police are often required to investigate, taking up their resources. But since possession of consensual adult pornography is essentially harmless, it means that the police are unnecessarily drafted in to assist the persecution of an individual to satisfy a private animus.

27. The committee might recall that one of the key reasons for decriminalising homosexuality was not because of widespread moral acceptance of homosexuality (which was to come somewhat later) but because the prohibition had become a 'blackmailer's charter'. The ban on homosexual acts had not caused people to stop engaging in such acts, but it had exposed many otherwise law-abiding citizens to being branded criminals. Extorting money, or favours, from homosexuals in return for not revealing their sexual orientation was commonplace.[73]

28. In extending the regulation of extreme pornography to popular sexual fantasy material, the Government risks reintroducing this sort of scenario and making blackmail over private sexuality a common problem once again.

Proposals for amendment

29. Given the scale of risk associated with this proposed legislation, we strongly advise that this amendment be abandoned. However, the legislation could be focussed more narrowly on genuinely abusive situations where there is actual non-consensual abuse and harm.

30. It should be noted that when S63 CJIA 2008 was debated in the Lords an assurance was given, in response to concerns expressed regarding the need to properly define the law that guidance would be issued to the public. However clear guidance on two categories (S63(7)(a) and (b) was never issued. As a consequence the legislation has been used in a way that Parliament never intended (R v Walsh) and hence we appeal to the committee to take this opportunity to repeal S63(7)(a) (life threatening) and (b) (serious injury). These two categories never have and probably never can be clearly defined.

31. If, despite this evidence, legislation is enacted it is vital that absolute clarity be provided to the public, to ensure that people can clearly determine material which is legal to possess and that which could result in a lengthy custodial sentence and inclusion on the sex offenders register. The penalties are so extreme that the public must be given absolute certainty and clarity.

March 2014

APPENDIX 1
DATA ON PROSECUTIONS

Offences charged and reaching a first hearing in Magistrate's Courts: -

	2008/09	2009/10	2010/11	2011/12	2012/13
7a	0	5	38	40	30
7b	0	52	132	102	98
7c	0	0	0	6	5
7d	2	213	995	1171	1179
Total	**2**	**270**	**1165**	**1319**	**1348**

Definitions:—

S63(7)(a): an act which threatens a person's life
S63(7)(b): an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals
S63(7)(c): an act which involves sexual interference with a human corpse
S63(7)(d): a person performing an act of intercourse or oral sex with an animal (whether dead or alive)

Written evidence submitted by Standing Committee for Youth Justice (SCYJ) (CJC 09)

SECURE COLLEGES AND THE CRIMINAL JUSTICE AND COURTS BILL
(PART 2 AND SCHEDULES 3 & 4)

Introduction

The Criminal Justice and Courts Bill (the Bill) legislates for the introduction of secure colleges (SCs) as a form of youth detention. Plans for secure colleges were set out in the government's response to the Transforming Youth Custody (TYC) consultation, published in January 2014. TYC also set out plans to improve resettlement and existing educational provision in Young Offenders Institutions (YOIs).

[73] Christie Davies, *The Strange Death of Moral Britain* (New Brunswick, N.J.: Transaction Publishers, 2004), 93.

The Government's stated aim in introducing SCs is to save costs, put "education at the heart of youth custody" and reduce reoffending. Construction of a 320-bed, £85million "pathfinder" SC will begin next year. SCs will hold children between 12 and 17 years of age and may hold a mix of girls and boys.

SUMMARY

The Children's Right Alliance or England (CRAE), Howard League for Penal Reform (HL) and Standing Committee for Youth Justice (SCYJ) are seriously concerned by several aspects of the plans for SCs including:

— The effect large institutions will have on the safety and outcomes of the most vulnerable children placed there.

— The safeguarding implications of accommodating girls and younger children with a large number of older boys.

— The permitted use of "reasonable force… to ensure good order and discipline" on children within secure colleges despite this being deemed illegal in 2008 and therefore removed from STC rules.

— The lack of a strong duty to assess and pursue each child's best interests to protect their welfare needs

— The high cost of the untested pathfinder secure college—£85 million—when youth justice budgets are tight and the lack of detail about Secure Colleges.

1. *Size of secure colleges: child safety and outcomes*

— SCs will house hundreds of troubled children between 12 and 17. This is to "achieve economies of scale" and thereby save costs.[1]

— Research shows that small secure units, close to a child's home, with well-trained/highly qualified staff, and high staff to child ratios, which provide intensive support, are safest and have the best outcomes for detained children.[2]

— Large institutions—similar to the proposed SCs—have a poor record on child safety, education and rehabilitation.[3]

— Large institutions result in children being detained far from their homes; the child custody population is small so few large custodial institutions are required. Inevitably, these will be far from the homes of many of the children detained.

— YOIs often suffer from high levels of bullying and violence.

— Jake Hardy and Ryan Clark, both of whom killed themselves in custody, were detained in the largest Young Offenders Institutions (YOIs) in the country.

— Resettlement and service continuity are far more difficult when children are detained far from home. Smaller, local units enable staff to more effectively establish links to local services and education providers[4] in order to ensure the young people can continue their learning post-release.[5]

— Detaining children far from home makes it difficult to maintain relationships with friends and family which has a negative impact on rehabilitation[6], oversight by children's services is more difficult, as are visits from social workers, which is particularly damaging for looked after children.

— Cost savings can be made in other ways, such as reducing the custody population[7] and reducing re-offending by giving children effective, holistic support in custody and through the gate.

— The Bill should limit the size of SCs.

2. *Secure Children's Homes*

— Large institutions are wrong for all children but they are particularly damaging to the most vulnerable.

— Currently, young and vulnerable children are detained in Secure Children's Homes (SCHs). These best match the model of small secure units, with well-trained/highly qualified staff, and high staff to child ratios, which provide intensive support—which research shows have the best outcomes.[8]

— Of the 16 deaths of children in custody since 2000 none occurred in SCHs, all occurred in YOIs and Secure Training Centres (STC).

— However, the Government has recently cut 28 SCH beds. Reducing the number of YJB Commissioned SCHs by almost a fifth. The government is clear that SCs will accommodate some of the children currently detained in SCHs.[9]

— The Government has made an ambiguous commitment to maintaining some SCH places for the most vulnerable.[10]

— It is of the utmost importance that SCH places are still available for all vulnerable children and that the definition of 'vulnerable' is not narrowly drawn. This should be included on the face of the Bill.

3. *Girls and younger children*

— The "pathfinder" SC will hold 320 children over the age of 12. It may hold a mixture of girls and boys. We understand other SCs will be similar.

— In 2012/13, 95% of children in custody were male, 96% were 15-17 years old. This means each SC will hold a very small number of young children and girls with a large number of older boys. This creates serious safeguarding risks.

— YOIs only hold boys who are 15 or over.

— We have seen no evidence that the government has considered the impact of SCs on girls and younger children. If they have not done so they will be failing to meet the requirements of the Public Sector Equality Duty, set out in the Equality Act 2010.

— The Bill should prevent children under-15 and girls from being detained in SCs.

4. *Restraint and the use of force*

— The Bill sets out that an SC custody officer may "use reasonable force" "to ensure good order and discipline" (GOAD) "if authorised to do so by secure college rules" (Schedule 4, (8(c)) and (10)).

— The Secure College Rules are yet to be drafted. The Government plans to introduce them via Secondary legislation.

— This matter is too important to be left to Regulations, particularly since Secondary Legislation is subject to less scrutiny.

— Including provisions on the use of force to maintain GOAD in both primary and secondary legislation has proved dangerous in the past.

— The courts have found that the confusion between the primary and secondary legislation relating to the use of force in secure training centres (STCs) resulted in the widespread illegal restraint of children for GOAD in the STCs.[11] Primary legislation needs to be clear and definitive on this issue.

— The term "use of force" is so broad that it can include use of restraint. "Maintaining GOAD" is so broad it will allow force to be used in almost any situation.

— In response to the first inquest into the death of Adam Rickwood—who committed suicide after being illegally restrained in Hassockfield STC—the government amended the Secure Training Centre Rules to allow restraint to be used to maintain GOAD. In 2008 the Court of Appeal ruled that this was unlawful because it amounted to "inhuman or degrading treatment" and the Government had not shown that use of force to maintain GOAD was necessary. The Rules thus breached Article 3 of the ECHR.[12]

— Allowing force to maintain GOAD in SCs would be unlawful, given the 2008 judgement. There has been no significant change in circumstances which is likely to make the use of force "necessary" for GOAD now, when it was not necessary in 2008. In addition, these provisions would not be compatible with the UN Convention on the Rights of the Child.[13]

— The Bill should be absolutely clear about the circumstances in which force can be used and should prevent SC officers from using force to maintain GOAD.

5. *Rights and welfare*

— Article 3 of the UN Convention of the Rights of the Child (UNCRC) sets out that, "in all actions concerning children… the best interests of the child shall be a primary consideration." This provision is reflected in legislation regulating the treatment of children in various contexts.[14] As per Article 3 UNCRC, the best interests of children in custody should be a primary consideration in all matters affecting them. We would like to see this reflected in the Bill.

— Schedule 4 (8) of the Bill sets out that an SC custody officer must "attend" to children's wellbeing.

— We would like to see a stronger duty to assess and pursue each child's best interests in the Bill.

6. *Cost, evidence, priorities and a lack of detail*

— SCs are an expensive experiment at a time when youth justice budgets are being stretched.

— Parliament is being asked to approve plans in the absence of evidence or detail.

— The "pathfinder" SC will cost £85million. Yet SCs have little evidence base, no small-scale pilots have been tested and there is little detail in either the Bill or TYC about what they will look like—most is left to Regulation (Secure College Rules), as yet unpublished.

— Improving education in custody is a welcome ambition but building a new prison is not necessary to achieve it.

— The £85million could be better spent and the MoJ could build on its recent successes to save costs in the long term in other ways.[15]

— There is no detail on staff to children ratios, the education or support to be provided[16], how the education on offer will be developed, or how SCs will manage and educate a large, complex population.[17]

— Highly trained, experienced, engaging and qualified staff will be key. Yet there is a lack of detail about the qualifications SC staff will need, or the support and training they will receive.

— Details of the qualifications staff require should be included on the face of the Bill and the Secure College Rules should be published alongside the Bill.

March 2014

The contents of this document do not necessarily reflect the views of all member organisations of the SCYJ.

References

[1] Impact Assessment: Transforming Youth Custody

[2] For example, a recent review found that smaller units allowed staff to develop closer and more supportive relationships, and fostered a more caring environment; larger facilities were expected to function as institutions. (*Khan, L.* (2010) *Reaching out, reaching in: Promoting mental health and emotional well-being in secure settings, London: Centre for Mental Health, p43*). A major review of youth justice found that the low staffing ratio (10-15:1) in YOIs was seen to be a key determinant of their safety and security problems. Institutional size was also said to be another important determinant of culture. (*Centre for Social Justice (2012) Rules of Engagement: changing the heart of youth justice, London: Centre for Social Justice*). The Missouri custodial model comprising small therapeutic and "home like" secure facilities was found to produce substantially lower reconviction rates than larger alternatives. (*Justice, p143 47 Peterson J (2006), A Blueprint for Juvenile Justice Reform: Second Edition, Youth Transition Funders Group, p9*). There is a growing body of evidence that young person–worker relationships are central to achieving engagement and reducing reoffending. (*See for example: Youth Justice Board (2004) The summary of the initial report on the Intensive Supervision and Surveillance Programme, p33; Knight B (2010) Back from the Brink: How Fairbridge transforms the lives of disadvantaged young people, Newcastle: The Centre for Research and Innovation in Social Policy and Practice*.)

[3] For example, YOIs provide an average of 15 hours of education per week, compared to 30 in SCHs (*Transforming Youth Custody p.8*). The Prisons and Probation Ombudsman (*'Learning Lessons Bulletin Fatal Incidents Investigation Issue 3: Child Deaths'*) reported that 'busy YOIs can struggle to ensure a consistent and reliable staff presence which allows for the building of trusting relationships and a supportive environment' (para 5.2) and 'Care and discipline were not consistently co-ordinated and the formal adult-orientated adjudication system appeared an inappropriate way to manage vulnerable children' (para 3.3.). Custody can 'destroy the potential to build positive attitudes towards and within social relationships. It does not …help engender respect for others or enhance empathy to others'. (*Brian Littlechild, evidence to the Justice Select Committee 2012/13 inquiry into youth justice. See the Committee's report, p28*.)

[4] The average length of stay in custody is 107 days (See TYC, paragraph 12). This is not a lot of time for young people to progress with their learning. There will need to be effective links between local education providers and custodial institutions if children are to continue their learning post-release

[5] The importance of joining-up custody and community was stated in the TYC green paper. This is not reflected in the Bill. Detaining children far from their homes makes "joining-up" more difficult.

[6] A review of recent inspections of the six under-18 YOIs in England shows that on average only 34% of children found it "easy" or "very easy" for friends and family to visit.

[7] Reducing the custody population results in significant savings. In response to a recent Parliamentary Question, the government said: "The budgetary savings to the YJB delivered by each planned reduction in the youth secure estate since 2009-10 total £76 million." (*HC Deb, 4 March 2014, c810W*)

[8] SCHs are smaller, have higher staff ratios and provide more intensive support than other custodial institutions. Children's reports of their experiences in SCHs are far more positive than their reported experiences of YOIs. Compare, for example, the Howard League for Penal Reform's evidence in Life Inside or inspection reports for YOIs to the 2009 Children's Rights Director and OFSTED report, 'Life in Secure Care'. The latter looked at the experiences of children in SCHs and noted that the units were a safe place to be that helped children keep out of trouble and sort themselves out. Children spoke very positively of the support they get and many found the staff to be caring. The perception of the amount of bullying was low.

[9] See TYC, paragraph 33.

[10] Paragraph 34 of TYC states: "We accept that there is always likely to be a small number of the very youngest, most vulnerable and most challenging young people who will be unsuited to the mainstream provision in a Secure College and will require specialist custodial services. To cater for this population we are continuing to provide sufficient places in SCHs, while seeking to secure improvements in service and reductions in cost."

[11] Confusion between the Criminal Justice and Public Order Act 1994 and the Secure Training Centre Rules resulted in illegal restraint of children for GOAD in the STCs. (*See R (on the application of C) (a minor) v Secretary of State for Justice [2008] EWCA Civ 882*)

[12] R (on the application of C) (a minor) v Secretary of State for Justice [2008] EWCA Civ 882

[13] In 2010 the government made a commitment to have regard to children's rights when developing law and policy affecting children. Article 19 of the the UN Convention on the Rights of the Child (UNCRC) protects

children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Article 37 of the UNCRC requires state parties to ensure that every child deprived of liberty shall be treated with humanity and respect for their inherent dignity. The proposals to authorise the use of restraint techniques run counter to these provisions.

[14] e.g. S.1 of the Children Act 1989; and S.55 of the Borders, Citizenship and Immigration Act 2009

[15] For instance, "since 2009-10, reductions in the child custody population has saved £76 million." (*HC Deb, 4 March 2014, c810W*)

[16] TYC (e.g.para 11) says that detainees will receive holistic support. It is not clear what this would mean in practice.

[17] Delivering education in an SC will be very different to delivering learning in an outside school or college due to young people entering and leaving custody at different times and having a wide variety of other needs.

Written evidence submitted by Rehman Chishti MP (CJC 10)

To whom it may concern,

Criminal Justice and Courts Bill

1. I am writing to ask the Committee to give consideration to including within the Criminal Justice and Courts Bill a measure to increase the maximum penalty for causing death by disqualified driving.

2. This would increase the maximum sentence from the current two years to 14 years and an unlimited fine, in line with the current penalty for causing death by dangerous driving.

3. This was the subject of my Causing Death by Driving Whilst Disqualified Bill introduced to the House on 2 December 2013.

4. The Criminal Justice and Courts Bill proposes changes to sentencing for a number of serious crimes. During the Second Reading of the Bill (HC Deb, 24 February 2014, c47) the Secretary of State for Justice told the house that he believes "serious and repeat offenders should face the full force of the law for their crimes." My proposed measure is in is in line with the Secretary of State's and the Bill's intention.

5. Those who cause death by disqualified driving are serious offenders who have already been banned from our roads and are intentionally driving unlawfully.

6. It is an offence that has tragic consequences but current sentencing levels are not in line with the seriousness of the crime, with it carrying a maximum of two years imprisonment.

7. I hope that the Committee will be able to fully consider the inclusion of this measure.

March 2014

Written evidence submitted by the Public and Commercial Services Union (PCS) (CJC 11)

PCS submission to the criminal justice and courts bill committee

1. The Public and Commercial Services Union (PCS) is one of the largest trade unions in the UK, with 250,000 members. We are organised throughout the civil service and government agencies, making us the UK's largest civil service trade union. We also organise widely in the private sector, usually in areas that have been privatised.

2. PCS is the recognised trade union for civil servants and others employed in the administration of justice and in offender management. Members work for HM Courts and Tribunal Service, the Ministry of Justice, National Offender Management Service (NOMS), Youth Justice Board (YJB) and the Parole Board.

3. PCS welcomes the opportunity to present evidence to the bill committee on what is an important piece of legislation relating to a broad range of issues within the criminal justice process.

4. We welcome the restriction on cautions contained within the bill but have concerns about the way "exceptional circumstances" will operate.

5. PCS is very concerned that the introduction of the Single Justice Procedure focuses too much on the speed of justice and that offender management will be overlooked. We are concerned about the lack of transparency particularly as cases will be heard without the parties being present.

6. The Criminal Courts Charge adds to the complexity of financial penalties prosecution costs, surcharge then courts charge. We are concerned that vulnerable people on low incomes will be penalised as this will not be means tested.

7. PCS believes that the changes to judicial review will restrict access to justice and will make government less accountable.

Part 1—criminal justice

8. PCS welcomes clause 2 which gives clarification about the extent of sexual offences to be subject to the dangerous offenders sentencing scheme. We also welcome clause 5 that would introduce a new "special custodial sentences for certain offenders of particular concern".

9. PCS is in favour of clause 4 which would see the greater involvement of the Parole Board in deciding whether to release those serving extended sentences.

10. PCS is concerned that the use of mandatory electronic monitoring (as proposed in clause 6) including GPS monitoring of whereabouts of those released from prison will be extensive and will not always be necessary and proportionate to the offences involved.

11. Clauses 10 and 11, which introduce the offences of remaining unlawfully at large after recall and remaining unlawfully at large after temporary release respectively, are welcome as this was a gap in previous legislation.

12. PCS supports the restriction on the use of cautions contained in clause 14. A caution for a rape or robbery does not only affect the offender and the victim but gives a message to society that such behaviour is tolerated and does not require judicial involvement. PCS believe cautions have been used excessively to run down the criminal courts. However, PCS is concerned that following the court closures and staff cuts, proper restriction on cautioning may find the courts struggling to cope. We are also concerned that to give police discretion in exceptional circumstances will have an impact on public confidence.

13. Where an offence is serious enough to be triable only on indictment there should never be a caution for an adult. A caution requires an admission of guilt. If circumstances are so exceptional should not a judge consider those circumstances to be sure that such a serious offence is made out before it is added to the record. If it is not that exceptional, a judge should consider sentence, there should be particular transparency in such serious cases.

Part 2—Young offenders

14. Clause 17 amends the *Prison Act 1952*, by adding secure colleges to the list of types of establishment that the Secretary of State may provide. PCS support better educational provision.

15. Clause 17 PCS support better educational provision for those in custody but do not support this important work being handed to the private sector to make profit.

Part 3—Courts and tribunals

16. PCS is concerned about clauses 24-28 which would introduce trial by a single justice on the papers. PCS is concerned that the change from "public prosecutors" to relevant prosecutors is an indication of further privatisation. PCS believes that the single justice procedure is another cut to justice, it will effectively be a 'rubber stamping', procedure and will reduce transparency in the system.

17. Thousands of regulatory offences are dealt with by way of fixed penalty. If there are issues which make them inappropriate for that procedure more than one lay justice should consider them. Magistrates do not generally make decisions alone. They are lay people. The fact there is more than one of them protects offenders from the consequences of inexperience, confusion and rogue decisions.

18. PCS legal advisor members are concerned that the court pays little enough heed to what defendants write at present in mitigation and focus on means and calculation of fines.

19. PCS is concerned that justice will not be seen to be to be done. Offenders will not even know which court is hearing the case. It will be difficult to discern which case an endorsement on a driving licence relates to.

20. The system of local justice in England and Wales has been changed after over 90 magistrates' courts and 49 country courts have been closed. Centralisation of this type of work means it is no longer local and worryingly, in our view, paves the way for further court closures.

Costs of criminal courts—clauses 29-31

21. Financial penalties can be complicated. They are often imposed in absence so the offender cannot ask for clarification. Offenders may be ordered to pay a fine, arrears of road fund licence duty or compensation to the victim of crime. In all cases of a fine there is a victim surcharge even though with thousands of offences the victim is the state or a public authority. In most cases the costs of the prosecutor will be added and now the costs of the courts.

22. PCS notes that the enforcement of all sums imposed by the criminal courts is at the moment being privatised. This is one more charge for the private company to make a profit from at the expense of the most vulnerable in society.

23. Clause 31 allows an offender to apply to a fine office for the payment or reserve terms of a collection order to be varied. PCS notes with concern that the Ministry of Justice is currently considering bids for the outsourcing of the collection and enforcement of fines, costs and compensation. The implications of this are very concerning. This could mean officers exercising the power to vary orders of the court will be the employees of a private company and PCS opposes any extension of their powers at this time. Private companies should not be allowed to make judicial decisions.

Part 4—Judicial Reviews

24. PCS believes that judicial reviews are of constitutional importance as a useful tool in holding the government of the day to account, protecting the public interest, and in improving policy-making. We believe the changes put forward in the bill represent a significant attack on the ability of individuals, charities, non-governmental organisations and trade unions to have access to challenge decisions made by the state. We are concerned that they will serve to make the government and public bodies less accountable as decision makers.

25. At the time of its consultation, the Government pointed to the rise in the number of applications as a major factor in the need to review the system. Administrative Court data is highlighted that shows there were only 4,500 applications for judicial review in 1998, as opposed to 12,400 in 2012. In its response to the consultation the government further notes that the volume of judicial reviews lodged continued to increase. However, there is no evidence that addresses whether the underlying problem is the result of faults in the initial decisions that are being challenged rather than the processes that are already in place.

March 2014

Written evidence submitted by Professor Clare McGlynn and Professor Erika Rackley at Durham Law School, Durham University (CJC 12)

1.0 Executive summary

1.1 We welcome the Government's intent to extend the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 (CJIA) to cover the possession of extreme images that depict rape and assault by penetration.

1.2 Legislative action against extreme pornography, including 'rape pornography', is justified because of the 'cultural harm' of such material. The existence and use of extreme pornography, including pornographic images of rape, sustains the cultural context in which society fails to take sexual violence seriously.

1.3 We welcome the fact that these proposals place some responsibility for the harms of extreme pornography on the user. However, the effectiveness of this strategy, namely targeting demand in order to reduce the prevalence of extreme pornography, will depend on prosecutorial policy.

1.4 Further amendments are crucial to ensure both the effectiveness of the new law and that it targets culturally harmful material. We make five key recommendations:

1.4.1 We recommend the inclusion of a provision stating clearly that the 'realistic' portrayal of the act/s in question refers to both real and simulated images.

1.4.2 We recommend the inclusion of a provision requiring reference to be made to the context—description, sounds, narrative—of the image when determining whether or not it is one of 'rape'.

1.4.3 We recommend clarifiying the defence of 'participation in consensual acts'.

1.4.4 We recommend the inclusion of a public good defence.

1.4.5 We recommend the removal of the requirement that the image be 'grossly offensive, disgusting or otherwise of an obscene character'.

1.5 Our support of the proposed changes to the law on extreme pornography does not extend uncritically to the entirety of the current regulation of obscenity and pornography. We further recommend the establishment of a Commission on Pornography and Obscenity, to be tasked with the wholesale review of obscenity and pornography regulation. This Commission would also consider potential actions beyond the criminal law.[74]

[74] As recommended in McGlynn & Rackley, 'Why Criminalise the Possession of Rape Pornography?' *New Statesman*, 12 February 2014, available at: http://www.newstatesman.com/politics/2014/02/why-criminalise-possession-rape-pornography

2.0 Introduction

2.1 We have particular expertise in the legal regulation of pornography, rape law and gender equality. Our scholarship has shaped public debates on the legal regulation of pornography law and we are regular commentators in the broadcast and print media on these issues.[75]

2.2 This evidence submission is based on the findings of our extensive research, with a particular focus on their analysis of the English legislation detailed in:

— 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) Criminal Law Review 677-690;

— 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) Criminal Law Review 245-260[76]; and

— 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law' (2013) Criminal Law Review 400-405.

2.3 In 2009 during discussions of the Scottish 'extreme pornography' provisions, the Scottish Justice Committee endorsed our argument that the use of the term 'obscenity' should be reviewed and that greater consideration should be given to the 'cultural harm' of extreme pornography.[77]

2.4 We have worked closely with a range of NGOs and women's groups in England & Wales, and Scotland, on pornography regulation, including supporting the campaign to include rape in the extreme pornography laws led by Rape Crisis South London and the End Violence Against Women Coalition in 2013.[78]

3.0 Justifications for action: the cultural harm of extreme pornography

3.1 We welcome the Government's intent to extend the extreme pornography offence at section 63 of the CJIA to cover the possession of extreme images that depict rape and non-consensual sexual penetration.

3.2 This reform rightly addresses the failure of the current law to take a strong stand against the normalisation of sexual violence. It is our view that the extreme pornography provisions in the CJIA 2008 represented a missed opportunity 'to consider the broader arguments of harm, extreme pornography and sexual violence…', with the debate instead focusing on 'moralistic and disgust-based justifications' that fail to fully consider the implications of such material.[79]

3.3 Criminalising the possession of extreme pornography is a serious matter. Legislative action must only be taken if we are certain that there is sufficient justification. Typically drawing on John Stuart Mill, the standard liberal position is to resist legislative action on the basis that there is no direct causal connection between the viewing of extreme pornography and sexual violence. It is then suggested that in the absence of direct harm, there can be no regulation.

3.4 We suggest that liberalism can be used to justify legislative action against pornography.[80] John Stuart Mill, for example, was far more receptive to radical legislative intervention that is often assumed.[81] Our liberal democracy champions the values of equality and dignity which are directly challenged by much violent pornography, especially rape pornography, thus demanding regulatory action. We further argue that the law has a precautionary role; to anticipate, preclude and counter the risk of harm to society and to individuals. As John Stuart Mill himself said: 'It is the business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed'.

3.5 We consider that arguments of direct, causal links between pornography and sexual violence are over-simplistic. Our argument is not that the person who views extreme pornography, such as pornographic images of rape, will then go on to commit rape. Rather, as we have argued elsewhere, 'the proliferation and tolerance of such websites and images, and the messages they convey, contributes to a climate in which sexual violence is condoned, and seen as a form of entertainment'.[82] Rape pornography sustains a culture in which a 'no' to sexual activity is not taken seriously. It promotes the myth that women enjoy being coerced into sexual activity, and that they enjoy violent, non-consensual sexual activity.

3.6 This is a culture in which, as research for the Children's Commissioner suggests, young people are turning to pornography for guidance on sex, are engaging in riskier behaviour as a result of viewing pornography,

[75] See, for example: McGlynn & Rackley, 'Why Criminalise the Possession of Rape Pornography?' *New Statesman*, 12 February 2014, available at: http://www.newstatesman.com/politics/2014/02/why-criminalise-possession-rape-pornography and BBC Radio 4 Woman's Hour: 'Extreme Pornography—should the laws be reformed?' 8 May 2013, available at: http://www.bbc.co.uk/programmes/p018rdr5.

[76] Available at: http://dro.dur.ac.uk/8111/1/8111.pdf?DDC117+DDC72+DDC71+DDD19+dla4jap+dla0cmm+dul4eg.

[77] Scottish Justice Committee Report, SP334, 18th Report (2009) Stage 1 Report, [292-294; 310].

[78] See further, End Violence Against Women Coalition "Campaign to ban 'rape porn'" http://www.endviolenceagainstwomen.org.uk/media-sexism [accessed 8 March 2014].

[79] McGlynn and Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) *Criminal Law Review* 245-260.

[80] McGlyn and Ward, 'Pornography, pragmatism and proscription' (2009) 36 *Journal of Law and Society* 327-351.

[81] McGlynn and Ward, 'Would John Stuart Mill have Regulated Pornography?' (2014) *Journal of Law and Society* forthcoming.

[82] McGlynn and Rackley 'Why Criminalise the Possession of Extreme Pornography?' Durham Law School Briefing Paper (Feb 2014), available at: https://www.dur.ac.uk/resources/law/research/RapePrnFeb14.pdf.

are uncertain as to what consent means, and develop harmful attitudes towards women and girls.[83] Rape pornography, therefore, generates cultural harm and it is this cultural harm which justifies legislative action.

3.7 **We urge the Committee to recognise the significance of the cultural harm of extreme pornography as a justification for legislative action.**

4.0 Clarification of the definition of 'realistic' image

4.1 In order fall within the remit of the CJIA, and the proposed amendment, the image in question must be an 'explicit and realistic' portrayal of a particular act/s.[84] 'Realistic' may have, at least, two meanings in this context: (a) that the image must depict 'real', as opposed to simulated/acted, activity; and/or (b) that the image must be of a 'real' human, as opposed to a cartoon or computer generated (CGI) image.

4.2 **The requirement that an image is 'realistic' does not require the act depicted to be 'real'**. This is why the law refers to images which are 'realistic', meaning those which resemble or simulate real life. The use of the term 'realistic' also mirrors international provisions on pornography which similarly include real and simulated images.[85] The current extreme pornography laws, and the proposed new provision, thus cover both real and simulated images. For example, there is little doubt that section 63(7)(c) of the CJIA extends to include 'realistic' images of necrophilia where the 'dead' person is not in fact dead. Similarly, in the proposed new law, a 'realistic' explicit image of rape and/or assault by penetration, that is an image of 'rape' which not, in fact, rape (ie it is acted or simulated) should be covered by the proposed amendment.

4.3 **However, in view of the fact that there has been some debate over the meaning of 'realistic', we recommend, for the avoidance of doubt, the inclusion of the following clause:**

> *"For the purposes of subsection 7, 'realistic' includes real and simulated images".*

4.4 In relation to cartoons and computer generated images, we do not consider that the current law covers such material. We do not recommend that the law on extreme pornography is extended to cover cartoons and computer generated images.

5.0 Importance of 'context' in the definition of an 'extreme' image

5.1 **The context of an image is valuable in determining whether the pornographic images are 'extreme'**. Simulated images of rape are widely available on free-to-access pornography websites.[86] The images are often accompanied by banners and text which glorify rape and sexual violence: "*these girls say no but we say yes'; 'see what happens when men lose control and don't give a f*ck whether she says yes or no. Damn, in fact, the guys enjoy a "no" more'*".[87] The narrative of the 'story' similarly conveys such meaning, as does the soundtrack. This contextual material makes it clear that the image/s is intended to be of rape or other non-consensual sexual activity. The non-consensual aspect, or what makes the image one of 'rape', is clear from this overall context.

5.2 Under the CJIA, the 'context' of a particular image is only relevant to whether or not the image is pornographic.[88] This is in contrast to the use of context in the Scottish extreme pornography provisions. The Criminal Justice and Licensing (Scotland) Act 2010 includes provision to ensure that the 'context' of the image (eg descriptions or sounds accompanying the image) is relevant to the determining whether an image is 'extreme'. This ensures that simulated images of rape come clearly within the remit of the legislation, whether or not the actual act was itself consensual (i.e. whether or not the actors in the image were consenting).

5.3 **We recommend the inclusion of a similar clause in the proposed amendment:**

> *"In determining whether (as found in the person's possession) an image depicts an act mentioned in subsection (7), reference may be had to*
>
> *(a) how the image is or was described (whether the description is part of the image itself or otherwise)';*
>
> *(b) any sounds accompanying the image; and*
>
> *(c) where the image forms the integral part of a narrative constituted by a series of images—(i) any sounds accompanying the series of images; (ii) the context provided by that narrative".*[89]

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[83] Office of the Children's Commissioner, 'Basically ... porn is everywhere', 2013, available at: http://www.childrenscommissioner.gov.uk/content/press_release/content_505.

[84] CJIA s 63(7) and Criminal Justice and Courts Bill clause16(2)(c).

[85] Article 9 of the Council of Europe Convention on Cybercrime (2001) (Offences related to child pornography) extends to 'realistic images' which, the explanatory notes state, includes 'real and simulated images'.

[86] http://www.endviolenceagainstwomen.org.uk/data/files/Closing_the_loophole_on_rape_pornography.pdf [accessed 10 March 2014].

[87] Quoted from Factsheet on Pornographic Rape Websites: https://www.dur.ac.uk/resources/glad/GLADFactsheet.pdf.

[88] CJIA S63(5).

[89] This mirrors section 42(2) of the Criminal Justice and Licensing (Scotland) Act 2010.

6.0 Clarifying the defence of 'direct participation in consensual acts'

6.1 The current law includes a defence where the defendant 'directly participated' in the acts portrayed (section 66 of the CJIA). The proposed amendment extends this defence of 'direct participation' to images of rape or assault by penetration which though portrayed as non-consensual were in fact consensual. We welcome the extension of this defence.

6.2 The target of the extreme pornography legislation is not—and should not be—private depictions of consensual BDSM activity. The current law, however, covers images which, when carried out with consent and produced only for private use, should not fall within its remit.[90] One reason for this is the limited interpretation of 'direct participation'—usually understood as requiring the defendant to be visible in the image in question.

6.3 **The Committee may wish to consider clarifying the scope of this defence so that it permits the possession of images taken of those participating in consensual acts and which are for private use only.**

7.0 Inclusion of a public good defence

7.1 The Obscene Publications Act 1959 includes a defence where the material in question is for the 'public good' (section 4). The absence of a public good defence in the extreme pornography law reinforces the fear that the provisions could be used to criminalise the possession of legitimate works of art, film and such like. The introduction of a 'public good' defence would demonstrate that there is no intention to bring educational, legitimate artistic or similar works within the scope of the legislation and would help to ensure that only harmful material is covered by the provisions.

7.2 **We recommend the inclusion of the following clause:**

> *"A person shall not be convicted of an offence [under section 63] if it is proved that the extreme image is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern".*[91]

8.0 Removal of requirement for image to be 'obscene'

8.1 The current law provides that for an image to be 'extreme,' it must also be one which is 'grossly offensive, disgusting or otherwise of an obscene character' (section 63(6)). The current amendment would preserve this provision. We urge the Committee to reconsider the use of the language of obscenity. The use of the term 'obscenity' has long been criticised on the basis that it is typically deployed to capture material which is not only harmful, but which also causes offence or disgust. It is also typically focussed on the impact on the consumer of the material, rather than wider considerations of harm.

8.2 We recommend that the extreme pornography law is justified on the basis of its cultural harm, not obscenity. We also contend that the criminal law is not used to prohibit material on the basis that it is considered 'disgusting'. We recommend, therefore, the removal of the requirement that the image be 'grossly offensive, disgusting or otherwise of an obscene character'.

9.0 Definition of penetration

9.1 We note that proposed new section 7(B) states that 'penetration is a continuing act from entry to withdrawal'. This provision mirrors section 79(2) of the Sexual Offences Act 2003 which defines penetration, for the purposes of the various sexual offences, as being a 'continuing act from entry to withdrawal'. This provision is included in the Sexual Offences Act so that where, for example, the initial consent to penetration is withdrawn during penetration, if the penetration continues, then the offence of rape or assault by penetration may still be made out. A similar provision is included in section 62(8) of the Coroners and Justice Act 2009 which proscribes the possession of a prohibited image of a child.

9.2 In the context of pornographic images, including this provision will ensure that where a sequence of images suggests initial consent to penetration, but this consent is withdrawn during penetration, the offence may still be made out as the continuing non-consensual penetration does constitute an offence.

10.0 Recommend Establish a Commission on Pornography and Obscenity

10.1 We welcome the Government's recognition that rape pornography is 'extreme' enough to be included in extreme pornography law.

10.2 We hope, however, that these amendments are just the beginning of a new approach to the regulation of obscenity and pornography, focussing on its cultural harm.

10.3 We recommend the appointment of a Commission on Pornography and Obscenity tasked with the wholesale review and revision of the obscenity and pornography laws. This Commission should consider reform of the Obscene Publications Act 1959 and its now outdated and erroneous focus on the 'depravity' of the consumer of obscene materials. It should examine the prosecutorial policy which continues to label

[90] As we have argued in more detail in: Rackley and McGlynn, 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law' (2013) *Criminal Law Review* 400-405.

[91] This mirrors section 4 of the Obscene Publications Act 1959.

as 'obscene' material that may be distasteful for some but is not unlawful to perform. It should review and recommend revision of the law and regulation to ensure that it is up-to-date for our technological age.

11.0 Relevant publications

McGlynn, C. and Rackley, E. 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) *Criminal Law Review*, 245-260. Available at: http://dro.dur.ac.uk/8111/1/8111.pdf?DDC117+DDC72+DDC71+DDD19+dla4jap+dla0cmm+dul4eg

McGlynn, C., and Rackley, E. 'Why Criminalise the Possession of Extreme Pornography' *New Statesman*, 12 February 2014. Available at: http://www.newstatesman.com/politics/2014/02/why-criminalise-possession-rape-pornography.

Rackley, E. and McGlynn, C. 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law' (2013) *Criminal Law Review* 400-405.

McGlynn, C. and Rackley, E. 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) *Criminal Law Review* 677-690.

McGlynn, C. and Rackley, E. 'The Politics of Porn' (2007) New Law Journal 1142. Available at: http://www.newlawjournal.co.uk/nlj/content/politics-porn

McGlynn, C. and Ward, I., 'Pornography, pragmatism and proscription' (2009) 36 *Journal of Law and Society* 327-351.

McGlynn, C and Ward, I, 'Would John Stuart Mill have Regulated Pornography?' (2014) *Journal of Law and Society* forthcoming.

March 2014

Written evidence submitted by Sex & Censorship campaign (CJC 13)

RESPONSE TO THE CRIMINAL JUSTICE AND COURTS BILL

1. Submitted on behalf of the *Sex & Censorship* campaign.

2. Written by Jerry Barnett and Dr David Ley, a psychologist specialising in sexuality. Dr Ley's website is at: http://drdavidley.com/

Summary

3. This is a response from *Sex & Censorship*, a campaigning body, to the 'non-consensual pornography' provisions (Clause 16) in the Criminal Justice and Courts Bill.

4. *Sex & Censorship* was set up in 2013 by Jerry Barnett, in response to growing concerns over the censorship and repression of sexual expression in the United Kingdom. Jerry has been an advocate for free speech and sexual freedom for a number of years. We are a non-profit organisation that aims to counter moral panics in the media and campaign for policy-making that is evidence-based and not driven by moral agendas.

5. Clause 16 is an amendment to the existing 'extreme porn' law that was introduced in section 63 of the the Criminal Justice and Immigration Act 2008. We believe that the original law does not serve the public interest, and is draconian, and that this new amendment will make it worse, and should be removed. In outline, our objections are as follows:

- The proposed law results from a moral panic over 'rape porn' rather than any evidence of harm.
- Although headlined as 'rape porn', the wording of the law would criminalise consenting (but perhaps non-standard) sexual activity.
- The law blurs the distinction between consensual and nonconsensual sex, and so may hinder, rather than help, attempts to reduce sexual violence.
- There has been no evidence presented that viewers of the content in question may be driven to commit sexual violence as a result of viewing it.
- Conversely, there is evidence that such content may serve as an outlet for people who are prone to sexual violence and may reduce rather than increase their likelihood to commit harm.
- In general, possession laws are draconian as they place an impossible burden of legal and technical knowledge on members of the public.
- Censorship itself is harmful to free expression. Censorship laws should, therefore, only be introduced in response to compelling evidence of harm rather than on the basis of moral values alone.

The Law Results From a Moral Panic Rather Than Evidence of Harm

6. The term 'rape porn' appears to have become popularised by the mass media and anti-pornography campaigners in the run-up to the government announcement of the new law in July 2013.

7. 'Rape porn' does not exist: the term appears to be an attempt to raise unwarranted fear among the general public, and to blur the line between the crime of rape and consensual adult sexual behaviour. In the sexual fetish community, this form of activity—in which non-consensual acts are roleplayed—is referred to as 'consensual non-consent', not 'rape porn'.

The Law Would Criminalise Consenting Sexual Activity

8. 'Rape porn' does not feature rape, but rather, shows scenarios in which non-consensual behaviour is acted out. There is a huge range of such sexual activity, from bondage to light slapping, to a wide variety of submissive/dominant roleplay scenarios. To criminalise the depiction of such activity is to stigmatise the activity itself. We do not believe that the state belongs in the bedrooms, or the fantasies, of consenting adults.

The Law Blurs the Line Between Rape and Consensual Sex

9. It is clearly understood among anti-rape campaigners that, in order to reduce rates of sexual violence, young people—especially young men—must be educated about the importance of consent in all matters. Yet this law appears to deliberately blur the line between a consensual act and a non-consensual one. The most aggressive act, when carried out with the full consent of participants, is not rape; and the most gentle sexual act, if carried out against a participant's will, is still rape. This law confuses this simple anti-rape message.

The Government Has Not Presented Any Evidence of Harm

10. It is notable that, amidst the emotive language used to introduce this law, no evidence has been presented that the material in question leads to anybody committing harm. There is a simple reason for this: as far as we know, there is no such evidence available. We are concerned that the state is prepared to introduce a harsh censorship measure without first requiring such evidence to be presented.

11. Instead, we have been repeatedly told that people prone to sexual violence are more likely to watch material featuring sexual violence. This is true; but it is very important, as ever, to note that *correlation does not equate to causation*. The fact that people prone to violence are also more likely to consume violent entertainment has long been documented, and should not surprise anyone. However, the reverse claim—that violent entertainment causes people to be violent—is a very different one, and lacks evidence to back it. Similar claims have often been made against horror films, violent computer games, and other forms of entertainment—all without evidence to back them.

Conversely, There is Evidence that Viewing Such Material May Reduce Sexual Violence

12. (This section is provided by Dr David Ley, a specialist in sexual psychology and author on the subject).

13. According to the best research available to date, exposure to pornography is only linked to increased rates of sexual violence in those individuals who already have a predisposition towards violence. Men who gravitate toward violent images in pornography are men who are already disposed toward violence and aggression. Research has shown that the effects of aggressive images in pornography upon viewers can be nullified when the viewers are in an inhibiting social environment and where the viewers understand the negative and damaging effects of these aggressive images.

14. Thus, what is needed are efforts to address the tendencies in societies to encourage and allow violent tendencies to go unchecked, unconfronted, and unaddressed until it is too late. (N. Malamuth, T. Addison, and M. Koss, "Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?" *Annual Review of Sex Research* 11 (2000): 26–91.) It is extremely unlikely that restriction of access to pornography will have a suppressive effect on rates of sex crime or rape.

15. Instead, research suggests just the opposite. Consistently, international research has documented that the rates of sexual violence and crimes correlate in a negative fashion with a society's access to pornography. In countries and states with increased access to pornography, rates of sexual violence diminish. When countries have increased restrictions on access to pornography, these countries have experienced concomitant increases in sexual crimes. It is noteworthy that this effect appears most significant in juvenile offenders, suggesting that such increased access to pornography has disproportionate positive effect in reducing rates of sex crimes by juveniles. (Pornography, Rape and Sex Crimes in Japan Author: Milton Diamond, Ph.D. and Ayako Uchiyama. Published: *International Journal of Law and Psychiatry* 22(1): 1-22. 1999; Pornography, Public Acceptance and Sex Related Crime: A Review. Author: Milton Diamond Published in: *International Journal of Law and Psychiatry* 32 (2009) 304-314; corrected with Corrigendum IJLP 33 (2010) 197-199)

16. Porn exposure in kids doesn't have a life-altering, warping effect on children. In fact, recent research in the Netherlands showed that exposure to pornography explained less than 1% of the variance in adolescents behavior. This means that 99% of the reasons why these kids do the things they do have nothing to do with the fact that they view pornography, and are far more connected to other life variables, such as poverty, education, etc. From the hyperbole and panic that we all hear on a regular basis, we are paying a lot more attention to porn than it deserves. (Hald GM[1], Kuyper L, Adam PC, de Wit JB. J Sex Med. 2013 Dec;10(12):2986-95. doi: 10.1111/jsm.12157. Epub 2013 Apr 26. Does viewing explain doing? Assessing the association between sexually explicit materials use and sexual behaviors in a large sample of Dutch adolescents and young adults.)

17. Research findings about the effects of non-pornographic depictions of rape or sexual assault are less clear, for a variety of complex reasons. First, as with the existing research on pornography, research on the effects of violence in the media are confounded by significant moral and social values. Further, the role of media exposure is difficult to separate from predisposing variables including social context, socioeconomic status, education levels, etc. Finally, the prevalence of fantasies of rape in the general population are quite high, confounding studies about the effects of media on this phenomenon.

18. Sexual fantasy about rape is exceedingly common among women, with as many as 25 to 65 percent of women endorsing some form of this fantasy, at least once in their lives, in one form or another. One study of female college students found that 65 percent of them acknowledged a fantasy of being forced in sex. (26. J. Bivona and J. Critelli, "The Nature of Women's Rape Fantasies: An Analysis of Prevalence, Frequency, and Contents," *Journal of Sex Research* 46 (2009): 33.) The prevalence of the fantasy of rape among women and men who have never experienced such events suggests that the rape fantasy probably occurs independent of a traumatic event.

19. Further, research by British psychotherapist Brett Kahr (Kahr, 2008. *Who's Been Sleeping in Your Head?* (New York: Basic Books)) suggests that fantasies of rape and violence are quite prevalent, and do not indicate levels of risk, or mental disturbance. Instead, Kahr, and many others, suggest that such fantasies allow for individuals to explore different aspects of their personalities, emotions, and to potentially resolve such fantasies or desires in nonviolent, noncriminal means.

20. Prohibition of material depicting sexual violence and rape is unlikely to result in a decrease of occurrence or fantasies of such acts. Instead, it is probable that such prohibition may in fact increase the likelihood of these criminal acts. Such depictions in media material offer individuals an ability to explore this fantasy, and in many cases, to masturbate to it, and "experience" this fantasy and sexual satisfaction in a private, noncriminal means. While it seems intuitively sensical that such fantasy-masturbation-orgasm pairings might increase the likelihood of the individual engaging in these behaviors in "real life," there is no evidence to support this, and a great deal of evidence that the contrary is true.

21. Finally, as described above, many women (and men) experience normative fantasies of being raped. Prohibition of such media materials is likely to unfairly punish and stigmatize these individuals, as well as those individuals who have been victims of rape or sexual violence. Both groups may commonly use such materials in intentional and unconscious ways to resolve their internal emotional reactions to their experiences and fantasies.

Content Possession Laws are Draconian

22. The existing 'extreme porn' law (section 63) is already vague and open to interpretation. The new amendment will make it far more so. It will undoubtedly be difficult for police, prosecutors and juries to decide whether an image '...portrays, in an explicit and realistic way, an act which involves the non-consensual penetration of a person's vagina, anus or mouth...'. So we believe that for a layperson to decide whether an image breaches the law is unreasonable.

23. How does an untrained viewer determine whether an image is non-consensual, or portrays such an act? Given that most sex acts can be carried out either consensually or non-consensually, this would seem an impossible decision to make accurately. Does the existence of restraint or a gag mean the act is deemed to be non-consensual? Does one rely on whether the model is smiling or not? We believe that this category of imagery is far too subjective to be left to a layperson to make these decisions.

24. The concept of possession goes far further than many people understand. Simply visiting a web page means that images are automatically cached on the user's computer, which then (in the eyes of the law) indicates possession. If a person visits a web page containing many sexual images (which is not unusual), and any one of those images is deemed to portray a non-consensual act, the person will be deemed to be in possession of 'rape porn', even if they have never seen the image before.

25. This 'crime' may occur without even the knowledge of the 'criminal'! This makes it a deeply draconian law, and risks criminalising many citizens, who would not knowingly break the law otherwise. People will be criminalised simply for seeking out legal pornography online; we suspect that this is not entirely an accidental by-product of the law.

Censorship Itself is Harmful

26. A law such as this one undoubtedly would be unconstitutional under the First Amendment of the United States Constitution, and in any other nation that has strong defence of free expression. Sadly, the United Kingdom, which once prided itself as a global leader on free expression has no such protection, save for Parliament itself. To our knowledge, no other country has seen the need to take such a drastic step as criminalising the possession of this category of pornography.

27. We would like to remind members of Parliament why previous generations have often rejected censorship, even of material that may be unpleasant, tasteless or offensive: censorship itself is harmful, and is incompatible with democratic values. Therefore, censorship should be seen as a last resort, and only in response to compelling evidence. As we have pointed out, there is no evidence at all that the content under discussion

is harmful. We therefore strongly believe that this law is not only unnecessary, but represents a step backward from liberty, and certainly not the first in recent years. We call on MPs to reject this clause, which protects nobody, but further empowers police and prosecutors, who already have plenty of existing tools with which to tackle the very real problem of sexual violence.

March 2014

Written evidence from the Law Society of England and Wales (CJC 14)

1. The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

2. The evidence contained in this briefing has been agreed by the Society's Administration of Justice Committee, which is made up of senior and specialist lawyers practising in this field.

3. The Society's comments on the Bill are as follows:

PART 3, CLAUSE 29—CRIMINAL COURTS CHANGE

4. **Purpose of Clause:** Clause 29 shows the Government's recognition that charging guilty defendants an amount towards the costs of their criminal case is a legitimate means to raise additional revenue to support the criminal justice system.

5. **The Law Society's position:** The Society welcomes Clause 29.

6. For many years, there have been calls on the Government to introduce such a charge to support the legal aid fund. The Society would invite it to treat the funds raised by the new Charge as a legal aid levy dedicated to fund this vital service, in light of the significant cuts to legal aid that already have occurred as well as the huge reductions it is now proposed to make under the Transforming Criminal Legal Aid programme.

PART 3, CLAUSE 32-35—APPEALS IN CIVIL PROCEEDINGS

7. **Purpose of clause:** Clauses 32-35 will extend the scope for civil and administrative cases involving points of law of major national importance to leapfrog to the Supreme Court without being heard in the Court of Appeal.

8. These provisions are dependent on the Supreme Court granting permission to appeal and are likely to be used infrequently.

9. **The Law Society's position:** The Society supports this proposal.

PART 3, CLAUSE 36—COSTS IN CIVIL PROCEEDINGS

10. **Purpose of clause:** Clause 36 places a duty on a court making a wasted costs order to consider whether to notify the lawyer's professional regulator and/or the Legal Aid Agency.

11. **The Law Society's position:** The Society considers clause 36 to be unnecessary.

12. The court already has the discretion to make a lawyer personally liable to pay any litigation costs which are caused by his or her improper, unreasonable or negligent conduct. The additional sanction is superfluous. The Solicitors Regulation Authority would not take further action if notified that a wasted costs order has been made against a solicitor. The existing liability to a financial penalty is sufficient sanction.

PART 4, CLAUSES 50, 51 & 52—JUDICIAL REVIEW IN THE HIGH COURT AND UPPER TRIBUNAL

13. **Purpose of Clause:** Clause 50 will extend the court's discretion to consider the likelihood of whether there would have been a substantially different outcome for the applicant if the decision challenged had been arrived at properly. The application will still be reviewed against this higher threshold by the judge considering whether to grant permission for a judicial review challenge to be heard.

14. **Background:** The Society was concerned about the Government's intention to undermine the right of individual members of the public to challenge the legality and reasonableness of the decisions of public bodies. The Ministry of Justice consultation 'Judicial review—proposals for further reform' contained two areas of concern. The Government proposal to alter the test for standing for judicial review, requiring an applicant to have a direct personal interest in the matter. Secondly, it proposed to restrict the payment of legal aid in judicial review cases to those which obtain the permission of the court to be heard. This means that a lawyer would be running the risk of receiving no payment for all preparatory work, which may reduce the number of lawyers willing to take on judicial review cases, therefore reducing the citizen's access to justice.

15. The Law Society is pleased that the Government has been dissuaded from narrowing standing. However, it has announced that it will bring forward secondary legislation to impose "at risk" funding for judicial review permission applications.

16. **The Law Society's position:** The Society does not support Clause 50 because it believes that this clause will not prevent the mischief that concerns the Government and will simply lead to greater complexity at earlier hearings.

17. Clause 50 would mean that an application for judicial review would not proceed to be heard if it is highly likely that the outcome for the applicant would not have been different if the decision-making authority had got the process right—as the same decision would be made regardless of a faulty decision-making process.

18. The Society considers that:

a) In practical terms, courts will need to determine this issue in any case and so the preliminary hearing is likely to become a full assessment of the case and will save little time or money.

b) In practice it may be very difficult to decide whether or not the same decision would have been made. Procedures exist to ensure that authorities consider all the evidence and it will often not be clear whether, in fact, the same decision would have been taken if all the procedures had been followed.

c) there will be satellite litigation over what "highly likely" means which is likely to add costs and uncertainty.

19. While the Society agrees that it is desirable to limit the number of hopeless JRs, it is not clear to us that there are a significant number of these and, in any case, the courts have ample powers to deal with these at the permission stage. In addition, the Society believes there are already numerous hurdles before judicial review applications are accepted and so any additional measures are unnecessary.

20. The purpose of **clauses 51 and 52** is to enable the court to make costs orders against third parties who are thought to be behind particular applications. While the Law Society recognises that it is undesirable for impecunious individuals to be used as "front" for groups who could well afford to take the risks, we share the views of the Bar Council about the implications of the very wide remit of the clauses and believe that it is essential that (a) there should be at least a discretion in the court to waive the requirements to provide information in appropriate cases and (b) to limit the liability of any third party to cases where there is (i) evidence that the third parties have a direct interest in the matter and (ii) are actually supporting the claimant financially.

Part 4, Clause 53—Interveners and costs

21. **Purpose of Clause:** Clause 53 would require interveners to meet not only their own costs but also any costs incurred by other parties resulting from the intervention.

22. **The Law Society's position:** The Society seeks the deletion of Clause 53.

23. Interventions are not frequent and require the permission of the court. Interveners are restricted both in the quantity of materials they can submit to the court and in the time they are allowed to present arguments before the court. At present interveners normally meet their own legal costs.

24. Interveners perform a useful function. The intervention of the third party may be on a point of significant public interest: they may provide evidence or legal argument not otherwise available to the court. If the court decides that it is appropriate for interveners to be heard then it follows that they are likely to add something of value to the case and there is no reason why they should bear the costs of other parties.

Part 4, Clauses 54-56—Capping of costs

25. **Purpose of Clauses:** Clauses 54 & 55 propose restricting the availability of Protective Costs Orders (PCOs). Clause 56 excludes environmental law cases from the proposed cap on PCOs in the preceding clauses.

26. **The Law Society's position:** The Society opposes clauses 54 & 55 and welcomes clause 56.

27. **Background:** PCOs are relatively new in England and Wales. They have been developed by the courts in order to create a level playing field between claimants and defendants in public law cases. Before a case is heard, the court sets a maximum figure for the costs which the applicant will be required to pay should their case not succeed. They are only available where the case raises serious issues which may affect the public generally and there are no signs of abuse nor over-reliance.

28. PCOs are serving the purpose for which they were intended—to enable ordinary people to have the certainty that in the event of being unsuccessful, they will not be confronted by substantial costs against them by the court. Any constraint on the availability of PCOs will have the effect of deterring claims which it is in the public interest to be heard.

29. According to the Impact Assessment, between January 2010 and August 2013, there have been 17 judicial review cases involving PCOs. As a signatory to the Aarhus Convention, the UK is committed to providing access to justice at reasonable cost in environmental cases and PCOs have met that obligation. Only three of those 17 PCOs related to non-environmental cases. Restricting availability of PCOs, so that unsuccessful applicants will have to bear the full costs of the public body which they are challenging, will not save much for the public purse.

Part 4, Clause 57—Planning proceedings

30. **Purpose of Clause:** Clause 57 will introduce a permission filter for legal challenges to planning decisions and orders brought under section 288 of the Town & Country Planning Act 1990.

31. There is already a permission filter for appeals against enforcement action under section 289 of the same Act.

32. **The Law Society's position:** The Society supports Clause 57.

33. The Law Society welcomes the announcement of the Government's intention to institute a Planning Court within the High Court this year which will be able to fast track planning cases before a cadre of specialist judges. The Planning Fast Track has already contributed to a reduction in the length of time taken for a planning case to be heard. The Planning Court will make further progress to ensure that legal challenges to necessary developments are dealt with in a more reasonable timescale.

March 2014

Written evidence submitted by the Rape & Sexual Abuse Support Centre (CJC 15)

RAPE CRISIS SOUTH LONDON / THE RAPE AND SEXUAL ABUSE SUPPORT CENTRE
EXTREME PORNOGRAPHY CLAUSE 16

1. Executive Summary

1.1. We welcome the proposal to extend section 63 of the Criminal Justice and Immigration Act (CJIA) 2008 to cover the possession of extreme pornographic images that depict rape and sexual assault by penetration.

1.2. The proposal comes on the back of a public campaign led by ourselves, the End Violence Against Women Coalition and two law professors from Durham University, namely Professor Clare McGlynn and Professor Erika Rackley. The public face of this campaign received overwhelming support, with an online petition gaining over 2,000 signatories *every day*.

1.3. The evidence we are submitting relates to both the content of the pornography that informed our campaign, as well as practice based evidence for the harms of pornographic depictions of rape and other forms of sexual violence. We defer to the expertise of our campaigning partners, who have also submitted evidence, regarding the necessary amendments to the proposals as they stand to ensure the effectiveness of the law, particularly that it targets the content of the pornography given in this briefing.

2. About Rape Crisis South London

2.1. Rape Crisis South London[92] (RASASC) was set up in 1985 as part of a Women's Aid project and has grown to be recognised as one of the foremost information and support resources for female survivors of sexual violence. As a registered charity (1085104) we are an independent organisation, based in Croydon, staffed by a dedicated team of over 60 highly trained professional workers and volunteers. In the almost 25 years since its beginnings as a once a week helpline, RASASC has grown to be a centre of excellence for survivors in London working with over 5,000 people yearly. Our aim is to provide professional services to female survivors of sexual violence who are aged 13 and above.

2.2. Our services include the national Rape Crisis Helpline, BACP[93] accredited specialist sexual violence therapy, through Helpline support, therapy and assistance through the Criminal Justice System using our Empowerment model to help survivors fully recover from sexual violence and lead happier and more productive lives. Our training and preventative department works in schools, colleges and pupil referral units (young people excluded from mainstream education) running workshops about sexual violence, trafficking, the dangers of being affiliated with Gangs in London and Child Abuse. We have outreach workers delivering services to survivors of domestic violence and a specialist working with women involved in prostitution. We are a professional organisation and to that end have become accredited members of the British Association of Counselling and Psychotherapy, The Helplines Association and we adhere to the National Occupational Standards of Rape Crisis (England and Wales). All of our work is informed by and represents the collective voices and experiences of the survivors of rape and childhood sexual abuse who access our services.

3. Background to the RASASC campaign for the amendment

3.1. In November 2010, Rape Crisis South London was informed by one of our service users about the existence of an internet site www.rapetube.org,[94] a free site offering graphic videos of rape including gang rape, the rape of young girls and incest rape. The site depicts videos which depict realistic simulations of the rape of women and girls with high levels of additional physical harm and a promotion of rape as a harmless form of

[92] We are known also known as the Rape and Sexual Abuse Support Centre.
[93] British Association of Counselling and Psychotherapy.
[94] No longer hosted at this address due to our lobbying of the hosting company.

sexual fetish or fantasy. For our service users, rape has been a devastating and debilitating event in their life, resulting in impacts similar to those seen in Holocaust survivors.

3.2. We were dismayed that such a site was available for free access in England, particularly given the introduction in 2008 of Extreme Pornography legislation, Sections 63 to 67 of which state that it is an offence to possess pornographic images that depict acts which threaten a person's life, acts which result in or are likely to result in serious injury to a person's anus, breasts or genitals, bestiality or necrophilia.

3.3. Despite the clear intentions of the Criminal Law Policy Unit to address various forms of extreme pornography, including 'rape pornography' in the new legislation, we found that a series of confusions during the Consultation stage meant it was inadvertently dropped from the proposals. While the Executive Summary of the consultation specifically mentioned outlawing pornographic depictions of both "violent…and…non-consensual acts", the wording of the criteria was as follows: iii) serious violence in a sexual context; iv) serious sexual violence

3.4. As well as the linguistic similarity in the two clauses, a footnote explaining "serious violence" was incorrectly attributed to "serious sexual violence", confusing and confounding the two clauses further. Responses to the consultation criticised these two criteria, but offered no specific or valid reasons why pornographic depictions of rape and other forms of sexual violence should not be criminalised. Instead, responses consistently mentioned the "imprecise… definitions of sexual violence and violence in a sexual context", highlighted the "lack of clarity in the definitions", and expressed "a great deal of concern… due to their lack of precision".

3.5. In their review of the consultation responses, the CLPU acknowledged that "the language used… was strongly questioned" and that there was "a need to look again at the categories "serious violence in a sexual context" and "serious sexual violence"". Despite admitting that these two similar-sounding criteria "caused confusion", we were disappointed to find that instead of clarifying the language (changing the wording of "serious sexual violence" to specifically "rape or other non-consensual penetrative sexual activity" as the equivalent Scottish Act received much support for) the CLPU "therefore propose[d] a single category of serious violence", leaving out rape depictions entirely.

3.6. After contacting the Internet Watch Foundation, we discovered that, following this, the CJIA as it stood did not cover images of rape, unlike similar legislation in Scotland. We thus undertook a small research project to understand the content and prevalence of images of rape in pornography

4. Content of rape pornography: Research 2011

4.1. In 2011 Rape Crisis South London undertook online research to explore the conventions and availability of 'rape pornography' across the internet. The work involved an initial Google search for 'rape porn' followed by a content analysis of over 50 videos selected from websites appearing in the search results.

4.2. In our own research into the freely available content on 'rape porn' websites, we found many of the videos' themes to be endorsing and promoting various criminal acts including kidnapping, additional physical violence and child sexual abuse. These images are explicitly defining themselves as being rape, non-consensual or forced sex. Our research found video descriptions like 'young schoolgirls abducted and cruelly raped. Hear her screams.'; 'little schoolgirl raped by teacher' and 'little girls cruelly raped at home'; 'tiny girl sleep rape' and 'girl raped at gunpoint'.[95]

4.3. The websites hosting the content included words like brutal rape, real rape, savage rape, only rape, in their web address. The viewers of these sites are encouraged to believe these images are real, that they are watching 'real rape'. Watching randomly selected videos on each site, we discovered there were two forms of 'rape' video; one where realistic violence or drugging was used to force sex, and the other of staged "positive-outcome rape"[96] scenarios, both of which we believe to be sending out profoundly damaging messages.

4.4. While dismissing the devastating experience of survivors of rape, this pornography dangerously promotes the beliefs that: physical force, coercion and drugging are acceptable sexual practices; that most rapes are completed with additional levels of physical violence and that women enjoy rape. Ending the spread of these myths is vital to ending this violence against women. These myths have huge impact on the Criminal Justice System where jurors are often making decisions based on wider public understandings of and attitudes towards sexual violence.

4.5. Having pornographic depictions of rape legally available that promote harmful myths about rape and contributes to a conducive context for violence against women through eroticising men's violence and women's non-consent. The importance of challenging this conducive context is seen in both Labour and Conservative-Liberal strategies to End Violence Against Women, which have pledged to tackle "attitudes that make violence against women acceptable to some".

[95] Quotes gathered from 3 of the top ten Google results for "rape porn".

[96] Catherine A MacKinnon, Are Women Human? And Other International Dialogues, Cambridge MA: Harvard University Press) 2006, p93

4.6. From our research: In the top 50 Google results for "rape porn", 77% of results were accessible porn sites with rape content. Of the top ten Google search results for 'free porn', half the websites host free rape pornography. Of the top 50 accessible 'rape porn' websites:[97]

- 78% advertise rape content of under-18 year olds (e.g. "schoolgirl rape")
- 67% advertise rape content involving guns or knives
- 67% advertise rape content involving "foreign" women
- 59% advertise rape content involving the woman bleeding
- 48% advertise rape content inflicted by a uniformed official (e.g. policeman / soldier)
- 44% advertise rape content involving incest
- 44% advertise rape content where the woman is unconscious/semi-conscious/ drugged
- 100% of those being assaulted are female (average number of women is 1.1)
- 98% of perpetrators of rape are male (average number of perpetrators is 1.5)
- 82% of perpetrators use restraint by force
- 50% of women are choked/hit/punched/kicked/slapped/have their hair pulled
- 18% of women are gagged
- 9% of perpetrators use a knife or gun
- 15% of women are bound
- 71% of women show signs of visible distress
- 65% of women express pain
- 59% of women are seen or heard crying
- 50% of women retaliate physically against the rape
- 44% of women express clear lack of consent
- 15% of women have a diminished capacity to consent (unconscious/semi-conscious/drugged)

5. Content of rape pornography: Research 2012

5.1. In October 2012 the research was revisited. Broader explorations of the routes to and locations of rape pornography on the web, as well as the range and manifests of it, were undertaken. We also particularly considered the concerns from the BDSM community including CAAN (The Consenting Adults Action Network) and Backlash regarding the impact of the criminalisation of rape pornography on our sexual freedoms.

5.2. Following this, we continued the content analysis of 'rape porn' video clips; Broadened our search terms at the search engine level, followed by specific searches within host sites (for example, 'free porn' was entered into Google and the top ten results explored using the following terms; 'rape' 'forced sex' 'abuse' 'incest rape'); Examined the Google search results for 'rape porn' in order to decipher the type of website/ reference to it; Explored whether rape porn is hosted within the most accessed generic websites in the UK during October 2012; Begun a comparative content analysis of 'rape porn' and BDSM (Bondage, Domination, Sadism, Masochism) pornography in order to explore any possible stylistic differences and similarities.

5.3. From our research in 2012 we found the following:

- Rape pornography is normalised across the web and is easily accessible and freely available alongside 'generic' and 'popular' pornography.
- Of the top ten Google search results for 'free porn', half the websites host free rape pornography;
- Rape porn is not only hosted on pornography websites but was found to be hosted on one generic video sharing site and blog spot.
- Rape pornography explicitly eroticises violence against women; racism; homophobia; child sexual abuse and crime.
- The following sub categories of rape pornography were found to exist across the internet: 'Animal rape', 'Granny rape'; 'Pregnant rape'; 'Male rape'; 'Nun rape', 'Muslim rape' 'sleeping rape' 'Drugged rape' (this list is not exhaustive).
- Themes of misogyny, racism and child sexual abuse/incest are common across rape pornography.
- Based on very early stages of a comparative view of rape pornography (RP) and BDSM porn videos, there appears to be discernible stylistic differences between the two. Including;
- clearly staged (BDSM) V claims of authenticity (RP);
- hints of consent (BDSM) V non-consensual/forced (RP);
- women appear as active and passive players (BDSM) V Women are always victims (RP);
- seemingly pleasure in pain (BDSM) V No pleasure, only pain (RP).

[97] We would like to stress that the videos we studied were only from the freely-available content, meaning they are shorter, less explicit, and less extreme than the paying sites they link to.

5.4. To ensure the pornography targeted by clause 16 does not impact on consensual BDSM practices but does challenge the normalisation and eroticisation of violence against women and girls we would suggest the importance of 'context' and the definition of 'realistic' to be debated in reference to the evidence given by Professors Clare McGlynn and Erika Rackley, alongside the removal of the requirement for an image to be 'obscene'—a requirement which places the argument on harm into a moralistic rather than human rights/ Violence Against Women based framework.

6. Harms of rape pornography

6.1. Rape is not a sexual fetish, even one which may be considered 'grossly offensive, disgusting or otherwise of an obscene character' (section 63(6)). Rape is a crime with devastating real life consequences. The argument for this legislation is not based on moral grounds, it is based on the harms of rape pornography and how its existence is at odds with the Government's commitment to the following national and international human rights and gender equality obligations:

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), Article 5
- The Beijing Platform for Action (BpfA) (1995), Objective J2
- Gender Equality Duty 2007
- Palermo Protocol (2000) Article 9

6.2. In January 2013, the Ministry of Justice (MoJ), Office for National Statistics (ONS) and Home Office released its first ever joint Official Statistics bulletin on sexual violence, entitled An Overview of Sexual Offending in England and Wales. It reported that:

- Approximately 85,000 women are raped on average in England and Wales every year
- Over 400,000 women are sexually assaulted each year
- 1 in 5 women aged 16-59 had experienced some form of sexual violence since 16yrs old.

6.3. For the consumption of materials designed to produce and embed a sexual arousal to rape to be wholly legal, and freely accessible, is to undermine the work being done across the Criminal Justice system to improve prosecutions of rapists and encourage greater reporting from survivors.

6.4. Despite the fact that direct links between 'regular' pornography and sexual violence have been scientifically difficult to quantify, the dangers of 'rape pornography' are much more apparent. Rigorous research in the US has long found a significant link between arousal to rape material and a "propensity to rape"[98]. Even the Ministry of Justice's Rapid Evidence Assessment submitted alongside the legislative proposals in 2008 specifically pointed out that "rapists… are much more aroused by depictions of coercion than non-criminal [persons]"[99] and, even more disturbingly, that "one third of rapists report using forced sexual depictions as part of their deliberate pre-offense preparation."[100] We see some of the harm of rape pornography in the ways the material assists in normalising offending for perpetrators, helping them legitimise and strategise their crimes, as well as overcome internal resistance.

6.5. Additionally, as well as dismissing the devastating experience of rape, 'rape pornography' wrongly and dangerously promotes the beliefs that physical force, coercion and drugging are acceptable sexual practices and that women enjoy rape. 'Rape pornography' allows rapists to normalise and justify their behaviour and can be triggering for those who have survived rape and/or other forms of sexual violence, some of whom may use or be encouraged to use pornographic depictions of rape to desensitise or numb the impact of Post-Traumatic Stress rather than access specialist support services such as ours to work through and ultimately recover from the trauma.

7. Evidence of widespread support

7.1. Finally we would like the committee to consider the overwhelming public support for this change to legislation. An online petition received 73, 523 signatures in approximately a month (just over 2,000 people signing *every day* it was live). Within a month of our campaign going public, the Prime Minister announced the change.

March 2014

[98] Neil M Malamuth, "Rape Proclivity Among Males", Journal of Social Issues, Volume 37: Number 4, 1981 http://www.sscnet.ucla.edu/comm/malamuth/pdf/81Jsi37.pdf See also: J. Check, G.G. Abel, D.H. Barlow, J. Ciniti, J. Briere, E. Blanchard, D. Guild and others

[99] The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment, London: Ministry of Justice Research Series, http://www.justice.gov.uk/publications/docs/280907.pdf p23

[100] The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment, p23

Written evidence submitted by Asda (CJC 16)

JUDICIAL REVIEWS AND THE PLANNING SYSTEM – PART 4, CLAUSES 50 – 57

About Asda

Founded in the 1960s in Yorkshire, Asda is one of Britain's leading retailers. It has 172,000 dedicated Asda colleagues serving customers from 572 stores, including 32 Supercentres, 316 Superstores, 33 Asda Living stores, 189 Supermarkets, 2 stand-alone petrol filling stations and has 26 depots and seven recycling centres across the UK. Its main office is in Leeds, Yorkshire and its George clothing division is in Lutterworth, Leicestershire. More than 20 million people shop at Asda stores every week and 98 per cent of UK homes are served by www.ASDA.com. Asda joined Walmart, the world's number one retailer, in 1999.

Asda has urged the Government to reform the Judicial Review regime. In November 2012 we published our *Barriers to Growth in the Planning System paper*, setting out 19 reforms that we believe could streamline the planning system and encourage economic growth. We also wrote to the Secretary of State for Justice in January 2013 proposing reform of the Judicial Review regime, including the introduction of a specialist planning chamber for Judicial Review applications. A revised *Barriers to Growth in the Planning System* paper, including four recommendations for the Judicial Review regime, was published in December 2013.

Overview

The Criminal Justice and Courts Bill introduces reforms of the Judicial Review regime, which are intended to discourage vexatious applications and streamline the process. If implemented these reforms will ensure Judicial Reviews are not used inappropriately for commercial gain, while protecting access to justice.

In our experience Judicial Reviews have been used to delay planning applications for new stores, often where there is little chance of success and they are subsequently found to be totally without merit. Specific applications made by Asda have been subject to Judicial Reviews and appeals brought by our competitors in locations where they are incumbent and we have little or no presence. This is a long and costly process, often running into hundreds of thousands of pounds for developers and local government, which delays the progress of new developments. We do not believe that Judicial Reviews should be used by our competitors to protect their commercial interests in this way at the expense of local authorities, delaying otherwise sound planning applications and limiting choice for consumers.

If introduced, the proposals contained in the Criminal Justice and Courts Bill will ensure the Judicial Review process does not become a cost effective mechanism for businesses seeking to protect their current market position.

Case studies

We offer three examples of the challenges created by vexatious Judicial Reviews:

- Dundee—Our application for a new store in Dundee was challenged at the outer and inner courts at Court of Session in Scotland and the Supreme Court in England by Competitor A. Competitor A had the highest market share within Dundee. The application was originally approved at committee in January 2010 and was finally approved by the Supreme Court decision in March 2012, a total of 26 months from the original determination. When this store eventually opened, approximately 8,000 people applied for 400 jobs available at the store, highlighting the benefits which could have been brought earlier to Dundee.
- Skelton—The permission obtained by a developer for our store in Skelton, North Yorkshire was the subject of a Judicial Review initiated by Competitor B. The local authority had resolved to grant permission in August 2011 and planning permission was issued in September 2011. A challenge was filed eight weeks later.
  - The judge who refused Competitor B permission to proceed found that this was "a hopeless case", and dismissed the claim at the earliest possible stage in the judicial process.
  - The challenge was originally made in the London Court, away from the site. The London Court process is more time-consuming that other courts given the volume of cases.
  - The court order was not made until March 2012, despite our efforts to progress the process, and the development (and the creation of several hundred jobs) was delayed six months.
- Cinderford—A planning permission achieved in March 2012 by a developer in Cinderford, Gloucestershire for an Asda store development was challenged by Competitor B. This was the third time Competitor B had taken the local authority to the High Court to try to challenge the entry of a competitor in to the town where they have a store. Despite the site being in the Forest of Dean, Competitor B has again lodged the challenge in the London Court. This challenge was thrown out in November 2012. The Judge held it was filed too late, and had no prospect of success; but it had already delayed development (and the creation of 150-200 jobs) by eight months, and put the developer to the expense of making a duplicate application in case the challenge had been allowed to proceed. Despite the Judge ruling that there was no prospect of success, the objector applied for an oral hearing of their application for permission. This caused still further delay. The case finally reached the High

Court in July 2013—sixteen months after the original decision. The application was re-submitted to the Council to reconsider. We finally received planning permission in October 2013 as the committee considered there are sound planning grounds to approve the application—nineteen months after the original decision. This new permission is now being challenged by Competitor B.

PROPOSALS

In our *Barriers to Growth in the Planning System Paper* (published November 2012 and revised in December 2013) we put forward the following proposals, many of which are now proposed in the Criminal Justice and Courts Bill, to ensure that Judicial Reviews are not used to delay otherwise sound planning applications, while protecting access to justice:

— Raise the bar for applicants beyond an 'arguable case'—Judicial Review applications have only to demonstrate an 'arguable case' in order to be granted permission to proceed. This allows vexatious cases - often with little hope of success or based on minor technical issues—to proceed. This incurs costs and delays for the applicant. The bar should be raised to consider whether the case is likely to succeed and if it is in the public interest for the case to proceed.

— Establish a specialist 'planning chamber'—We support the introduction of a chamber of specialist QCs to speed up decisions for Judicial Reviews filed in relation to planning applications. This could deliver several benefits: it would speed up the process considerably; free up judges to focus on other cases; deliver a substantial saving to the public purse by enabling many cases to be resolved and dismissed quickly at the permission stage, without the need for full trials; and once it was known that the Permissions would be decided quickly, much of the incentive to delay competitors with vexatious challenges would be lost, reducing the number of cases overall.

— Introduce a 'no difference' argument—The Government has also announced proposals to change how courts deal with 'minor procedural defects', ensuring that mistakes that have no bearing on the planning decision itself cannot form the grounds of Judicial Reviews. We would welcome the introduction of the 'no difference' argument being considered at the permission stage, enabling courts to reject Judicial Review applications where the alleged defect would have made no difference to the final decision made.

— Enable judges to award damages—The current costs regime for permission applications is much lower than the costs of hearing cases, as incurred by defendants and local councils. Under the current regime commercial objectors can lodge vexatious or speculative Judicial Review challenges to competitor's permissions in the knowledge that they will only be required to pay a relatively small contribution towards the Defendant's legal costs (usually between £1,000—£3,000 plus VAT) if they are unsuccessful. This behaviour could be discouraged if courts were given powers to award up to the full economic costs incurred by the challenge to the Defendant and Interested Party. We propose that the full costs would only be awarded where a Judicial Review was subsequently found to be entirely without merit, ensuring that legitimate challenges are undeterred and access to justice is maintained. The commercial incentives for delaying or preventing a competitor entering a local market are substantial. Therefore, the Judicial Review process risks becoming a cost effective mechanism for businesses seeking to protect their current market position, regardless of the merits of the challenge being put forward. If objectors faced the full costs of their actions most would be discouraged from lodging vexatious claims; reducing the cost to the public purse.

March 2014

Written evidence submitted by Martin Westgate QC (CJC 17)

BIOGRAPHICAL NOTE AND SUMMARY OF POSITION

1. Martin Westgate QC is a barrister practising at Doughty Street Chambers. He was called to the bar in 1985 and became a QC in 2010. He is a member of the executive committee of the Administrative and Constitutional Law Bar Association and has co-ordinated the responses from that organisation to recent consultations on legal aid and judicial review.

2. ALBA is the professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles. It is predominantly an association of members of the Bar, but amongst its members are also judges, solicitors, lawyers in public (including Government) service, academics and students. It currently has over 1,000 members, including barristers who act for claimants and defendants in judicial review proceedings and in statutory appeals including in immigration, public procurement and planning cases.

3. ALBA's position in relation to the changes proposed by the Bill are set out fully in its response to the consultation paper at: http://www.adminlaw.org.uk/docs/ALBA%20JR%20Consultation%2010%202013.pdf

4. Some of the proposals have not been proceeded with in this Act but for those that have the objections raised by ALBA have not been met.

5. The views set out below are those of Martin Westgate in his individual capacity.

Proposals in the Bill:

6. As a general point there is a manifest lack of balance in this Bill. All of the proposals are designed to make it more difficult for challenges to be brought against the government or other public bodies. It is particularly unfortunate that many of the clauses are explicitly directed at challenges or representations made in the public interest by bodies with no individual stake in the outcome. This is behind the proposals relating to interveners, for costs capping orders and financial disclosure. None of the clauses seek to ensure that public bodies do not waste funds defending challenges unnecessarily.

Cl 50 – Likelihood of substantially different treatment

7. There are several substantive components here:

a. On a full hearing the Court must refuse to grant any relief by way of judicial review if it appears to be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

b. In addition the court may not make a damages award [cl 50(1)].

c. On an application for permission for judicial review the court must apply the same test if either the Defendant asks it to do so or it decides to do so of its own motion and it must refuse to grant leave if it appears to be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

8. This approach is wrong in principle, whether the issue is addressed at the permission stage or the final hearing stage. There are 2 aspects to this:

(a.) Due process is part of the essence of the rule of law and it cannot be dismissed as simply a technical matter if it can be asserted that the final outcome would have been no different. The simple fact is that a public body which fails to follow a fair or lawful procedure breaks the law just as much as it does if it makes a substantive error. The court must have power to exert effective supervision over such breaches and it will not be able to do so if it is forced to focus unduly on the likely eventual outcome. Public bodies will have far less incentive to follow lawful procedures if they can always avoid the consequences by saying that the decision would have been no different. It is worth observing that this section is drafted in such a broad way that it covers any kind of breach, no matter how grave. To take an extreme hypothetical example; what if a public official took a bribe or they acted for reasons of personal spite. Is it really intended that the court should be powerless to act simply because there happened to be underlying reasons that could justify their action?

(b.) The second point is that the court is ill-equipped in many cases to make a judgment about what the likely outcome will be. This is not simply because the parties have not deployed sufficient evidence but because their constitutional function is different from that of the decision-maker. The courts are concerned to see that legality is observed and they are not primarily concerned with the merits. Once one aspect of the decision making-process is overturned then other parts may be undermined as well. Where the breach consists in a failure to allow consultation or representations one simply cannot predict with accuracy how these would have been received, or would be received if the matter is remitted. as Lord Justice Bingham phrased it: "Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance" (R v Chief Constable of the Thames Valley Police, ex p Cotton [1990] IRLR 344, §352)

9. There are also more practical problems that arise from the way in which this clause is drafted.

(a). It prevents the court from granting "any" relief but this would also include a declaration. It is hard to see why the court should be prevented from even stating in formal terms that the Defendant was wrong.

(b.) Similarly the refusal of any damages cuts across important provisions in the common law and may be incompatible with the ECtHR. For example:

(i.) A failure to follow due process may mean that a tort has been committed, such as false imprisonment or assault. In some cases damages will be denied if the outcome would be no different and in that sense this clause is not needed but that does not follow in every case. This clause potentially undermines common law rights.

(ii.) Similarly compensation under the ECHR (which is normally extremely modest) can sometimes be awarded for the loss of an opportunity to participate in a legal process.

10. In practice the courts can and do refuse relief where it is obvious that an error could have made no difference. But this power has to be exercised sparingly if the courts are not to step outside their proper province of legality rather than merits. There is no basis for thinking that the present rules do not work effectively.

11. In any case there are strong practical reasons why this rule, if it is introduced, should not apply, or at the very least should not be mandatory, at the permission stage. This is intended to cover case where the Defendant can establish a "knock out blow" to the application. The MOJ has done nothing to dispel fears that permission

hearings will, on this basis, turn into dress rehearsals for the full hearing with a consequent waste of cost and court time.

Cls 51-2 provision of and use of information about financial resources

12. No reason at all is given here as to why a different set of rules should apply in judicial review challenges than apply in other areas of litigation. Nobody would suggest that in commercial litigation that when a limited company brings a claim it must provide information about the means of its shareholders. To do so would interfere with long established principles of company law *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34. But that seems to be suggested here for all kinds of judicial review. If this provision is to be introduced then it will unfairly discriminate against applicants for judicial review as against other litigants.

13. The requirement will be burdensome and may involve the disclosure of confidential and/or privileged material.

14. The proposal also goes beyond the provision of information and appears to create a presumption that a third party costs order will be made (cl 52(2) and (3)). The rules on such orders are well established and no justification has been given for this change. Cl 52(3) is extraordinarily wide and seems to be intended to have the effect that somebody who is "likely to be able to [provide financial support" could be at the receiving end of a third party costs order. This seems to have no purpose other than to frighten people into not supporting challenges that they might otherwise have sympathy for. It is very likely to be a breach of Articles 10 and 11 of the ECHR (freedom of speech and freedom of association).

Cl 53 – Interveners and costs

15. The present position as regards for interveners is that they neither recover their costs nor have to pay the costs of other parties. This is a symmetrical approach that works well and reflects the fact that interveners assist the court but without necessarily taking the side of any party.

16. This clause is completely one sided. It keeps the rule that interveners do not get their costs but makes them liable for the costs of other parties. Moreover, cl 53(4) seems to have the effect that the losing party can ask for their costs against an intervener. This is wrongheaded and fails to understand the point of an intervention. Interveners do not "choose" to become involved in the way that the parties to the litigation may choose to litigate. They make an application to be heard which is subject to control by the court. The basis on which they make that application is that they have something of value to contribute to the court's deliberations on the issue that has not been introduced by the parties. They are therefore performing a function in the public interest in assisting the court reach a well informed decision. Indeed the government may itself intervene in proceedings for this reason. Since the whole point of the intervention is to add to the material already before the court it is obvious that this will involve some additional work for the parties. The additional costs so incurred will be in proportion to the value and relevance of the material adduced by the intervener. Given the purpose of interventions it is wrong in principle to make them bear the costs of any such additional work occasioned by their intervention. This clause has the bizarre result that the more helpful and pertinent the intervention the greater the costs that an intervener has to pay.

17. If interveners are guilty of time wasting or have unnecessarily caused costs to be incurred then existing powers are sufficient. Likewise if they have nothing to add then the court will not allow them to intervene. This clause is directed at a non-existent problem.

Cls 54 and 55 - Capping of costs

18. Cost capping orders, or Protective Costs Orders are generally used in cases where a challenge is intended to be brought in the public interest but the person or body that brings the claim requires protection against the risk of an adverse costs order if they lose. They form a valuable function in allowing access to the courts at reasonable cost.

19. These limit the availability of PCOs. The criteria overlap with many of those that are presently used but they are over-rigid. So:

20. Cl 54(3) states that an order cannot be made pre-permission. The costs of permission proceedings can be substantial and there is no reason to limit the power to post-permission cases.

21. Cl 54(5) provides that certain types of financial information must be provided. Often it will be sensible for information of this kind to be provided but it is obvious that the regulations could impose excessive and burdensome blanket requirements that not needed in an individual case but will be so disproportionate that they will choke off applications.

22. Cl 54(6) says that an order can only be made if the application will reasonably be withdrawn if it is not made. Again, this is a factor to take into account but there is no reason to make it an absolute rule.

23. Cl 55(2) provides that a costs cap must be reciprocal so that if a claimant succeeds in limiting their exposure to costs they may also be subject to a limit ion what they can recover if they succeed. Again, this may be an appropriate order in some cases but it is wrong to make it a rule. A rule framed in this way is completely counter to the Jackson report on civil justice. He recommended that in certain asymmetrical cases (of which

judicial review was one) the general rule should be one of qualified one way cost shifting (QOCS) so that a claimant would recover their costs if they won but would not have to pay if they lost. The government decided not to adopt this proposal except in relation to PI claims This was a lost opportunity to make justice genuinely accessible in other cases at affordable cost. But it is one thing not to implement a proposal recommended by a senior Court of Appeal judge. It is another thing to impose a rule that the courts cannot achieve a QOCS outcome on a case by case basis where it is warranted.

March 2014

Written evidence submitted by the Criminal Justice Alliance (CJC 18)

The Criminal Justice Alliance (CJA) is a coalition of 74 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions—involved in policy and practice across the criminal justice system.[101] The CJA works to establish a fairer and more effective criminal justice system. It is currently making the case for more justice reinvestment; better support for ex-offenders in their local communities and greater use of problem solving in the courts—all of which would ensure a more responsible, accountable and effective justice system.

Overview of the Criminal Justice and Courts Bill

The CJA welcomes some measures in the Bill. In particular:

- the much needed provision of an appropriate adult for 17 year olds who are given a youth caution or conditional caution,
- the removal of the automatic revocation when a youth referral order is breached or further offences committed and
- the increase in the upper age for jury service from 70 to 75 years which will allow greater participation by the community in the criminal justice process.

However CJA is very concerned that :

- increased electronic monitoring and changes to the prisoner recall system will result in a rise in the prison population. This will be in addition to the increase expected due to breaches of the planned mandatory 12 month supervision for all prisoners serving less than 12 months included in the Offender Rehabilitation Bill.
- there will be a substantial increase in the work of the Parole Board which is unlikely to be adequately resourced and will add to their existing back log, which in April 2013[102] was 1323 cases.
- when there has been a steady reduction, over a the last five years, in the numbers of children in custody the proposal to build a new large 320 bed secure college will lead to a needless increase in this population.
- Restricting the use of simple cautions may have the unintended consequence of unnecessarily widening the net of the criminal justice system.

Part 1

Clause 6: Electronic Monitoring following release on licence

1. CJA welcomes the government's concern about the reduction of re-offending by those newly released from custody. We also recognise in some, limited circumstances certain offenders may find a short, defined period of electronic monitoring helpful, if it encourages them to stay away from places where they are likely to be drawn into offending or to resist peer pressure to join in criminal activity. However we are concerned that the compulsory electronic monitoring of whole groups of offenders is an unnecessary and disproportionate restriction which will not greatly contribute to reducing their re-offending. Indeed for offenders who are in work, education or training, it will pointlessly identify them as an offender to all of their peers and make it harder for them to re-integrate back into their community. Electronic tagging only monitors an individual's whereabouts and not their actions. Thus, criminal behaviour, such as drug dealing or handing stolen goods, may be brought into the family home impacting on everyone living there if offenders know their whereabouts are subject to surveillance. Also whether an offender is a perpetrator of domestic violence must also be considered before confining him or her for long periods at home under a curfew monitored by electronic tagging.

2. This proposal lacks any costing at all. The CJA strongly contends that the resources needed to set up such an extensive surveillance system would achieve much better reductions in re-offending if they were invested in health, housing and educational services in the community. In addition, the mandatory electronic monitoring of all those released from prison is likely to result in a high number of breaches which in turn will increase

[101] Although the CJA works closely with its members, this briefing should not be seen to represent the views or policy positions of each individual member organisation. For a full list of the CJA's members, please see http://www.criminaljusticealliance.org/organisations.htm

[102] Ibid.

the number of recalls to prison. All licence conditions, especially complicated or lengthy ones need to be clearly explained to offenders. 20-30% of offenders have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system[103], exacerbating the likelihood of breaching their licence. Supporting offenders on release with the appropriate interventions, will result in better long term outcomes including higher rates of desistance.

3. The blanket monitoring of a whole class of released offenders without the need of an assessment of their individual circumstances cannot be justified, and safeguards should be incorporated into the legislation. The CJA considers that the compulsory electronic monitoring of everyone on licence is too disproportionate a measure. Rather than preventing crime it will only aid in its detection once it has been committed.

Clauses 7-8: Test for Release after Recall: determinate sentences

4. The CJA fears that this proposal will add considerably to the prison population and further clog up the already inundated parole system.

5. The profile of prisoners drawn from Ministry of Justice statistics is of a population who are unemployed in the four weeks before they go into custody (68%), homeless (15%), exhibiting symptoms of psychosis (16%), suffering from anxiety and depression (25%), have attempted suicide (46% of women and 21% of men), have used Class A drugs (64%) and drink alcohol on a daily basis (22%)[104]. They are a group who lead chaotic lives, who do not have settled accommodation and are not used to keeping regular appointments. Currently offenders who are on licence having served sentences between 12 months and 4 years are all subject to a set of standard licence conditions, requiring them to report regularly to the Probation Service, live at an address approved by the Probation Service and to be of good behaviour.

6. Nicola Padfield's recent research[105] on recall shows that prisoners can feel they have been set up to fail by unreasonable licence conditions which have been inadequately discussed with them. They consider people who don't know them impose conditions upon them which they cannot meet. She notes that licence conditions can be poorly drafted, overly complicated and too broad e.g to be of "good behaviour" and may impinge on the offender's ability to get a job. Prisoners who had been recalled had little knowledge or understanding of what is being done to progress their case before the parole board. She also highlights that practical consideration needs to be given to what is done with recalled prisoners, particularly with those who don't understand their recall so they can progress to a more effective resettlement in the future.

7. The proposals in the Offender Rehabilitation Bill to bring the 50,000 prisoners a year who serve short term sentences under mandatory supervision will include a group of prolific offenders who commit low level crime, often linked to alcohol or drug misuse. The government estimates that 13,000 people a year will be recalled to custody under these proposals[106]. These additional recalls coupled with the rise in standard recalls, a result of the new test proposed in this clause, will mean a substantial increase in the Parole Board's work load. The calculations used to estimate the number of recalls and their costs in the impact assessment accompanying the Bill do not take into account those expected extra places.

8. Under the new test, the Parole Board will have to consider whether each recalled offender is "highly likely to breach their licence condition" if released. Our concern is that this new group of short term prisoners being brought under supervision, are likely to breach their licences, and if recalled many of them are likely to pass the proposed test. Thus, this measure will result in more offenders being recalled to custody for longer periods increasing the prison population. Before this proposal is introduced the CJA would urge the government to reconsider their estimates taking into account all the recalls to be expected under all new legislative provisions. Underestimates of predicted numbers in the past, such as with the introduction of the indeterminate sentence for public protection (IPP), have had a much greater impact on prisons and the parole system than was ever envisaged which will be felt for years to come.

9. David Calvert Smith, Chair of the Parole Board, recently highlighted that the review of recall cases, is by far the largest part of its work and that the recent case of *Osborn, Booth and Reilly [2013] UKSC 61*.is likely to increase the annual number of oral hearings from 4,500 to over 14,000[107]. Furthermore, in its Annual Report 2012/13, written before the Criminal Justice and Courts Bill was before Parliament, the Parole Board set out how it saw its work load increasing over the next few years due to the numbers of IPP sentences coming up for review, and as the new sentencing provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 come into play[108].

10. These proposals to increase the number of standard recalls and to instigate an additional test for those highly likely to breach their licence will substantially add to the work of the Parole Board. It is unlikely there will be any additional resources to support this increased workload. As recalls are the most pressing priority of

[103] Loucks, N. (2007) No One Knows: Offenders with Learning Difficulties and Learning Disabilities. Review of prevalence and associated needs, London Prison Reform Trust.
[104] Results of the Ministry of Justice Surveying Prisoner Crime Reduction (SPCR) survey 2012.
[105] Padfield, N. (2013) Understanding Recall 2011 Paper no. 2/2013 Legal Studies Research Paper Series, University of Cambridge.
[106] Ministry of Justice (2013) Updated Impact Assessment for the Offender Rehabilitation Bill, London . Ministry of Justice.
[107] Minutes of the All-Party Parliamentary Group on Penal Affairs held on 4th Feb. 2014
[108] The Parole Board for England and Wales Anuual Report and Accounts 2012/2013: The Parole Board. London

the Parole Board they will push back other cases to the detriment and frustration of lifers and prisoners serving long determinate sentences whilst simultaneoulsy increasing the prison population.

Clauses 10 and 11: Increasing the maximum sentence for the offence of remaining unlawfully at large

11. Increasing the sentence for offenders who are unlawfully at large from 6 months to 2 years is unnecessarily punitive. Offenders may be unlawfully at large for a number of reasons including wilfully absconding, a genuine mistake over their licence or because they have misunderstood what was expected of them (see earlier discussion of problematic licence conditions). Once they return to custody they are likely to have to serve the rest of their sentence as well as the sentence for absconding. Increasing the length of this additional sentence is unnecessary, unlikely to act as a deterrent and will further add to the prison population. When considering the situation of offenders unlawfully at large a distinction needs to be drawn between those who deliberately abscond and those who do not, to avoid punishing offenders with learning disabilities or difficulties. Explicit provision should be made to ensure all offenders understand the licence conditions they are subject to. Prisoners report seeing their licence conditions for the first time at the moment of release, when they would sign anything to get out or having never read them[109].

Clauses 14 and 15: Simple Cautions

12. Simple cautions and other out of court disposals OOCDs are a valuable tool in dealing with low level offending and the numbers administered are decreasing. OOCDs play a vital role in filtering those who progress further into the criminal justice system. They keep individuals from unnecessarily clogging up valuable court time whilst allowing for reparation, high levels of victim satisfaction and often providing a sanction more likely to prevent individuals from committing further offences. They also enable a more localised response to offending and these advantages should be properly communicated to the public. By limiting the discretion of well trained, experienced police officers there is a danger of widening the net of criminal justice over those who would be better served through using other more appropriate interventions.

Part 2

Clause 17: Secure colleges

13. The CJA believes there is a danger that sentencers will see the new secure college as a panacea to stop children offending. This will lead to the imposition of longer sentences so children can "benefit" from the education and other services available in the secure college and the "uptariffing" of children who are on the custody threshold.

14. Many of the children who find themselves in custody have spent some time in care, are very likely to have had an absent parent, have experienced neglect or abuse, have high prevalence of mental illness, and to have been excluded from school. 23% of young offenders have learning difficulties (IQ below 70) and 36% have borderline learning difficulties (IQ 70-80)[110]. Boys (aged 15-17) in prison are 18 times more likely to take their own life than children of the same age in the community[111]. 11% of children in prison have attempted suicide[112]. Thus children in custody have many issues which have to be addressed, they don't just need to be educated. Entering the secure estate should not be a pre-requisite for them getting the interventions they require to lead a crime free life in the future.

15. The population of children in custody has dropped by 59% in the last 5 years. Thus those left in custody are the most troubled, high risk and difficult to manage children in the criminal justice system. The reduction of this population does not represent an opportunity to save money, as dealing with them effectively requires sufficient resources to be invested in holistic services. Staff working with these children need to be experienced and well-trained and provide more than educational provision.

16. It is hard to imagine how in practical day to day terms secure colleges will differ from current youth custody provision which results in very high re-offending rates for the children released from them. 72% of children (aged 10-17) re-offend within a year[113]. The model of large institutions is unsound as many children report feeling unsafe[114] and it is very difficult to keep those with rival gang affiliations apart. One large central England facility will break a child's ties with local services and strain family relationships resulting in fewer family visits.

17. The CJA is very concerned that this secure college will lead to children aged 12-14 being held in conditions that are currently reserved for the 15-17 year old age group as more expensive provision in secure children's homes is cut. It is also deeply worrying that sections 8-10 of Schedule 4 allow "reasonable force" to be used to maintain good order and discipline within the establishment, despite the courts clearly ruling that such practices are illegal.

[109] Padfield, N. (2013) Understanding Recall 2011 Paper no. 2/2013 Legal Studies Research Paper Series, University of Cambridge
[110] Harrington, R and Bailey, S (2005) Mental Health needs and effectiveness provision for young offenders in custody and the community. London. Youth Justice Board
[111] Fazel, S et al. Suicides in male prisons 1978-2003, The Lancet, vol 366, issue 9493, 8 October 2005
[112] Jacobsen J et al (2010) Punishing Disadvantage: a profile of children in custody, London: Prison Reform Trust
[113] Table 18b, Ministry of Justice (2013) 2013 Compendium of re-offending statistics and analysis, London: Ministry of Justice
[114] Murray, R. (2012) Children and Young People in Custody 2011-12, London: HM Inspectorate of Prisons and Youth Justice Board

18. Removing children from their homes and local communities and sending them many miles away is unlikely to improve their rates of re-offending. Providing robust, intensive and well resourced community sentences is more likely to produce better outcomes for these damaged children as well as being cheaper than the building, running and staffing of a new secure college.

Clauses 20-23

19. The CJA supports the proposals for youth cautions, conditional cautions and referral orders.

PART 3

Clause 29-31: The criminal courts charge

19. The imposition of this new charge is in addition to existing penalties and the courts powers to require offenders to make payments including compensation for victims, the victim surcharge, prosecution costs and fines. Applying yet another charge to those sentenced by the court will increase their financial burden. Many offenders are reliant on benefits and paying this extra charge will either incur further debt or result in increased deprivation to the offender and their family. In a recent study when offenders serving community sentences were asked what would help them stop offending 62% said having a job,[115] similarly 48% of those in prison have a history of debt[116].

20. This charge is an additional burden for offenders and their families and must be seen in the light of recent benefits cuts. Inability to pay is likely to see offenders bought back before the courts and there is a danger of an escalation in punishment through the addition of this extra charge.

March 2014

Written evidence submitted by Bail for Immigration Detainees (CJC 19)

PART 4: JUDICIAL REVIEW

1. As currently drafted, this Bill would place serious restrictions on immigration detainees' access to judicial review. Judicial review is a crucial safeguard, and examples are set out below of cases in which the courts have found that detainees including children have been held unlawfully.

CLAUSE 50 STAND PART: LIKELIHOOD OF SUBSTANTIALLY DIFFERENT OUTCOME

2. Clause 50 provides that the courts must refuse relief if '*it appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*.' The courts already have the power to refuse relief where it is deemed inevitable that the outcome would not have been substantially different.[117] Obvious cases can be decided at permission stage.

3. Clause 50, however, would require judges to make decisions about the likely influence of the defendant's conduct at permission stage. This would turn permission hearings into 'dress-rehearsals' requiring full disclosure and evidential preparation, and incur unnecessary cost and delay. Furthermore, the '*highly likely*' test would draw judges into second guessing what may have happened if different procedures had been followed. The inherent dangers of such an approach are outlined in the judgment of *John v Rees* [1970] Ch345 at 402, where Megarry J states:

4. '*.. the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change*.'

Clause 53 Stand Part: Interveners and costs

5. Clause 53 provides that the High Court or Court of Appeal '*must order the intervener to pay any costs specified*' by a party or interested party that have been incurred '*as a result of the intervener's involvement*.' It would be impossible for many NGOs including BID to pay such costs. This would mean that we would be prevented from intervening and providing crucial evidence to these courts.

6. Interveners must convince the court of the value of their involvement when seeking permission to intervene. The senior judiciary's response to the Government consultation on Judicial Review reform states: '*The court is already empowered to impose cost orders against third parties [interveners]. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties*.'[118]

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[115] Ministry of Justice (2013) Results from the Offender Management Community Cohort Study: Assessment and Sentence planning, London:Ministry of Justice

[116] National Offender Management Service (2007) Signposting Offenders to Financial Capability Training, Debt Advice and Financial Services, London: Ministry of Justice

[117] See SH (*Afghanistan*) *v SSHD* [2011] EWCA Civ 1284

[118] Judiciary of England and Wales (2013) *Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform*'

Case Study: Child detention

In 2011, following judicial review proceedings in the 'Suppiah' case,[119] the Administrative Court found that two families had been detained unlawfully. Liberty intervened in this case, and BID provided evidence to support their intervention. In his concluding remarks, Justice Wyn Williams found:

'*The Defendant's current policy relating to detaining families with children is not unlawful. There is, nonetheless, a significant body of evidence which demonstrates that employees of UKBA have failed to apply that policy with the rigour it deserves*.'

At paragraph 111, Justice Wyn Williams stated: '*On the basis of the evidence adduced by the Claimants and Liberty, no one can seriously dispute that detention is capable of causing significant and, in some instances, long lasting harm to children. That emerges with clarity from the observations of HM Inspector of Prisons, the Children's Commissioner, Members of Parliament, the Independent Inspector of UKBA and the detailed evidence of Mr Makhlouf [BID]*.'

Since this judgment was handed down, there have been numerous improvements to Government policy on child detention. In paragraphs 31–40 of this judgment, Justice Wyn Williams is critical of the Home Office's failure to properly communicate the option of voluntary return to the claimants before their detention. Since this case was brought, the Home Office has improved their communication on voluntary return in family cases, and families are now given a minimum of 4 weeks to consider returning voluntarily or by 'self check-in' before any enforcement action is taken.[120]

Clause 54 Stand Part: Protective Costs Orders

7. Clause 54(3) provides that a protective costs order can only be made if permission to apply for a judicial review has been granted by the court. However, defendants and interested parties may accrue significant costs, in some cases exceeding £30,000, before permission is granted.[121] If an order cannot be obtained to protect claimant organisations against such costs risk, claims with substantial public interest will not be brought. For example, Medical Justice, a detainee support organisation, obtained a protective costs order and in 2010 successfully challenged a Home Office policy of removing certain groups without a minimum of 72 hours notice.[122] This notice period is crucial because it enables people to seek legal advice to challenge their removal, including in cases where removal would be unlawful.

Further examples of cases which would be affected

8. We believe that the Government's proposals would severely curtail access to judicial review for meritorious cases challenging detainees' removal, the legality of their detention or maltreatment in detention. We remind the committee that immigration detainees are held without time limit, in some cases for years. Where cases can be brought, the barriers to interventions contained in Clause 53 would limit the evidence available in some cases.

Maltreatment of Detainees

9. Recently, *The Observer* reported alleged sexual abuse of female detainees by staff at Yarl's Wood,[123] for which two custody officers have been dismissed.[124] This case, and the case cited below, highlight the importance of access to the court for detainees wishing to challenge maltreatment.

[119] *R (on the application of) Reetha Suppiah and others v SSHD and Interveners* [2011] EWHC 2 (Admin)
[120] Home Office *Enforcement Instructions and Guidance* Chapter 45
[121] Jaffey, B. and Hickman, T. (2014) *UK Constitutional Law Association Blog* 'Loading the Dice in Judicial Review: the Criminal Justice and Courts Bill 2014' http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/
[122] *The Queen on the Application of Medical Justice v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin)
[123] *The Observer*, 14th October 2013, "Detainees at Yarl's Wood immigration centre 'facing sexual abuse'"
[124] Nick Hardwick, Chief Inspector of Prisons, Press release by HM Inspectorate of Prisons 29 October 2013, 'Progress made, but further improvements needed'http://www.justice.gov.uk/news/press-releases/hmi-prisons/yarls-wood-immigration-removal-centre

Case study: Use of force against pregnant women

In January 2013 *The Guardian* reported that force was used against a pregnant woman during an attempt to remove her from the UK: '*She said her body was covered in bruises after the incident.. an independent doctor warned that putting the woman on the plane without adequate monitoring while she was bleeding could lead to premature labour and ruptured membranes*.'[125]

This woman's treatment was also criticised by the Prisons Inspectorate.[126] Despite having no published policy governing the use of force, and widespread criticism of their practices,[127] the Home Office continued to use force against children and pregnant women to effect removals. This situation only changed as a result of a judicial review application in the case of *R* (*on the application of Yiyu Chen and Ors*) *v Secretary of State for the Home Department* CO/1119/2013. Shortly before a court hearing, the Home Office re-published an old policy prohibiting the use of force against children and pregnant women save where absolutely necessary to prevent harm. In this case, further harm to vulnerable detainees was only prevented by an application for judicial review.

Legality of detention

10. BID regularly refers detainees to solicitors to challenge the legality of their detention.

Case Study: Separation of families

In September 2010 and April 2011, following judicial review proceedings the High Court found that two single mothers, both clients of BID, had been unlawfully held in detention and separated from their children.[128] The unlawful detention of these mothers had serious consequences for their children's welfare.

One of the children in the latter case of 'NXT' changed foster placements six times during the mother's imprisonment and detention and experienced abuse and neglect. Following these judgments, in November 2011, the Home Office published six sets of guidance on the separation of families. These instructions set out detailed procedures to be followed in such cases, including steps to consider child welfare. It appears likely that the Home Office decided to publish guidance on this matter at least partly as a result of this litigation. The ability to bring judicial review proceedings in such cases is crucial in obtaining the claimant's release, providing them with redress, and challenging systemic problems in Home Office decision making.

Judicial reviews to challenge removal from the UK

11. BID has worked with a number of parents who the Home Office has sought to remove or deport, despite this not being lawful or in their children's best interests. Judicial review is a crucial safeguard against such action.

Case study: challenging removal of a family

Faith was detained with her partner for 206 days after serving a prison sentence. Her four children were aged between one and eleven when she went to prison; the eldest child was a British Citizen. The children were extremely distressed, and some of them developed behavioural and health problems.

Three months into her detention, the Home Office wrote to Faith and her partner informing them that they intended to remove the parents and children together. The family had been separated for two years and five months. The Home Office noted the need for the children to "*re-establish their relationship with their parents before removal*," and envisaged that this might happen at Heathrow Airport. It is extremely concerning to see that the Home Office thought it would be appropriate to reunite these extremely distressed children with their parents during the course of their forced removal.

This removal attempt was cancelled, and the Home Office arranged a new date for the family to be removed using the same method, but this was prevented by a judicial review application. The parents were subsequently released from detention and granted leave to remain in the UK.

Interaction of the Judicial Review reforms with other legislation

12. **Residence test**: The Government proposes to exclude people who are not lawfully resident in the UK, or have not been lawfully resident for 12 months, from access to many types of civil legal aid. If both the residence test and the proposed reforms to judicial review are introduced, people who are detained unlawfully will in practice often have no route to challenge their detention. Those who fail the residence test will not be

[125] *The Guardian*, Friday 11 January 2013 , 'UK Border Agency rejects calls to stop using force on pregnant detainees'
[126] HM Inspector of Prisons (2012) *Report on an announced inspection of Cedars Pre-Departure Accommodation*
[127] Home Affairs Select Committee (2012) *The work of the UK Border Agency (April–June 2012) Eighth Report of Session 2012–13*
[128] *MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) and NXT, R (on the application of) & Ors v Secretary of State for the Home Department [2011] EWHC 969 (Admin)

able access legal aid to bring a civil claim for compensation for unlawful detention after their release.[129] Under the judicial review reforms, detainees' access to judicial review to challenge the legality of their detention would be severely curtailed.

13. **Immigration Bill**: Clause 12(3) of the Immigration Bill provides that '*foreign criminals.. can be deported first and appeal after, unless that would cause serious irreversible harm*.'[130] Given that 32% of deportation appeals succeed,[131] many people with valid appeals may be deported, including where they fear for their safety or return and/or have children in the UK. Judicial Review is offered as a safeguard, and yet the measures set out above would severely limit access to judicial review.

Bail for Immigration Detainees is a charity which provides immigration detainees with free legal advice, information and representation to secure their release. From 1 August 2012 to 31 July 2013, BID assisted 3367 detainees.

March 2014

Written evidence submitted by the Magistrates' Association (CJC 20)

This document provides a briefing for the Public Bill Committee considering the Criminal Justice and Courts Bill 2014. This document covers those clauses of the Bill that are most relevant to the work of magistrates and builds on the Magistrates' Association's (MA) briefing for the 2nd reading of the Bill.

The MA welcomes certain provisions, particularly those that reflect concerns that the MA has raised previously (for example restricting the use of simple cautions and raising the age for which an appropriate adult is required for young people); however the briefing does identify some areas that might be suitable for further scrutiny.

PART 1 CRIMINAL JUSTICE

Clauses 14-5: Use of Simple Cautions

The MA welcomes the proposals to restrict the use of cautions in certain circumstances; specifically in cases involving more serious offences or repeat offenders. The MA raised concerns in its response to the Government consultation on Out of Court Disposals, about cautions being used for offences such as domestic violence, hate crime or crimes of violence with injury unless exceptional circumstances applied. The MA would hope that the Secretary of State would take the view that cautions should only be used for low level offending where early intervention can be a deterrent when specifying offences in which a caution may only be given in exceptional circumstances.

The MA would also like to take the opportunity to raise the issue of ensuring sufficient oversight of the use of all out of court disposals is in place; consistency of scrutiny panels continues to be a matter the MA believes should be a priority for the Government.

Suggested amendments:

— Clause 14

Page 15, line 21 insert

(4) If—

(a) the offence is an either-way offence not specified under subsection (3), and

(b) in the five years before the commission of the offence the person has been convicted of, or cautioned for, a similar offence, a constable may not give the person a caution except in exceptional circumstances relating to the person, the offence admitted or the previous offence.

Page 14, line 22 leave out "or an either-way offence"

Rationale

The MA also identified repeat offenders in its consultation response as an area where cautions are not appropriate. The MA is concerned that the proposals do not go far enough; while taking into account relevant offences within two years might be suitable for summary only offences, the MA suggests a time period of three to five years would be more appropriate for all other cases. The court has access to a wider range of information than front line officers and can therefore respond to repeat offenders more appropriately and effectively.

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[129] Ministry of Justice September 2013 *Transforming Legal Aid: Next Steps, Annex B: Response to consultatio*n, Paragraph 125; Ministry of Justice February 2014 *Government response to the Joint Committee on Human Rights: The implications for access to justice of the Government's proposals to reform legal aid,* p11

[130] Home Office October 2013 *Immigration Bill Factsheet: appeals (clauses 11-13)* http://bit.ly/1gOp7y8

[131] Home Office 15/7/12 *Impact Assessment of Reforming Immigration Appeal Rights,* p7 http://bit.ly/1cygmWm

— Clause 14

page 15, line 29 leave out "police officer" and insert "senior police officer of at least the rank of Inspector"

Rationale

The MA would also hope that in specifying the rank of officer able to decide whether exceptional circumstances exist, the Secretary of State would ensure an appropriate level of seniority.

PART 2 YOUNG OFFENDERS

Clause 17: Secure colleges and other places for detention of young offenders The MA welcomes the increased provision for education for young people in secure colleges as low levels of educational attainment and lack of training are features associated with young offenders.

The MA understands the Government's objective to reduce per capita spend on young offenders in detention, but believes the Government must be mindful of the effect this could have on the standard of provision.

Schedule 4: Part 1: Contracting out provision and running of secure colleges:

Paragraph 1

The MA emphasises if secure colleges are to be contracted out they must have specific targets and be rigorously inspected.

Paragraph 13

The MA believes that the provision that means young people are committing an offence if they 'obstruct or resist' a secure college custody officer will need careful scrutiny and monitoring.

Clause 20: Youth cautions and conditional cautions: involvement of appropriate adults

The MA welcomes the provision that 17 year olds receiving a youth caution need to be in the presence of an appropriate adult (previously this was just the case for 10–16 year olds).

The MA emphasises the importance of making sure the appropriate adult is fully equipped to take on this role. This includes their independence, their relationship with and in depth knowledge of the young person and their understanding of the processes involved in youth cautions. The MA hopes an appropriate adult would either be a parent or guardian, a family member with extensive knowledge of the young person or a responsible member of the care team with duty of care or mentoring of the young person.

Clauses 21-23:

The MA welcomes the greater discretion offered to courts within these clauses in relation to referral orders; particularly when the aim set out in the explanatory notes of enabling restorative justice processes to be completed is kept in mind. If the restorative measures constitute work concerning the victim then it is especially important that this work be completed.

Clause 21: Referral orders: alternatives to revocation for breach

The Bill makes provision of fines up to £2,500 for young people breaching a referral order. The MA is not in favour of fines being imposed for breaches of referral orders as the fines often become the responsibility of the parent or guardian and can have little meaning for the young person. This is especially the case for looked after children where the fines may be paid by the local authority or foster carers. It should be borne in mind the inability for some young people to pay these fines currently or in the future and that alternatives such as unpaid work or reparations may be more appropriate.

PART 3 COURTS AND TRIBUNALS

Clauses 24-8: Single Justice Procedures

The arrangements in this Bill to allow a single magistrate to convict and sentence high volume, low seriousness cases where the defendant pleads guilty, agrees to the procedure, or does not respond at all are workable. The MA welcomes the reference in the accompanying explanatory notes to the cases that would come under the remit of these new procedures as offences such as TV licence evasion, various non-imprisonable motoring offences and rail fare evasion. The MA will collaborate with the Government in relation to procedural matters of how the proposed measures could be effectively implemented.

The Bill also permits these cases to be dealt with outside of a public courtroom, which might be an office in the court building, a retiring room or a regular courtroom which is simply closed to the public.

The MA is well aware that few members of the public attend to listen to and observe cases where the defendant is absent. However it is a principle of British justice that cases are heard and the results are made known in public and we would be sorry to see this principle abandoned, even for the cases which this Bill deals with. We would be concerned if the general public perception became that these cases were no longer criminal cases handled by magistrates with the same rigour as every other criminal case.

MPs might like to consider whether these proposals will trigger an adverse public reaction among those who distrust politicians, are increasingly suspicious of police integrity and who say that the Government is at war with motorists. These proposals may present an open goal to tabloid newspapers running campaigns on secret courts and roadside cameras being there for cash generating purposes rather than for road safety.

In the fact sheet which accompanied the single magistrate clauses of the Bill, the Government promised in paragraph 11:

> *In order to preserve open and transparent justice, magistrates' courts will continue to publish daily case lists on the day of the appointed hearings. These lists are currently, and will continue to be, available to local media. In addition the court will still be obliged to give certain case information to the public on request, as they are currently.*

Paragraph 12 of the same fact sheet speaks of the Government's wider transparency agenda and its wish to make court processes more transparent to the public.

However, this Bill provides for a single justice procedure notice which does not need to give a place and time for a court hearing and allows cases to be adjourned without notice. The MA would be interested in any proposals that gave reassurance that there is a real commitment to open justice such as in terms of publishing case lists and outcomes.

Suggested Amendments:

— New Clause 24: Middle tier of jurisdiction

1) Section 154 of the Criminal Justice Act 2003 (General limit on magistrates' court's power to impose imprisonment) is amended as follows:

2) After "magistrates' court" insert "constituted with three justices, one of whom is a DJ (MC)"

Rationale:

Section 154 empowers magistrates' courts to impose a custodial sentence up to twelve months but this clause is yet to be implemented. This amendment would specify that only magistrates' courts in which two magistrates sat with a District Judge would be empowered to impose a custodial sentence between six and twelve months. This would allow magistrates' courts to hear cases currently dealt with in Crown Courts.

In 2001 Sir Robin Auld recommended a middle tier of jurisdiction to consider either way offences limited to a set level of severity of possible sentence. The proposal was for this court to constitute two magistrates sitting with a district judge to hear this group of cases. The current Lord Chief Justice raised this suggestion in his speech on "Reshaping Justice" given on 3rd March 2014; saying that "Surely it is time to consider this issue again given the financial circumstances in which we are now placed." He went on to suggest evidence and analysis was need in this area.

In line with the Lord Chief Justice's suggestion, the MA proposal would allow a safe and limited environment for the use of twelve month sentencing powers to be used in magistrates' courts; restricted by the availability of DJ(MC)s. This would essentially constitute a pilot study of allowing certain cases for lesser offences to be kept in the magistrates' court. Cases such as middling theft, actual bodily harm, drug offences and a large proportion of dangerous driving could be kept out of the Crown Court in those areas where it has the longest backlog.

— Clause 26

page 25, after line 42 insert;

"(c) information supplied by the DVLA to inform the court of penalty points endorsed on the defendant's driver record"

Rationale:

The Bill requires the court to try the charge relying only on the documents served on the defendant and any written mitigation supplied by him (page 25 lines 39-42). The court needs more than that to make the right decision about whether it should adjourn the matter, as required by statute, to consider disqualifying an absent defendant from driving. The court needs to know whether the defendant has sufficient points on his record that the current offence will make him a totter (liable to disqualification as having amassed twelve points). There is an automatic safeguard in using such information from the DVLA which was not supplied initially to the defendant with the written charge, because he can make further representations and mitigation in time for the matter to be considered again after the adjournment.

— Clause 26

page 26 lines 7 & 8 leave out "and if a party appears must proceed as if the party was absent"

Rationale:

The MA would not like to prohibit interested parties who might be able to aid the process from participating. An example would be an experienced prosecutor who can be an asset in identifying the relevant evidence in a bundle quickly; therefore ensuring fair and expedient justice.

Clauses 29-31: Court charges and fines collection

The MA has concerns about the new imposition of court charges and how this could be efficiently implemented in practise.

Suggested amendment:

— Clause 29

Page 30, line 7 leave out "must" and insert "may"

Page 30, after line 28 insert:

"(6) Reasons must be given for either imposing or not imposing court charges"

Page 30, line 30 leave out "must" and insert "may"

Page 30, line 43 leave out "must" and insert "may"

Page 31, line 10 leave out "must" and insert "may"

Rationale:

The MA advises the Government in the interest of justice to amend the proposals to allow the court discretion in imposing these fees. The court is in the best position to identify in which cases the ordering of payment of court costs would be inappropriate or unreasonable.

The MA would presume that in prescribing which cases will be exempted from this set of clauses, the Lord Chancellor would consult closely with relevant stakeholders.

In those cases where the ordering of a court charge payment is appropriate, the MA would suggest a detailed and thorough scoping exercise must take place to ensure the systems in place are sufficient to deal with this additional layer of complexity in imposing fines without damaging the efficiency of case management or compromising the judicial duty to ensure sentences are proportionate in the totality.

In general, the MA supports the greater flexibility offered in relation to payment of fines which allows response to changes in an offender's circumstances. However the MA is concerned that an additional layer of complexity is being added to a system at a time when the Government is planning to contract out the Compliance and Enforcement Service. It is important that the necessary provisions are in place to ensure the system can ensure effective collection of fines and orders.

March 2014

Written evidence submitted by the Public Law Project (CJC 21)

PUBLIC BILL COMMITTEE BRIEFING PAPER FOLLOWING ORAL EVIDENCE

PART 4 CRIMINAL JUSTICE AND COURTS BILL

THE NUMBER OF JUDICIAL REVIEW CASES

In recent months, it has been stated time and again that judicial review cases are on the rise and, in the words of a Public Bill Committee member on 13 March 2014, "out of control". The data that has been produced by the Government in support of this position is incomplete and incorrectly analysed. The Public Law Project has conducted an independent, academic, empirical analysis of the figures on judicial review.

That analysis shows beyond doubt that, leaving aside asylum and immigration cases which are no longer dealt with in the Administrative Court, the numbers of judicial review cases have remained static for the last decade.

The genesis of the claim that judicial review is on the rise can be found in the Government consultation paper *Judicial Review: Proposals for Reform*, where it was stated that, "There has been a significant growth in the use of judicial review to challenge the decisions of public bodies. In 1974, there were 160 applications for JR, by 1998 this had risen to over 4,500, and by 2011 had reached over 11,000."

These figures are problematic for a number of reasons:

— Comparisons with the use of judicial review that go back as far as 1974 are completely meaningless, not least because prior to O'Reilly v Mackman [1983] 2 AC 237 claimants did not need to use judicial review in public law matters. We do not know how often government was

challenged in the courts prior to the early 1980s and there is no data on this. This absence of data was recognised in the Bowman report, where he stated that the information required in order to make proposals with a proper factual basis, was "not readily available and was going to be difficult to obtain."[132]

— The increase in the scale of judicial review litigation is substantially attributable to immigration and asylum cases. This is recognised by the Government and is not an expressly targeted area for reform in the Criminal Justice and Courts Bill 2014 because those JRs have now been transferred out of the Administrative Court.

— Once asylum and immigration cases are placed to one side, there is no evidence of any significant change in the volume of judicial claims over the last ten years: indeed, it is widely recognised that there has been none. The graph provided in the Judicial Review: Proposals for Reform consultation document[133] supports this: the number of judicial review applications in the 'others' category (i.e. not immigration and asylum or criminal judicial reviews), have remained static since 2005. In fact, since the mid-1990s the number of claims has remained fairly stable at the 2000 per annum mark. As Harlow and Rawlings remind us, these numbers are "infinitesimal" compared with the scale of government decision making.[134]

— According to the Ministry of Justice's own statistics the number of substantive judicial review hearings is steadily decreasing. In 2010 the number of substantive judicial review hearings decreased by 6% on 2009[135] and in 2011 the number decreased by 14% on 2010.[136]

Similarly misleading data was provided by the Government in a 'web chat' convened by the Ministry of Justice on 29 October 2013.[137] Richard Mason, Deputy Director—Administrative and Civil Justice, responded to a question challenging the Ministry's assertion that judicial review claims were on the rise. He stated, "[…] There's actually been a 27% increase in non-immigration and asylum cases—from around 2,300 in 2007 to around 3000 in 2012".

PLP has analysed the complete database from the Administrative Court.[138] We examined all 12,434 issued JRs in 2012, and divided them according to subject matter into three sections: civil JR, criminal JR and immigration/asylum-related JRs. According to our calculation, and based on the MoJ's own figures and records, we counted 406 criminal JRs and 9,868 immigration/asylum JRs. The remaining total for non-immigration related civil JRs is accordingly 2,160. This is 840 cases below that claimed by the Ministry on 29 October 2013 and demonstrates that judicial review remains around the 2000 per annum mark, where it has been since the mid-1990s.

The Number of Successful Judicial Review Cases

It has also been repeatedly stated that claimants and their lawyers bring too many weak and time-wasting judicial reviews. The figures do not back up this allegation either.

The *Transforming Legal Aid* consultation document stated that in 2011–12 "there were 4,074 cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court". From this it appears that all 2,275 cases were concluded before being issued. From PLP's research on settlement outcomes,[139] it is likely that a majority of these 2,275 cases were settled in favour of claimants. Such resolution will have been speedy and cheap, and cannot form part of the group of cases in which the Government considers that there has been waste of public funds. So already at this point, 56% (2,275 of 4,074) of legally aided cases benefit from the efficiency of the judicial review process which encourages early engagement between the parties leading to a high rate of settlement and withdrawal.

The document went on to state that 1,799 cases were considered for permission of which 845 ended after permission was refused. This represents a success rate at permission of 53%, a very respectable success rate in addition to the many cases that had already settled positively at the earlier stage. According to the consultation, of the 845 cases that are known to have been refused permission, 39% (330 cases) were recorded as having had a positive outcome for the claimant.

This leaves only 515 cases out of the initial 4,074 legally aided cases (i.e. 13%) as having ended at permission without benefit to the client. **So at the end of the permission stage, 87% of the sample of legally aided cases relied upon by the Government had either been settled, had ended following the refusal of permission but with substantive benefit recorded to the client, or had been granted permission**.

[132] The Bowman Report, *supra*, p.10 para.8.
[133] At page 10, figure 1.
[134] Harlow and Rawlings, *Law and Administration*, p.712.
[135] *Judicial and Court Statistics 2010*, Ministry of Justice (2011), p.145. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf
[136] *Judicial and Court Statistics 2011*, Ministry of Justice (2012), p.65. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf
[137] The chat can be viewed here: http://www.justice.gov.uk/ministry-of-justice-webchats
[138] Available here: www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013
[139] See *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf)

On any reasonable view, therefore, the figures that have been made available do not support the assumption underpinning the reforms that there is serious waste in the legal aid funding of judicial review claims on account of weak cases being brought by claimant lawyers.

March 2014

Written evidence submitted by Liberty (CJC 22)

LIBERTY'S COMMITTEE STAGE BRIEFING ON PARTS 1, 2 AND 3 OF THE CRIMINAL JUSTICE AND COURTS BILL IN THE HOUSE OF COMMONS

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at http://www.liberty-human-rights.org.uk/policy/

Introduction

1. The Criminal Justice and Courts Bill comes in five parts. Part 1 makes provision for sentencing, largely in relation to offences connected with terrorism. It also includes proposals to extend the purpose and scope of post-release electronic monitoring and to limit the use of cautions for serious offences or repeat offences. Part 2 of the Bill sets out proposals in relation to young offenders, which include the creation of so-called 'secure colleges' intended to replace current detention facilities for young offenders. Part 3 contains wide-ranging changes to procedures in courts and tribunals. This Part includes extremely worrying new powers for trial by a single magistrate on the papers for less serious offences. Part 3 would also introduce oppressive new charges to be levied towards criminal court costs to be paid by convicted adult offenders, would increase the upper age limit for jury duty to 75, and create a new offence of juror research. Part 4 implements radical changes to the availability and operation of judicial review and constitutes a significant threat to the constitutional role of the courts in ensuring the legality of Execution action. Part 5 makes consequential provision.

2. Liberty has produced separate briefings on clauses contained in Part 4. In this briefing we focus on clauses contained in Parts 1, 2 and 3. Specifically: the sweeping extension of the "tagging" regime (clause 6); the establishment and running of 'Secure Colleges' and the power for staff to use force to enforce good order and discipline (clauses 17, 18, schedule 4); trial by single magistrate on the papers (clauses 24–28); and the mandatory criminal costs order (clause 29). These proposals demonstrate muddled and short-sighted thinking. The first envisages a new regime for mandatory blanket tagging of those on licence for the purpose of surveillance, as opposed to compliance, that will cost hundreds of millions of pounds to administer. The last three appear to be driven by cost-cutting objectives and together threaten child safety and rehabilitation; the right to trial by jury; open justice and the presumption of innocence. Cumulatively these proposals reveal a frightening desire on the part of Government to absolve itself of responsibility to adequately fund a fair and functioning criminal justice system and instead to divert funds away to the ever burgeoning private surveillance and security industry.

3. Liberty urges MPs at Committee to probe Government on the inclusion of these clauses and to press for their deletion from the Bill.

Clause 6: Electronic monitoring following release on licence

4. Clause 6 amends provisions in Part 3 of the *Criminal Justice and Court Services Act 2000* which authorise electronic monitoring or "tagging" of those released on licence. It amends the current law in three significant ways. It permits (for the first time) tagging of individuals in order to "monitor whereabouts" as opposed to "monitoring compliance with another condition of release" such as a curfew. It imposes a requirement that where an individual is tagged, a person is made responsible for monitoring an individual subject to tagging and therefore for collecting, storing and processing data on the subject's movements. It also gives the Justice Secretary the power to mandate, by order, the imposition of tags on whole categories of offenders.

5. It is unclear why the Government is seeking to amend the law to monitor whereabouts in addition to monitoring compliance with licence conditions. This reform will change the nature of a tag from an enforcement device which simply monitors adherence to a court sentence to a mechanism of State surveillance for unprescribed purposes. This represents a significant shift and implies suspicion of re-offending for all those made subject to such an order. The Government has not made any case for blanket imposition of surveillance

tracking for those released on licence. Further, it is difficult to see how blanket monitoring of licensees will help with Government's stated aims of improving reintegration and lowering recidivism. For those released on long licences it is easy to see how extended tagging requirements will interfere with re-settlement and rehabilitation.

6. Liberty has further concerns about those who will be made responsible for blanket monitoring of the whereabouts of licensees, and the safety and use of the wealth of data that will be generated by the new monitoring regime. The Bill is silent on the identity of "persons" to be made responsible for monitoring and the Bill states merely that the Justice Secretary must implement a non-binding Code of Practice in relation to the processing of data gathered via tagging. Given the trajectory of recent Government policy in this area it seems likely that private security companies will be made responsible for this surveillance. As we detail in paragraph 18 below, we have grave concerns about the track record of the private security industry in general and specifically in relation to tagging functions. On 19 November 2013 G4S admitted overcharging the Ministry of Justice for its tagging services following the Justice Secretary's referral of the company to the Serious Fraud Office.[140] G4S offered the Department a 24 million pound credit note which it rejected as auditors continued to establish the extent of the overcharging.

7. Tagging is costly and currently discharged by companies that have been unable to demonstrate basic standards of integrity, record keeping and efficiency. The Government has not evidenced why it believes the tagging industry should be enlarged in this way nor provided information as to the further significant costs that will be incurred.

Clauses 17, 18, Schedule 4: Secure Colleges

8. Part 2 of the Bill sets out a legislative framework for the creation of Secure Colleges. The Government proposes that Secure Colleges will come to completely replace Young Offender Institutions (YOIs) and Secure Training Centres (STCs) in addition to taking some children currently held in Secure Children's Homes (SCHs). They will hold the vast majority of 12-17 year olds in the prison estate. The stated rationale[141] behind the reform is twofold: to reduce the cost of detaining young people[142] and to provide a more holistic and educational environment for young offenders than at present –

> "*A Secure College will for the first time offer a fully integrated multi-agency approach to tackling the offending of young people. With education at the heart of the regime and effectively integrated with health, substance misuse and wider services, the Secure College will improve the educational engagement and attainment of young offenders, while also addressing offending behaviour in a holistic and co-ordinated way which can be sustained by community services on release.*"[143]

9. The particular changes outlined include: a single lead provider overseeing a Secure College and all the services it delivers rather than the separate commissioning of custody and educational services; a headmaster or principal overseeing educational delivery; educational providers to provide education in the youth estate; aspiration to increase in the number of hours of education provided to detainees per week; more effective resettlement policies.

10. The Government's stated ambition for Secure Colleges is a laudable one. It recognises the complex matrix of issues that lead young people to commit offences and commits to prioritising education and the other diverse needs of children in detention.[144] However, we are concerned that the scheme set out in the Bill and accompanying policy documents fails to reflect the Government's vision in a number of crucial areas. In particular - the construction of larger detention facilities to detain mixed ages and sexes; use of force to enforce good order and discipline; the option for Secure Colleges to be run by private security firms; and vastly reduced spending per head than that currently spent on child detainees in STCs.

11. The number of children in custody has fallen considerably in recent years. It has dropped by almost half under the Coalition, from 2,136 children in May 2010 to 1,168 in December 2013. Rather than focusing on proposals to build larger prisons for children, the Government should focus on bringing youth custodial rates down further by, as the Howard League argues—

[140] A National Audit Office report published in November 2013 highlighted the overcharging and found, for example, that G4S charged 3000 pounds per day for 612 days for tagging an offender who had been sent to prison 20 months earlier when the company removed the equipment and G4S billed the MoJ for 4700 pounds for tagging an offender even though his monitoring equipment had been removed 935 days earlier.

[141] As set out in *Transforming Youth Custody*: putting education at the heart of detention consultation, February 2013, available at – https://consult.justice.gov.uk/digital-communications/transforming-youth-custody and the Government's response to the consultation published in January 2014.

[142] Government says that replacing YOIs and STCs will "*enable us to withdraw from some of the most expensive youth custodial provision, generating substantial savings*." (Government response to consultation, para 5). It estimates that reducing the number of places of detention in the youth estate will "*enable a Secure College to achieve an operating cost significantly below the 100 000 pound current average cost of a place in youth custody*" (para 4.) Financial savings are again emphasized in relation to the 'pathfinder' Secure College in the East Midlands which will "*enable us to withdraw from existing custodial capacity which serves these regions…realizing significant ongoing savings from the pathfinder alone*". (para 16).

[143] Government response to the consultation, para 2.

[144] In the Lord Chancellor's foreword to the Government's response to the consultation he acknowledges that 86% of boys in YOIs have been excluded from school at some point; over half of 15-17 year olds have the literacy and numeracy level expected of a 7-11 year old and that 18% of children in custody have a statement of special educational needs.

> "*addressing in particular the high number of children held on remand, the majority of whom do not go on to receive a custodial sentence and the excessive number of children in prison for non-compliance. For the small fraction of the existing children's prison population who truly require custody, the network of small, localised Secure Children's Homes represents the best model for success. These homes put the welfare of the child first and provide an education that offers a wide curriculum… Deploying the money intended for a Secure College on Secure Children's Homes and crime prevention would produce significantly more effective outcomes for the taxpayer and children."*[145]

Schedule 4, paragraphs 8 and 10: Use of Force

12. The Government says that it wants education to be at the centre of the new mandate for youth custody and to better vet and train those detaining and working with young people in detention. However the legislative scheme specifically allows for use of force to enforce 'good order and discipline'. Schedule 4, paragraph 8 provides that use of force can be used among other things[146] to "*(c) to ensure good order and discipline on their part" and paragraph 10 provides that a custody officer may "use reasonable force where necessary in carrying out duties in paragraphs 8 and 9*." This would allow staff at Secure Colleges to use force against children who, for example, refuse to follow an instruction or break a rule.

13. The use of force against children in detention to enforce good behaviour is contrary to basic human rights standards and notions of decency. It has also recently been found to be unlawful by the Court of Appeal. In June 2007 the Government amended secondary legislation, pursuant to the *Criminal Justice and Public Order Act 1994*, in order to explicitly allow force to be used to enforce good order and discipline (GOAD) in STCs.[147] In *R(C) v Secretary of State for Justice [2009]*[148] the Court of Appeal interrogated the amended Rules and the Government's reasoning for use of force to enforce GOAD and held that the amended rules were unnecessary and in breach of Article 3 of the European Convention on Human Rights as incorporated by the *Human Rights Act 1998*. It follows that primary legislation allowing for such use of force for identical purposes is incompatible with human rights standards and we are puzzled and concerned that the Government seeks to re-legislate in manner that is clearly unlawful.

14. Since April 2000, sixteen boys have died in youth detention. The tragic consequences of unnecessary use of force against children in detention is made all too clear in at least two of these deaths. In 2004 Gareth Myatt, 15, died in Rainsbrook STC as a direct result of use of force triggered by his refusal to clean a sandwich toaster. He was 4 ft 10 and weighed under seven stone, yet was restrained by three members of staff who ignored his shouts that he was unable to breathe. He died of 'positional asphyxia' after he choked on his own vomit. Also in 2004 Adam Rickwood, 14, took his life at Hassockfield STC, a few hours after being restrained for discipline purposes. Adam was restrained by staff when he refused, when asked, to move from a communal area to his room. At the second inquest in to Adam's death, the jury found that the use of force against Adam "more than minimally" contributed to his decision to take his own life. An internal review of deaths in youth custody published by the Youth Justice Board in 2014 further found that -

> "*When Adam died in 2004, there was confusion at every level within the youth justice system about whether or not restraint for this purpose (maintaining the good order and discipline of the establishment) was lawful. This confusion led to a systemic failure to identify unlawful practice—an issue which was resolved in 2008 when the Court of Appeal ruled that the use of restraint for the purpose of maintaining good order and discipline in STCs was, and always had been, unlawful*."[149]

15. Confusion as to whether use of force to enforce GOAD is lawful will be re-ignited if the Government re-legislates for it.

16. Force should only ever be used where strictly necessary, for example to prevent a child doing harm to themselves or others. Following the deaths of Gareth Myatt and Adam Rickwood the Government commissioned an *Independent Review of Restraint in Juvenile Secure Settings* which reported in 2008 and proposed the following six principles for the use of restraint –

1. Force should be used only as a last resort.
2. Force should be used only to prevent the risk of harm.
3. The criteria for using force should be consistent across settings.
4. The minimum force necessary should be used, and this should be proportionate to the identified risk.
5. Only approved restraint techniques should be used.

[145] The Howard League for Penal Reform, Criminal Justice and Courts Bill Second Reading Briefing, February 2014.
[146] Custodial duties also include (a) to prevent their escape from lawful custody, (b) to prevent, or detect and report on, the commission or attempted commission by them of unlawful acts and (d) to attend to their well being.
[147] The Secure Training Centre (Amendment) Rules (2007) which replaced the Secure Training Centre Rules (1998).
[148] [2009] QB 657.
[149] *Deaths of Children in Custody: Action Taken, Lessons Learnt*, Youth Justice Board, 2014 available at - http://www.justice.gov.uk/downloads/youth-justice/monitoring-performance/deaths-children-in-custody.pdf

6. Force should only be used in the context of an overall approach to behaviour management, including de-escalation and debriefing, in which children and young people are actively involved.[150]

It is entirely unclear why this valuable learning cannot be reflected in the legislation the Government now seeks to pass. Ministerial assurances that secondary legislation will clarify that force should not be used to enforce GOAD ignore the mixed messages that the legislation will give. If the Government truly wants to prohibit use of force for this purpose it must remove the power from primary legislation. There is no justification for legislating a policy that is entirely contrary to the Government's stated intention. As the YJB finding makes clear, a conflict between primary and secondary legislation is likely to give rise to confusion in practice and will doubtless lead to force being used inappropriately. The price of not addressing this issue as the Bill passes through Parliament could be very high indeed.

Clause 18: Secure Colleges contracted out to private companies

17. Government states that it wants to attract a "*diverse and innovative range of new education providers into the youth custodial sector*" and says it is taking steps to ensure that "*custodial staff working with young people have the right skills for the job*.[151]" Yet, clause 18 allows private security firms to run the new Secure Colleges. This surely runs counter to the Government's stated aims for the ethos of Secure Colleges. Taken with Schedule 4, paragraphs 8 and 10, it means that private contractors will be licenced to use force against children who do not follow their instructions.

18. The private security firms that currently provide detention services in the UK are mired in abuse and financial scandals and dogged by administrative failings. All STCs are currently run by private security firms on behalf of the Youth Justice Board. G4S currently manages and operates 3 purpose-built STCs (Medway STC, Rainsbrook STC and Oakhill STC) as well as eight specially designed residential children's homes for young people with emotional and behavioural difficulties. Serco runs Hassockfield STC and GEO run a number of SCHs.

19. Gareth Myatt died at the hands of G4S security guards. Following the inquest into his death, the coroner wrote to the then Justice Secretary, to highlight G4S' dismal handling of the incident and failure to act on reports of abuse.[152] Commenting on the Joint Committee on Human Rights' report of Gareth's death, Buxton J in the Court of Appeal said it demonstrated "*an outrageous attitude on the officers' part"*[153] *and stressed that "Hassockfield STC is run by, and the Secretary of State relies on the evidence of, a man who…in these proceedings sought apparently unchecked by the Secretary of State, to argue that his contractual obligations were not binding*"[154]. More recently –

— A number of G4S employees were referred by Mr Justice Mostyn for prosecution for forgery and contempt of court in relation to an immigration appeal.[155] In the judgement Mostyn J said employees Tamara Burns, Marilyn Bennett and Matthew Newman were involved in 'corruptly redacting' an official certificate which helped bolster the case against an immigrant who was being deported from the UK.

— In October 2012 the Chief Inspector of Prisons published a report into Cedars in which G4S were criticised for using "non-approved techniques" during an incident where a pregnant woman's wheelchair was tipped up whilst her feet were held. The incident caused significant risk to the baby and was a "simply not acceptable" use of force.[156]

— In November 2012 a G4S security guard working at the SECC complex in Glasgow murdered a delegate at a medical science conference. Clive Carter, a G4S employee at the time beat a woman to death with a fire extinguisher. He was convicted in October 2013 and sentenced to 20 years imprisonment.[157]

[150] *Independent Review of Restraint in Juvenile Secure Settings*, 2008, Smallbridge and Williamson, available at - http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Review%20of%20restraint.pdf

[151] Government response to the consultation, para 21, which continues "*We are reviewing the core skills and competencies of senior custodial staff in YOIs…future recruitment campaigns for custodial staff in YOIs will require applicants to demonstrate their clear desire and commitment to working with young people as part of a rigorous assessment process. Current staff will be receiving further training…" Government further welcomes the fact that it received consultation responses from "academies, education providers and employers as well as established custody and care home providers – demonstrating the strength and appetite of the market to deliver a new form of youth custodial provision based around quality education and training provision. We look forward to continuing this discussion with providers as we move to introduce the first Secure College*".

[152] "Coroner tells Straw to act now on restraint in child prisons" *The Guardian,* 19 July 2007, http://www.theguardian.com/society/2007/jul/19/youthjustice.prisons.

[153] Ibid at footnote 7, para 12.

[154] Ibid at para 74.

[155] Following the decision in R(on application of AB) v Secretary of State for Home Department [2013] EWHC 3453 (Admin).

[156] Paragraph 1.52, Report on an announced inspection of Cedars Pre-Departure Accommodation by HM Chief Inspector of Prisons (30 April – 25 May 2012) available at - http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/cedars/cedars-2012.pdf

[157] "Clive Carter jailed for life for Khanokporn Satjawat SECC murder" BBC News, 29 October 2013, available at - http://www.bbc.com/news/uk-scotland-glasgow-west-24727644.

— In October 2010 three G4S guards held down and killed Jimmy Mubenga as they restrained him during deportation. On 13 July 2013 an inquest jury found that Mr Mubenga's death was caused by G4S guards "using unreasonable force and acting in an unlawful manner".[158]

Size and funding

20. The proposed size of Secure Colleges and the spend per inmate will likely work against the central objectives of reducing re-offending and improving life chances for children in custody. Secure Colleges are intended to be vastly bigger than YOIs and STCs. The first 'pathfinder' 320-place Secure College is due to be built in the East Midlands in 2015 and to open in 2017. History teaches that large detention facilities inevitably become more difficult to manage and that security and discipline challenges overtake education and training objectives in these environments. At the same time, the spend will be similar to the spend per head in YOIs which are currently unable to meet their target of 15 hours education a week and much less than the spend per head in STCs.

Mixing vulnerable children of different ages and gender

21. We are also concerned about the implications of placing children classified as vulnerable in large prisons; detaining younger and older children together and mixing boys and girls. Children classified as vulnerable are accommodated in SCHs or STCs rather than YOIs. STCs are divided into—males between 12–14; females between 12-16; males between 15–17 and females aged 17. The Government says "*We anticipate retaining some specialist custodial provision for the very youngest and most vulnerable people remanded or sentenced to custody by the courts, but our vision is for Secure Colleges to cater for the vast majority of young people in custody."*[159] And later *"Older and more resilient young people will be accommodated in larger living units, while those who are younger and more vulnerable will be accommodated separately in smaller blocks*."[160] Further, "*the larger sizes of Secure Colleges will allow a broader curriculum and range of services to be provided at a lower cost, without any compromise in the safeguarding of young people*."[161] It seems to be implied that even very young girls will be detained in facilities with boys including older boys. Liberty is concerned that staff will not be able to ensure safety of girls and younger detainees. It is also the case that bullying and peer pressure are more likely to come into play by mixing physically and emotionally stronger and weaker children.

Risk of increased use of custody

22. Finally Liberty is concerned that excessive rhetoric around the (yet to be proven) educational credentials of secure colleges will encourage sentencers to see them principally as educational establishments and impose greater numbers of longer custodial sentences on children. As the Howard League have pointed out –

> "*The construction of Secure Training Centres in the late 1990s, along with the introduction of the Detention and Training Order, provides a cautionary tale of the effect of such an approach: the promise of training and education saw the number of children in custody rise dramatically, so that by 2007 over 3000 children were behind bars*."[162]

Government should be alive to this risk and ensure that it does not perversely encourage greater use of child custody.

Clauses 24 – 28: Trial by single magistrate on the papers

23. Clauses 24 - 28 of Part 3 provide for a power for a single Magistrate to deal with summary cases, not punishable with a sentence of imprisonment, on the papers. It is proposed that the procedure will operate where a defendant does not serve notice of her wish to be tried in court or an intention to plead guilty or not guilty having been served with a written charge. Consent to be tried on the papers, by a single magistrate, is therefore to be implied by omission. Magistrates will have discretion whether to apply the power and the procedure can also be set aside in circumstances where the defendant makes a statutory declaration that they did not know of the procedure.

24. In the Coalition Agreement, the Government promised to "*protect historic freedoms through the defence of trial by jury*."[163] This proposal will significantly harm the principle of trial by jury as well as that of open justice – two cornerstones of the British justice system.

25. For centuries, the common law principle that defendants are tried by their peers has allowed justice to be dispensed fairly and in a manner that commands public confidence. Lay magistrates, who currently

[158] "Jimmy Mubenga was unlawfully killed, inquest jury finds" The Guardian, 9 July 2013, http://www.theguardian.com/uk-news/2013/jul/09/jimmy-mubenga-unlawfully-killed-inquest-jury.
[159] Ibid, para 5.
[160] Ibid, para 16.
[161] Ibid at para 33.
[162] Ibid at footnote 6.
[163] The Coalition: Our Programme for Government, page 11, May 2010, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

hear less serious criminal cases,[164] are justified in accordance with the jury trial tradition on the basis that they are laypersons, neither legally trained nor professional judges, that act as peers. In recognition of this, the *Magistrates' Courts Act 1980* requires that criminal trial and sentencing is presided over by at least two magistrates. In practice three magistrates generally sit together and a mix in age, gender and ethnicity is sought as far as possible. Further Magistrates are employed on a voluntary basis with only their expenses paid.

26. The implications of the reform proposed in clauses 24-28 should not be underestimated. Currently magistrates have only very limited powers when sitting on their own, restricted to: hearing remand applications and issuing search warrants and warrants for arrest. Magistrates' panels on the other hand fulfil a substantial function in our criminal justice system and command significant power. They deal with approx. 97% of criminal cases in England & Wales and sit in Magistrates courts and Youth Courts. They hear and decide the outcome of cases (including both questions of law and fact) and pass sentence. They have the power to impose sentences of up to six months imprisonment as well as community penalties and fines of up to 5,000 pounds per offence. While it is not currently proposed that Magistrates should be able to sit alone and in private to determine cases that attract a sentence of imprisonment it is highly likely that once this procedure has been established further piecemeal reforms will be proposed.

27. It is impossible for a single magistrate to form a "panel of peers" and this will offend against the basic premise of trial by jury. Further, perceived flaws in the current lay magistracy system are addressed at least in part by the requirement that magistrates sit in open court and as a panel. These complaints will be exacerbated by the single magistrates process. Complaints about the current system include that the lay magistracy are not sufficiently representative of society;[165] that magistrates should not be charged with reaching decisions of both fact and law, that there is wide discrepancy in magistrate sentencing, and that they rely too heavily on legal clerks. Further, a magistrate deciding cases and sentences while sitting in private, fatally undermines the principle of open justice. The slow erosion of these bedrock principle risks dangerously undermining public trust and confidence in the criminal justice system over the long-term.

28. The proposal that basic fair trial protections will be waived by omission is further problematic. Think of those who may not read the notice or cannot read the notice either because they lack English language proficiency or have a disability. Defendants will not attend at court and so will not have the procedure and its implications explained to them. At the very least, the procedure should only be activated by a defendant explicitly filing notice to the effect that they wish to waive their rights in a manner which sets out in explicit terms that they understand the full implications of doing so.

29. The Government attempts to justify this proposal by reference to the cost of the current system. It is a fact of life that a decent and functioning legal system will cost a relative proportion of the public budget. Court buildings cost money to run and maintain, as does staff time. In reality, as a result, of the trial by jury system, the criminal justice system in England and Wales benefits from huge savings. Neither lay magistrates nor jurors are paid (above reasonable expenses incurred) and it is therefore difficult to see how the Government can justify slashing the trial by jury system on the basis of cost.

Clause 29: Criminal courts charge

30. Clause 29 creates a requirement for all criminal courts to impose a costs order on those it convicts. "Court costs" are defined as—"*costs of providing the judiciary and the rest of the system of courts*." It is proposed that the court charge will be mandatory and no financial limit is fixed in Bill—this is left to regulations to be made by the Lord Chancellor. This drastic proposal risks doing significant harm to the right to plead not guilty and the presumption of innocence.

31. There already exists a wide judicial discretion for costs orders in the criminal justice system in addition to a range of sentences[166] and other post conviction orders[167] that can impose financial liability. Section 18 of the *Prosecution of Offences Act 1985* grants Magistrates and Crown Court judges a discretion to award prosecution costs against a convicted person "*as it considers just and reasonable*." Costs can similarly be awarded where a criminal appeal is dismissed in the Crown Court or Court of Appeal. The Practice Direction on criminal costs orders makes clear that costs should be ordered by the Court under section 18 of the POA only where the "*court is satisfied that the defendant has the means and ability to pay*."[168] CPS guidance on costs further states that prosecution applications for costs should not be made if in the circumstances of the individual case "*it would*

[164] Currently, those charged with an indictable offence are sent – or for either way offences can elect to be sent - to the Crown Court to face a jury of 12 men and women drawn from all walks of life, tasked with reaching a fair conclusion on the case. Those charged with a summary offence are sent – or for either way offences can elect to go - to the Magistrates court.

[165] The majority of magistrates are within the 45-65 age range and overwhelmingly from professional and managerial backgrounds. That said, the gender and ethnicity make-up of the magistracy is largely representative of society and certainly much more so than the professional judiciary.

[166] Fines can be imposed as sentences both in the Magistrates and Crown Court. The former can impose fines of up to £5000 and up to £20,000 for offences under certain regulations, such as a breach of the health and safety in the workplace. In the Crown Court the fines can be limitless. The court will enquire into the financial circumstances of the offender and fix the fine at the level reflecting seriousness of the offence, taking account of the circumstances of the case and the means to pay.

[167] Confiscation orders imposing an obligation to pay a sum of money that reflects the benefit a convicted person received from his criminal conduct are available under the *Proceeds of Crime Act 2002* and courts are now required to impose the victim's surcharge in respect of offences committed on or after the 1st October 2012.

[168] Practice Direction on Costs in Criminal Proceedings at para 3.4.

be unmeritorious or impractical."[169] The guidance gives examples of where an application for costs would be inappropriate, including where "*it will cause undue hardship e.g. where it is clear that the defendant suffers from a serious physical or mental illness*" or where "*the defendant is in such dire financial circumstances that the Court are likely to consider the award of costs as oppressive*." It further suggests that where a long sentence or a hospital order is made, a costs award need not be made.

32. No such discretion or nuance is part of the proposal in clause 29. Instead it appears that the court charge will be mandatory, irrespective of circumstances of the individual or the nature of the case. This will have an oppressive impact. It will also act as a powerful disincentive to a not guilty plea. Innocent defendants faced with the prospect of a mandatory costs order in addition to higher sentence for a not guilty plea will be forced to weigh up whether they can afford to plead not guilty. This is shameful state of affairs for a criminal justice system with a proud reputation for fairness and integrity.

March 2014

Supplementary Written evidence submitted by Liberty (CJC 23)

LIBERTY'S COMMITTEE STAGE BRIEFING ON PART 4 OF THE CRIMINAL JUSTICE AND COURTS BILL IN THE HOUSE OF COMMONS

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at http://www.liberty-human-rights.org.uk/policy/

Introduction

The Criminal Justice and Courts Bill was introduced in the House of Commons on 5 February 2014. The Bill comes in five parts. Part 1 is entitled criminal justice and makes provision for sentencing, largely in relation to offences connected with terrorism. It also includes proposals to limit the use of cautions for serious offences or repeat offences except in exceptional circumstances and with permission of the Director of Public Prosecutions. Part 2 of the Bill sets out proposals in relation to young offenders, which include the creation of so-called 'secure colleges' as an additional custody option for young offenders. Part 3 contains wide-ranging changes to procedures in courts and tribunals. The part includes extremely worrying new powers for trial by a single magistrate on the papers for less serious offences unless the defendant serves a written notice specifying he or she wants to plead not guilty or wants a trial in open court. Part 3 would also introduce new charges to be levied towards criminal court costs to be paid by convicted adult offenders, would increase the upper age limit for jury duty to 75, and create a new offence of juror research. Part 4 focuses on changes to judicial review (JR) and Part 5 makes consequential provision.

This briefing paper focuses on the proposals contained in Part 4 of the Bill. The focus here on Part 4 reflects the gravity of Liberty's concerns about the proposals contained in that part and their position as part of a concerted attack on state accountability and equality before the law. We have prepared a shorter briefing on other aspects of the Bill.

Liberty is extremely concerned that the proposals contained in Part 4 of the Bill constitute a significant threat to the constitutional role of the courts in ensuring that the Executive acts within the law. In the absence of proper and sustainable justifications for changing JR, these proposals appear to be an attempt by the already exceptionally powerful executive to insulate itself from proper challenge, largely, although not exclusively, by erecting financial barriers to make it harder for individuals to pursue a claim. Provisions in the Bill would also permit future Governments to bypass Parliament if it wished to make changes to the content of the Bill. Part 4 would therefore create a system in which the Executive is increasingly free to act without regard for Parliament or the law. In a democracy predicated on the Rule of Law, this is surely unacceptable.

We encourage Members of Parliament to delete clauses 50, 51, and 53 from the Bill and to reform clauses 54 and 55. In the alternative we have set out in this briefing a series of suggested amendments which we hope would reduce the grave negative consequences of Part 4 by:

— Retaining judicial discretion as to whether or not to hear a 'no difference' argument (amendments 4 and 7)

[169] CPS Guidance on Costs available at - http://www.cps.gov.uk/legal/a_to_c/costs/#a05.

— Retaining judicial discretion as to whether or not to grant permission or relief in JRs where a 'no difference' argument has been made (amendments 2, 6, and 9)

— Raising the threshold to make a 'no difference' argument from 'highly likely' to 'inevitable' (amendments 3,5 and 8)

— Retaining judicial discretion as to whether to require parties to provide financial information to the court or tribunal and limiting the information provided to that of the extent of resources (amendments 11, 12 and 13)

— Removing the requirement that organisations which bring judicial reviews have to provide financial information about their members (amendments 14 and 16)

— Removing the obligation on the court to consider all the financial information provided under clause 51 when making costs orders (amendments 17 and 18)

— Requiring the Court to award costs against interveners only where it is in the interests of justice to do so (amendments 20 and 21)

— Allowing the Court to award a Costs Capping Order to an applicant or intervener at an early stage of proceedings (amendments 22 and 23)

— Preserving the role of Parliament in making any future changes to the provisions laid out in the Bill and in making changes to the future funding of JR. (amendments 24 and 26).

Background

Judicial Review

JRs operate in two phases. The applicant must first receive permission from the court to run a full claim. Permission can be received by a written or oral process in front of the court. Only once permission has been received can the applicant proceed to a full substantive hearing of the claim.

JR allows individuals, businesses and organisations to challenge the lawfulness of decisions or actions of the Executive, including Ministers, local authorities and other bodies exercising public functions. In a JR process, the court does not make an assessment of the merits of the execution of the Executive's power nor can it replace the decision of the relevant executive body with its own. Rather, it tests whether a decision was legal, rational and procedurally correct. If the decision did not meet these criteria, the court can order relief but cannot mandate the course of action to be taken by the public body. This narrow and supervisory form of oversight of the legality of executive decision-making is a limited but vital part of our delicate system of checks and balances which protect individuals from the arbitrary exercise of power by the state and which must exist for democracy to flourish. JR also occupies a central place within our framework for the protection of civil liberties, providing an essential means of enforcing human rights standards.

JR constitutes an effective and already streamlined mechanism for holding the state to account for the legality of its use of power. According to Government figures, in 2012 there were 12,600 JRs lodged, 7,500 of which were considered at the permission stage. Of these, 1,400 received permission to proceed to a full hearing.[170] The Government takes these figures as evidence that too many JRs are being pursued, and that too many JRs are weak claims. But this reveals a fundamental misunderstanding of the JR process and the factors that sit behind these statistics. First, when faced with a JR claim many public authorities which have been intransigent up to that point will concede that they have made a mistake, accounting for a significant number of withdrawals of claims even before permission stage. This self-correcting role has a widely acknowledged, healthy and economical effect on the entire justice system, facilitating the resolution of problems without the direct involvement of the court. Indeed, cases which attract an early settlement in this manner are likely to be amongst the strongest legal claims. Second, the courts themselves clearly have an effective process for filtering the cases that do reach permission stage. There are many safeguards to control the cases that proceed beyond this point. These include fulfilling the 'sufficient interest' test; court discretion to grant permission in full or only in respect of limited or certain grounds; JR as a tool of last resort after other avenues of redress (such as internal complaints, appeals etc.) have been exhausted; short limitation period; and the requirement to complete pre-action protocols that encourage early settlement. However, it is important that cases that do not receive permission are not automatically viewed as malicious or an undeserving abuse of process. JR is a highly technical and legal process and many of the cases inevitably concern the disputed borders of the law. It is entirely proper both that applicants should be given the opportunity to raise these cases and also that the courts have the opportunity to decline to hear them. Third, viewed as a proportion of the enormous and frankly incalculable number decisions made by the state and its agencies at a local and national level, the number of JR claims even lodged is tiny, or "infinitesimal".[171] The impact of the JR process on the exercise of executive powers is therefore limited.

Similarly, overall statistics on the number of total adjudicated decisions that were made in favour of the claimant at final hearing demonstrate that the system isn't generally being abused—with the Government's

[170] Ministry of Justice, *Judicial Review – proposals for further reform: the Government response*, February 2014, paragraph 7.
[171] Carol Harlow and Richard Rawlings, *Law and Administration* 3rd Edition, September 2009.

consultation paper explaining that "for cases lodged in 2011, around 40% of adjudicated decisions at the final hearings were made in favour of the claimant".[172]

Wider context of reform

The proposals contained in Part 4 cannot be viewed in isolation. Rather, they form part of a wider programme of reform that has reduced the accessibility of the justice system. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 significantly limited the availability of legal aid by both reducing the eligibility threshold and removing entire areas of law from the scope of public funding. At that time no changes were made to the funding of JR. The consultation paper set out that:

> "In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly."[173]

However in 2013 the Government also consulted on and confirmed a further round of legal aid reform, this time including JR.[174] Most worrying is the proposal for a 'residence test', which would require anyone who wishes to receive publicly funded legal advice – including for JR – to be able to demonstrate at least twelve months of residence in the UK.[175] This approach would completely undermine the notion that legal protection is available equally to all, and would make it increasingly difficult for vulnerable individuals to hold the state to account.

The Coalition Government then consulted on JR at the end of 2012[176] and subsequently shortened the time limit for bringing a JR from three months to six weeks in certain planning cases and to thirty days in certain procurement cases; removed the right to oral renewal (of an application for permission) where a case is assessed as without merit on the papers; and introduced a fee for an oral renewal hearing where permission has already been refused by a judge on the papers.

Consultation on JR reform

The Ministry of Justice issued an additional JR consultation paper, entitled *Judicial Review: proposals for further reform*, in September 2013. The changes in Part 4 of this Bill were tested in this paper and a number of other worrying proposals from that consultation paper will be taken forward outside of this Bill. These include proposals that costs incurred in the pre-permission stage by legal advisers funded under the legal aid scheme will only be recoverable if permission is granted or, if permission is denied, at the discretion of the Legal Aid Agency.[177] This would require legal aid practitioners to accept a potentially crippling financial risk in order to pursue a claim. The likely impact of this proposal would be to significantly reduce the prospects of a legally aided individual from finding a practitioner to take on their case.

The changes made in this Parliament to the justice system have been undeniably significant. Viewed cumulatively, their impact is to make it harder for individuals without the financial resources to spend on legal fees to bring cases. This effect is especially worrying when it insulates the state from challenge. It is an essential part of the Rule of Law that the rules of the land apply equally to all—including the state itself. And yet to add to these changes further barriers to justice smacks of a Government using its power to escape legal accountability and to deny the protection of the law to those the Government is meant to serve.

The case for reform?

In both the consultation on proposals for further reform and in its response, published in February 2014 the Government failed to make the case for reform of JR.[178] Both documents claimed that there has been a massive and out of control growth in the use of JR, stating that in the period from 1998 to 2012, JR applications grew from 4,500 per year to 12,400.[179] However, as the consultation paper itself explains, "the main driver of growth was in immigration and asylum applications, which more than doubled between 2007 and 2012 and made up 76% of the total applications in 2012".[180] Therefore the complained of "massive expansion" of JRs was almost exclusively in the area of immigration and asylum and applications for JR other than in immigration and asylum cases have remained static. Responsibility for hearing immigration and asylum JRs has already been moved from the Administrative Court to the tribunals system, and it is anticipated that this will reduce two thirds of the volume of work of the Administrative Court. The problem set out in the consultation paper was somewhat misleadingly formulated as a reason for reform and in fact has already been addressed. The consultation

[172] Ministry of Justice, *Judicial Review – proposals for further reform*, September 2013, paragraph 15.
[173] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, November 2010, paragraph 4.16.
[174] Ministry of Justice, *Transforming Legal Aid: Delivering a more credible and efficient system*, April 2013 and Ministry of Justice, Transforming Legal Aid: Next Steps September 2013. .
[175] Ministry of Justice, *Transforming Legal Aid: Next Steps*, from paragraph 2.11.
[176] Ministry of Justice, *Judicial Review: proposals for reform*, December 2012.
[177] Ministry of Justice, J*udicial Review – proposals for further reform: government response*, September 2013, para 46.
[178] Ministry of Justice, *Judicial review – proposals for further reform*, and *Judicial review – proposals for further reform: government response.*
[179] Ministry of Justice, *Judicial Review – proposals for further reform*, page 8 footnote 4.
[180] Ministry of Justice, *Judicial Review – proposals for further reform*, paragraph 10.

response added that in the first nine months of 2013 there were 12,800 applications for JR lodged.[181] Not only does this slight increase hardly justify fears of a massive expansion, but it also says nothing about the area of law of those claims and how many of those claims even reached permission stage, let alone how many led to a full hearing. Also, there is no indication from the Government as to any change in the volume of decisions made by the executive over recent years. It is therefore entirely possible that as a proportion of the decisions made by the state, the number of JRs has actually decreased.

The Government also claims that unsuccessful JRs have a detrimental effect on economic growth. It is indeed the case that a properly functioning justice system will lead to the temporary suspension of activities while lawfulness is examined. That's the nature of justice. The Government's argument in this respect is similar to saying that the power of arrest needs to be curtailed because people are sometimes arrested, charged or prosecuted and not convicted. This is not evidence that the justice system is not working, but rather a necessary consequence of the fact that in a healthy and functioning legal system, not all legal action is going to succeed. Indeed if all JRs were successful the Government would no doubt be arguing that this was evidence of the need for even greater reform.

Importantly, there is no statistical analysis which demonstrates any negative link between JR and economic growth. This is unsurprising given the small number of JRs that are brought each year and the even smaller number that relate to infrastructure projects. Very little JR litigation is economically significant, relating as it does to housing, education, community care, prisons, police, mental health, and local authority services that involve vulnerable and disadvantaged claimants. According to statistics published in the journal Public Law, in the years 2000-2005, 85% of local authorities only attracted one or two JR challenges per year, with over half of those concerning housing issues.[182]

In the consultation document the Government also made claims that campaigning organisations were abusing the JR system.[183] However that same paper explained that on average campaigners bring only 50 JRs per year[184] —amounting to 0.4% of the total of JRs—and that these JRs tend to be relatively successful when compared to other JRs.[185] This suggests in fact that the use by NGOs and charities of the JR process is both limited and considered. Liberty is pleased to note that when confronted with its own evidence the Government dropped plans to ban third parties from bringing JR claims. But it is deeply worrying that despite this evidence to the contrary, the Government continued to claim that JR is being 'misused'[186] and has instead used the Bill to attempt to price out third parties from participating in JRs via the intervention process.

The Lord Chancellor also claimed in the Daily Mail that JR was a tool of the left-wing.[187] This reveals a fundamental misunderstanding of the JR process—which is to allow those who meet the legal requirements for bringing a claim to do so, regardless of financial means, political colour or power, or other extraneous factors. And once again, evidence belies the claim. Liberty—for example—is a non-party, cross-party organisation that will occasionally seek to participate in JRs. We do this not because of any party political motivations, but because it is an appropriate way to test whether the Executive – regardless of its political persuasion has behaved in accordance with law. And there are certainly plenty of examples of JRs in recent times brought by those not known for their left-wing leanings including the Countryside Alliance, the Daily Mail, the Daily Telegraph, sometime UKIP treasurer Stuart Wheeler, Conservative Peer Lord Rees Mogg and Conservative-run Councils. These applications have concerned decisions on matters diverse as ratification of the Lisbon Treaty, the high-speed rail link, fox-hunting and anonymity for journalists giving evidence to an inquiry into press conduct and ethics.

The Government has also claimed that it is introducing financial measures so that "those who bring weak claims face a more appropriate measure of financial risk".[188] It is extremely inappropriate for the Government to seek to use financial barriers to prevent individuals from pursuing legal claims. Such an approach will not only have a disproportionate impact on those with limited financial means, but financial barriers will also inevitably affect not only those with weak claims but those with strong claims. Not only has the Government failed to make its case as to why reform is needed, but the changes it has sought to introduce constitute an extremely blunt tool. The best mechanism for weeding out weak or unmeritorious cases is in fact the court itself, which in the case of JR has a large discretion to refuse to hear a claim. Instead of relying on this proven and trusted tool of judges, the provisions set out by the Government in Part 4 of the Bill will provide protection for executive actors who do not follow the law and will reduce justice across the board.

As a human rights organisation, Liberty undertakes policy, campaigning and legal work. In 2013, in total we represented clients in over 40 cases. We brought 5 JRs and we made 3 interventions. In 2012 we acted in over 35 cases, brought 4 JRs and made 8 interventions. As interveners, we have never had costs awarded against us, and we have once benefitted from a costs capping order. It is undeniable that a small but important part of our work would be made harder by the changes in this Bill. But the reason we bring and intervene in JRs is also

[181] Ministry of Justice, *Judicial Review: Proposals for further reform*: the government response, paragraph 7.
[182] Maurice Sunkin et al.. Public Law (2007) 545 p.550.
[183] Ministry of Justice, *Judicial Review: Proposals for further reform*, para 7.
[184] Ministry of Justice, *Judicial Review Proposals for Further Reform*, para 78.
[185] Ministry of Justice, *Judicial Review Proposals for Further Reform*, para 78.
[186] Ministry of Justice, *Judicial Review – proposals for further reform: the Government response* para 35.
[187] Lord Chancellor, *The Daily Mail*, 6 September 2013.
[188] Ministry of Justice, *Judicial Review – proposals for further reform: Government response*, para 41.

the reason why we have prepared this briefing: we believe that it is important that the executive is accountable for its use of power. As part of our constitutional settlement, it is imperative that the courts can check whether the executive is correctly applying the laws set out by Parliament. We are concerned that the changes in this Bill will erode the actual and perceived ability of the court to do this. We strongly encourage Members of Parliament to protect the UK's delicate balance of powers and to keep the executive in check by amending this Bill.

CLAUSE 50—'NO DIFFERENCE'

Amendment 1

Page **51**, Line **35**, **delete clause 50**

Effect

This amendment would remove clause 50 from the Bill.

OR—

Amendment 2

Page **52**, Line **3**, **leave out 'must'** and **insert 'may'**

Effect

This amendment would allow the high court judge in a JR hearing to retain discretion as to whether or not to grant relief in 'no difference' cases rather than require him or her to refuse relief.

Amendment 3

Page **52**, Line **7**, **leave out 'highly likely'** and **insert 'inevitable'**

Effect

This amendment would raise the threshold at which a 'no difference' argument can be made in a JR from when it is 'highly likely' that the conduct complained of would have made 'no difference' to the outcome to when it is 'inevitable'.

Amendment 4

Page **52**, Line **15**, **leave out 'and'**

Page **53**, Line **16**, leave out **subsection (b)**

Effect

This amendment would allow the judge in a JR permission hearing to retain discretion as to whether or not to consider a 'no difference' argument rather than requiring him or her to hear the argument if raised by the defendant.

Amendment 5

Page **52**, Line **18**, **leave out 'highly likely'** and **insert 'inevitable'**

Effect

This amendment would raise the threshold at which a 'no difference' argument can be made in a JR permission hearing from when it is 'highly likely' that the conduct behaved of would have made 'no difference' to the outcome to when it is 'inevitable'.

Amendment 6

Page **52**, line **19**, **leave out 'must'** and **insert 'may'**

Effect

This amendment would allow the court judge in a JR hearing to retain discretion as to whether or not to grant permission in 'no difference' cases rather than require him or her to refuse permission.

Amendment 7

Page **52**, Line **38**, **leave out 'and'**

Page **53**, Line **39**, **leave out subsection (b)**

Effect

This amendment would allow a tribunal judge to retain discretion as to whether or not to hear a 'no difference' argument when considering whether to grant permission for JR rather than requiring him or her to do so if raised by the defendant.

Amendment 8

Page **52**, Line **44**, **leave out 'highly likely'** and **insert 'inevitable'**

Effect

This amendment would raise the threshold at which a tribunal judge could consider a 'no difference' argument when considering whether to grant permission from when it is 'highly likely' that the conduct complained of would have made no difference to the outcome to 'inevitable'.

Amendment 9

Page **52**, Line **45**, **leave out 'must'** and **insert 'may'**

Effect

This amendment would allow a tribunal judge in a JR hearing to retain discretion as to whether or not to grant relief when it appears that the conduct complained of would not have affected the outcome of the decision rather than require him or her to refuse relief.

Briefing

Under clause 50, a court or tribunal would be required by law to refuse to grant relief if it appears to the judge highly likely that the outcome for the applicant would not have been substantially different if the procedural incorrectness complained of had not occurred. Clause 50 would also require the judge to consider 'no difference' arguments if raised by the defendant at the permission and substantive hearing stages. The clause makes similar provision for JRs heard in tribunals rather than the High Court.

At the moment, the courts can already apply a 'no difference' principle in much more limited circumstances. Under the current approach, when a court is satisfied that the outcome of a decision would 'inevitably' have been the same if the defect complained of had not occurred, it can refuse to grant the remedy sought. These arguments can, in principle, be made at any stage but tend to be heard at the substantive JR hearing.

A JR can be brought on the grounds that the decision made by a public body was procedurally incorrect. Historically, a procedurally incorrect decision was known as one which breached the rules of natural justice. The two elements of procedural correctness are the rule against bias and the duty to act fairly. Often, JRs on this ground will concern the issue of whether consultation took place and whether those affected by a decision were given the chance to make their case during the decision-making process.

This ground of review sums up the essence of JR and why it matters. Concerned not with the outcome or the merits of the decision, it reflects the fundamental importance of lawful, transparent and fair decision making by those exercising public powers. The repercussions of arbitrary of biased decision making are felt widely, undermining confidence in public bodies and driving down standards. Even where individuals are not satisfied with the outcome of a decision-making process, the fact that they have been given a fair hearing often serves to satisfy their sense of justice and promotes trust in state institutions and democratic processes.

Technicalities?

It has been remarked by the Lord Chancellor that clause 50 relates only to "technicalities".[189] In a sense, that is true, but not in the seemingly derogatory way in which it was intended. It is no insult to the process to say it requires decisions to be made in accordance with law and guidance and in a rational and even-handed fashion. Do we really want to suggest that the process by which executive decisions are made is a matter of little consequence? If a poorly performing public authority randomly stumbles on the right answer without process or reason, does the Lord Chancellor really believe there is no cause for judicial oversight? Such an approach would have extremely serious implications for administrative decision-making affecting all areas of our lives. If 'technical' breaches of the rules of natural justice are permissible, why not have a defence of 'technical' illegality to criminal offences? This argument also ignores the fact that many significant and important JRs are brought on the grounds of procedural impropriety. The internationally famous Pinochet No 2[190] case was brought on the grounds of bias. The less famous but equally important case—Coughlan[191]—which concerned the closure of a care home despite the promise made to severely ill and disabled individuals in long term care that the home would be theirs for life—also concerned procedural impropriety. These are cases that matter.

[189] Second Reading debate of the Criminal Justice and Courts Bill, 24 February 2014, Hansard at column 58.
[190] R v Bow Street Stipendiary Magistrate, ex parte Pinochet (no 2) [2001] 1 AC 119.
[191] R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 (CA).

Alter the nature of JR

Liberty is concerned that by requiring judges to refuse to grant relief where it would be 'highly likely' rather than 'inevitable' that the outcome would have been substantially different necessarily alters the nature of JR. It forces the judiciary to move away from pronouncing on whether the decision was legally correct and properly taken, and instead asks them to place themselves in the position of the decision maker. It fundamentally undermines the purpose of JR, which is to test not for outcome but for compliance with law and process.

At the Second Reading of the Bill, some concern was expressed that JR has moved beyond its procedural review function. Mr Nick Herbert MP stated that "*…decisions by the courts are increasingly substituting for decisions that should be made by Ministers*."[192] And Mr Robert Neill MP claimed that many "*… believe that rather than being a process of procedural review—an administration of the propriety of decision making—judicial review should be used as re-run of the merits. That is not what it was ever intended to be*."[193]

There was no evidence adduced to support the claim that courts exceed or confuse their jurisdiction in JR processes, but the changes proposed at clause 50 would certainly make these concerns more rather than less likely to materialise. The Lord Chancellor himself stated that clause 50 would mean that "*cases…cannot simply be brought on a technicality relating to the process*". Requiring judges to consider the merits of a decision rather than the so-called 'technicalities' of the process is constitutionally inappropriate.

In a democracy under the Rule of Law, it is imperative that public bodies are required to behave in accordance with the law. JR is a mechanism for testing legality in a particular case but also helps to create an environment in which public bodies know that consequences will follow if they act with disregard for the law. Completely removing the discretion for judges to grant relief in cases where a 'no difference' argument has been made out —regardless of the nature of the conduct of the defendant—by requiring the court to refuse *any* relief, removes a key incentive for public bodies to exercise their powers properly.

Circumvent accountability

Giving defendants the opportunity to raise a 'no difference' argument at the permission stage of JR rather than at the full hearing gives the decision-maker the opportunity to circumvent a full hearing about the way in which they made a decision, reducing the opportunity for the substantive claim to be fully examined. This will even be in cases where it is possible that, had the public authority used its powers appropriately, the outcome for the applicant would have been different.

The judiciary was concerned that this approach would lead to lengthy dress rehearsals of the main arguments at the permission stage, in fact reducing the efficiency of the JR process.[194] However, in its response to the consultation the Government dismissed these concerns by stating that the risk of dress rehearsal is 'manageable' and that JRs in this context are not a good use of time or money.[195] It is odd that the Government is so willing to rely on the discretion and skill of the court to negate this risk but elsewhere seek to reduce judicial discretion to an absolute minimum.

Conclusion

Liberty is seriously concerned about the message clause 50 sends to decision-makers. JR is a safeguard against poor and unfair decision making, which is itself a serious problem. Public bodies and their agents should not be accorded greater freedom to adopt a cavalier approach to their legal duties. Removing the clause from the Bill would not mean that 'no difference' arguments cannot be made, but would mean that public bodies would operate in the shadow of the courts, knowing that if they do not follow the rules of natural justice then they will be liable to account for it.

Clause 51 – provision of financial information

Clause 51 would require an applicant seeking permission to apply for JR to provide information about the source, nature and extent of their financial resources. The exact details of the information to be provided will be contained in regulations. Clause 52 would require the court to then take this information into account when determining the payment of costs.

Amendment 10

Page **53**, Line **7**, **delete clause 51**

Effect

This amendment would delete the clause on provision of financial information about financial resources from the Bill.

OR—

[192] Second Reading debate of the Criminal Justice and Courts Bill, 24 February 2014, Hansard per column 76.
[193] Second Reading debate of the Criminal Justice and Courts Bill, 24 February 2014, Hansard per column 57.
[194] Senior Judiciary of England and Wales, *Response to Judicial Review: Proposals for Further Reform*' para 22.
[195] Ministry of Justice, *Judicial Review: proposals for further reform: government response*, para 38.

Amendment 11

Page **53**, Line **16, insert "or the Court has ordered that such prescribed information need not be provided in whole or in part**."

Effect

This amendment would allow the judge to retain discretion not to require the parties to provide all or any of the financial information set out in the clause prior to commencing a JR process.

Amendment 12

Page **53**, Line **20**, **delete "source, nature and"**

Effect

This amendment would remove the requirement for applicants to provide information about the source and nature of their financial resources. The applicant would still be required to provide information about the extent of their resources.

Amendment 13

Page **53**, Line **21**, leave out **"likely to be available"**

Effect

This amendment would remove the requirement that the applicant has to supply the court with information about financial resources likely to be (as opposed to actually) available to them prior to commencing a JR.

Amendment 14

Page **53**, Line **22**, **leave out "and"**

Page **53**, Line **23**, **leave out subsection (b)**

Effect

This would remove the requirement that if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources to meet liabilities arising from the JR, it has to then provide information to the court about its members and their ability to provide financial support.

Amendment 15

Page **53**, Line **43**, leave out **"likely to be available"**

Effect

This amendment would remove the requirement that the applicant has to supply the tribunal with information about financial resources likely to be (as opposed to actually) available to them prior to commencing a JR.

Amendment 16

Page **53**, Line **44**, **leave out "and"**

Page **53**, Line **45**, **leave out subsection (b)**

Effect

This would remove the requirement that, if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources to meet liabilities arising from the JR, it has to then provide information to the tribunal about its members and their ability to provide financial support.

Briefing

We understand the need for the Court to be in a position to make an assessment of the capacity of an applicant to pay costs. However we do not understand why the 'source' and 'nature' of these resources are relevant to this assessment. In fact, it is not entirely clear what exactly these terms will mean. Similarly, we are concerned by the requirement that organisations provide financial information about their members.

The Government claims that these clauses are necessary because JRs are being driven by non-parties to a claim.[196] Even if a JR is funded by a third party, it seems extremely unlikely that this fact will have a bearing on the merits of the case. If an applicant is able to demonstrate that they have an arguable case and meet the rules of court on matters such as time limits and standing, they should be given a fair opportunity to make their case

[196] Ministry of Justice, *Judicial Review – proposals for further reform: the Government response* para 63.

and should not be obstructed from doing so by onerous requirements to provide what may constitute personal financial information.

As noted elsewhere, the Government is seeking to restrict significantly the availability of public funding for bringing JR claims. A number of requirements of the clause are exceptionally vague and Liberty is concerned that the details of this process of information provision—to be set out separately—will impose a heavy bureaucratic burden on claimants and will possibly spawn satellite litigation about the extent of disclosure required and conflicting obligations of confidentiality. Proposals requiring organisations to declare information about their members seem particularly disproportionate and intrusive. For organisations with large membership numbers, the practical and principled difficulties of gathering and sharing this information would be huge. Ultimately, this provision is liable to act as a deterrent to those who wish to apply for JR.

If the judge considers financial information is necessary then he or she can ask for it. Making it mandatory that such information is provided is bureaucratic and unnecessary. We encourage Members of Parliament to test the case for this clause.

Clause 52 – use of financial information

Clause 52 would require the court or tribunal to take into account the financial information provided under clause 51 when determining costs. It also requires the court or tribunal to consider whether to order costs to be paid by a person other than a party to the proceedings on the basis of information provided under clause 51.

Amendment 17

Page **54**, Line **7**, **leave out "must"** and **insert "may"**

Effect

This amendment would retain judicial discretion as to whether or not to have regard to the information provided under the process set out at clause 51 when determining costs.

Amendment 18

Page **54**, Line **13**, **leave out "must"** and insert **"may"**

Effect

This amendment would retain judicial discretion as to whether or not to consider whether to order costs against a person other than a party to the proceedings.

Briefing

The requirements set out at clause 51 are already disproportionate and bureaucratic. But by also requiring judges to consider all the information that the clause 51 process generates and to consider whether to award costs orders against third parties would only serve to exacerbate the excessive nature of clause 51. The court is already able, if it considers it appropriate, to consider financial information and to award costs. By making it mandatory that courts undertake this evaluation exercise, the Government moves ever further away from its claimed objective of creating a more streamlined JR system.

Conclusion

Liberty would welcome further clarity about the purpose of clause 52 and encourages Members of Parliament to challenge this disproportionate incursion into judicial discretion.

Clause 53 – Interveners

In JRs, expert organisations will sometimes be granted permission from the court to 'intervene'. This usually entails submitting oral or written legal analysis for the court to consider. Under clause 53, if a third party seeks to intervene in a JR, it would be required to pay its own costs. It would also be required to pay any costs specified by the parties to the case listed as incurred as a result of the intervention. Only in 'exceptional circumstances' would the court have discretion to order otherwise.

Under the current system, interveners tend to cover their own costs and in return the court will not normally order the intervener to pay the costs of the other parties. However the court—which has a wide ranging discretion in relation to interventions, such as to whether to allow an intervention, to direct the issues an intervention may cover etc.—also has discretion as to costs and so may make a costs order, notably where an intervention has been misguided or conducted in an inappropriate manner.

Amendment 19

Page **54**, Line **27**, delete clause **53**

Effect

This amendment would remove clause 53 from the Bill.

OR –

Amendment 20

Page **54**, Line **37**, **delete "must"** and **insert "may"**

Effect

This amendment would allow the judge to retain discretion as to whether or not to make a costs order against an intervener rather than requiring him or her to do so.

Amendment 21

Page **54**, line **36**, **leave out subsections (4), (5) and (6)** and **insert**:

(-) On an application to the High Court or the Court of Appeal by a relevant party to the proceedings, the court may order the intervener to pay such costs as the court considers just.

(-) An order under subsection (4) will not be considered just unless exceptional circumstances apply.

(-) For the purposes of subsection (5), exceptional circumstances include where an intervener has in substance acted as if it were the principal applicant, appellant or respondent in the case.

Effect

This amendment would allow judges to award costs against interveners where the court considers it is 'just' to do so rather than requiring them to award them. It sets out that it will only be 'just' in exceptional circumstances, which include where the intervener has acted as if it were the principle applicant in the case.

Briefing

Interventions are largely considered to add value to the legal process, allowing the court to benefit from the insight, knowledge and experience of experts in a particular field. Many interventions made by NGOs or charities are in fact prepared by very experienced lawyers acting on a pro bono basis, meaning that the court can benefit from the analysis offered to it by national and international experts rather than just rely on the partisan submissions made by the parties to the case. Rather than complicate matters and prolong or confuse the JR process, often these interventions help to untangle the relevant law. In its response to the government's 2013 consultation, the judiciary noted that the fact that very few costs orders are made against interveners "*reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties*."[197]

Interveners driving JRs?

Interveners do not 'drive' JRs. Rather, they provide analysis on a process that is already taking place. During the Second Reading debate on the Bill, the Lord Chancellor was asked whether the proposals on interventions would risk making it hard for people to intervene even though it would be constructive for them to do so. The Lord Chancellor replied that:

> "*My real concern is when pressure groups use individuals as financial human shields in cases that the groups wish to bring. They find someone who has no financial means, use them to challenge the government, and whether or not they win, the Government—that is, the taxpayers—are guaranteed to have to pay the bill*."[198]

The Lord Chancellor provided absolutely no evidence to support the claim that interveners use individuals as 'financial human shields'. Such a claim also completely disregards the fact that the court has total discretion as to whether or not to allow an intervention. A judge will consider both whether an intervention (a) is a valid use of court process and (b) will add any value to the legal process. A party who wishes to intervene will ordinarily write to both parties to a JR in advance and therefore each party will have the opportunity to explain to a judge if they object to the intervention. Under current practice, if a judge *does* allow an intervention and considers that the intervention was conducted inappropriately, it is open to him or her to order the intervener to pay costs. This system therefore contains safeguards to prevent and censure abuse of process and to ensure that the intervention is not a waste of time. Amendment 21 would replicate the current position for costs against interveners in JRs and reflects also the Rules of the Supreme Court, which set out that costs will not normally be awarded for or against interveners, but may be awarded where the intervener acts like a main party to the process.[199]

[197] Senior Judiciary for England and Wales, *Response to Judicial Review: proposals for further reform*, para 37.
[198] Second Reading Debate of the Criminal Justice and Courts Bill in the House of Commons, 24 February 2012, Hansard per column 56.
[199] See Supreme Court Rules, Part 7, Rule 46(3).

Financial interest?

In its consultation response, while accepting that interveners often support the court to establish facts and context, the Government then explained that interveners should have a 'more proportionate financial interest in the outcome'.[200] This approach fundamentally misunderstands the nature of interventions, which are not about financial interest but rather about helping the court to reach the correct legal answer. But by exposing interveners—many of which are charities or NGOs without significant income—to uncertain and prohibitively high costs risks, the Government will significantly reduce the capacity of third parties to lend their expertise to the JR process. Parties making interventions do not stand to make a profit from their intervention, so it is illogical to tie their participation to their capacity to pay for the costs of others.

It is worth reiterating that judges already must give permission for an intervention and the judge retains discretion as to the issues to be covered by the intervention. In practice, judges will often be directive as to what the intervention can cover. In a sense, the better the intervention—in that it adduces different points to those raised by the parties—the more of a disincentive clause 53 will be to participation. Ultimately, it would be our justice system and the fair resolution of cases which pays the price for this change.

Liberty interventions

Liberty intervenes in cases to provide expert evidence to assist the court in complicated areas of law and policy. Our interventions can only be made where the court considers that we will add value to the legal proceedings. We intervened in the case regarding DNA collection and blanket retention on arrest under section 64 PACE. In assessing the distinction between DNA samples and DNA profiles in the Court of Appeal, Sedley LJ took this view of Liberty's submission—

> "*This is why I have found Liberty's written submission of great assistance. It avoids the polar positions adopted, as tends to happen in litigation, by the parties and instead reasons by degrees. The distinction which Liberty draws between DNA profiles and the bodily samples from which the profiles are derived is in my judgment crucial to what we have to decid*e."[201]

Far from overcomplicating matters, third party interventions can help to untangle difficult areas of domestic legislation, regulation and case law. As Lord Neuberger (then Master of the Rolls) observed in *Ladele v Islington London Borough Council (Liberty, intervening)*[202] in the Court of Appeal, approving our approach—

> "*Liberty's argument is simple, and is based purely on the natural meaning of the 2007 Regulation.*"

In another, very recent, example of the value of third party interventions in important JRs, in *HC v Secretary of State for the Home Department and Metropolitan Police*[203] the High Court considered whether the Home Secretary had acted irrationally in refusing to change the rule that 17 year olds should be treated as adults for the purposes of criminal custody. This followed two tragic cases of suicide following the separate arrest and detention of two 17 year old boys. The High Court found that the Home Secretary's refusal to treat 17 year olds as children for the purposes of custody breached Article 8 of the *Human Rights Act 1998*. In Annex B to the judgment the Court said -

> "*Much of the substantial material with which the court was provided came as a result of the submissions of the two interveners... Many of the important arguments were not contained in the claimant's submissions but rather emerged, if one delved into the interstices, within the intervener's submissions*."

Conclusion

A good quality intervention which provides a different analysis and raises additional questions may well require the defendant to put further work into a case. However if the court has allowed an intervention then it must consider that this extra work is necessary and is in the public interest. Making it financially impossible for interveners—often charities or NGOs without access to substantial funds—to help courts to consider the relevant issues and reach the right answers is not in the interests of justice. We strongly encourage Members of Parliament to amend or delete this clause.

Clause 54 – Costs Capping Order

Clause 54 would set out the conditions to be met and process to be followed in order for a 'costs capping order' (CCO) to be made. A party will have to apply for a CCO under the Rules of Court and the Bill suggests that these rules may make reference to the provision by the party of information about the source, nature and extent of its financial resources. The court will only be entitled to make a CCO if it decides that the JR would constitute public interest proceedings and if the applicant would reasonably have to withdraw from proceedings in the absence of an order. The Bill restricts the definition of public interest proceedings to those in which an issue of general public interest is at stake and the public interest requires that the issue be resolved. Clause 54

[200] Ministry of Justice, *Judicial Review—Proposals for further reform the government response*, para 62.
[201] R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire [2002] EWCA Civ 1275 paragraph 72
[202] [2009] EWCA Civ 1357.
[203] [2013] EWHC 982 (Admin).

does set out a list of factors for the court to take into account when deciding if proceedings are in the public interest (such as the number of people likely to be affected) but also provides that these sections can later be amended by statutory instrument.

Amendment 22

Page **55**, Line **22**, **leave out subsection (3)**

Effect

This amendment would remove the requirement that a CCO can only be awarded if permission to apply for JR has been granted.

Briefing

In a case between a public authority and a private individual or small NGO, there will ordinarily be a very significant disparity in resources. Save for those individuals who are of extremely limited means and qualify for legal aid support (an ever dwindling number thanks to brutal cuts to the system) or are extremely wealthy and can fund litigation privately, most people could not afford to take on the Government or a public authority if they were potentially liable for all of the costs of a case. In recognition of the chilling effect of costs liability on public law challenges, the courts developed the Protective Costs Order (PCO). PCOs can currently be made at an early stage in litigation and place a cap on the claimant's (or, rarely, the defendant's) liability for the costs of the case, making legal challenge a viable option. They are designed to facilitate cases of significant public importance, which involve issues that should be resolved in the public interest.

We welcome the Government's endorsement of the importance of orders allowing costs to be capped. It is an admission of the central role that judicial review plays in protecting the public interest against illegal behaviour of the state and is a welcome recognition of the principle that justice should be open to all.

However it is extremely troubling that the Government is set to undo this good work by preventing applicants from applying for an order until after the permission stage of the JR process. The legal work undertaken up to and including the permission stage of JR can sometimes be significant. If it is incumbent on the applicant to accept the risk of a huge costs order at early stages of the process, it seems likely that very few individuals or organisations will be in a position to initiate JR claims, even if it is possible that at a later stage of proceedings a CCO would have been made. This undermines the rationale behind costs-capping, as hardly any claims will even get to the permission stage. This provision (clause 54(3)) almost completely negates the value of the clause in general.

Amendment 23

Page **55**, Line **25**, after "judicial review" **insert "or any intervener"**

Effect

This amendment would allow interveners to apply for CCOs.

Briefing

Unless changes are made to clause 53, interveners in JRs may be liable to pay significant costs of the parties to the case. Clause 54 represents an acceptance by the Government of the importance of ensuring that cases in the public interest are able to proceed regardless of the financial capabilities of the claimant. It follows, then, that if the court considers that an intervention will add value in the public interest, they too should be able to apply for financial protection from the court.

Amendment 24

Page **56**, Line **10**, **leave out subsections (9), (10) and (11)**

Effect

This amendment will delete subsections which will allow the Lord Chancellor by statutory instrument to make regulations which amend this clause.

Briefing

Clauses—often known as Henry VIII clauses—which allow primary legislation to be amended by subordinate legislation fetter the proper power of Parliament in scrutinising legislation. In this particular case, it is to be feared that secondary legislation will be used to restrict even further the availability of CCOs, stymieing all but the most deep-pocketed applicants from pursuing critical challenges against the state. It is important and appropriate that the courts retain some discretion as to whether a matter is in the public interest and the executive should not be in a position to seriously curtail the scope of CCOs without even the benefit of proper Parliamentary scrutiny.

Clause 55—CCO: orders and their terms

Clause 55 sets out the factors the court must take into account when considering whether to make a costs capping order. It also sets out other terms of CCOs.

Amendment 25

Page **57**, Line **8**, **Leave out "must"** and **insert "may"**

Effect

This amendment would retain judicial discretion as to whether a CCO should apply to both the applicant and the defendant.

Briefing

As noted above, the Government has recognised the importance of CCOs as a tool for ensuring that justice, in cases of public importance, is not blocked due to the financial limits of the applicant. We urge restraint when setting rules which will tie the hands of the court when it makes CCOs. The court must have flexibility to make a decision as to what the interests of justice require in each particular case.

Amendment 26

Page **57**, Line **12**, **Leave out subsections (3), (4) and (5)**

Effect

This amendment will remove subsections that will allow the Lord Chancellor to amend this Clause by statutory instrument.

Briefing

As noted at paragraph 54 above, clauses which allow primary legislation to be amended by subordinate legislation can fetter the proper power of Parliament in scrutinising legislation. Significant and substantial changes to primary legislation should be made by primary—not secondary—legislation.

New Clause: legal aid, judicial review and delegated legislation

Amendment 27

Insert:

(1) The Legal Aid, Sentencing and punishment of Offenders Act 2012 is amended as follows:

(2) In section 9, after "schedule" insert the following subsection:

(-) No order made pursuant to subsection 2(b) may vary or omit any services specified in paragraph 19, Part 1, Schedule 1 (Judicial Review).

Effect

This amendment would require any changes to the funding of judicial reviews under the legal aid scheme to be made by primary rather than secondary legislation.

Briefing

As noted elsewhere in this briefing, the proposals contained in Part 4 of the Bill are only part of package of reforms to JR that the MoJ intends to take forward. We are incredibly concerned that proposals such as the 'residence test' and limiting the availability of legal aid for JR will have a severely detrimental impact on the capacity of individuals to hold the state to account. This amendment would require the Ministry of Justice and the Lord Chancellor to engage properly with the democratic process in order to make such significant changes in the future.

March 2014

Written evidence submitted by the Newspaper Society (CJC 24)

1. The Newspaper Society represents regional and local news media companies which publish around 1100 local newspapers, read by 30 million people a week, with 1700 local media websites attracting 79 million unique users each month and ever developing digital information services. We are therefore chiefly interested in the proposed amendments to the Contempt of Court Act 1981 and other freedom of expression issues.

Contempt of Court: Clause 37

2. We appreciate that the Bill acknowledges the concerns of the media expressed during the Law Commission consultation. The qualified defence under clauses 37 and right of statutory appeal under s 159 in clause 38 of the Bill are intended to help address the problem recently created by two rulings by judges presiding over two Crown Court trials in July 2012, on the meaning of publication for the purpose of the Contempt of Court Act 1981 and use of an injunctive power under the Senior Courts Act 1981 in Crown Court proceedings, to restrain a feared future contempt. In the immediate cases, these resulted in orders to take down articles from a historic online archive and restrain the broadcast of a television programme. Without clarification of the law, media organisations could therefore be at risk of contempt, injunction and under onerous burdens of monitoring and censoring their historic archives of material lawfully published prior to proceedings becoming active. Although the media has questioned whether those cases were rightly decided, the legal issues have not been considered on appeal to the higher courts.

3. We appreciate that the Government has also decided against the introduction of any new specific power to order media organisations to take down or expunge material from their archives.

4. We would suggest that the Government's introduction of juror criminal offences addresses the actual problem, which is not the continued availability of material published prior to proceedings becoming active, but jurors searching out additional material, rather than reaching their verdict only upon the evidence presented to them in court.

5. Thus the Bill could clarify the contempt laws in a different way, without risk to fair trials or risk of undue development of the power of the Attorney General or the courts to interfere with freedom of expression which clauses 37 and 38 might permit.

6. In line with the media's submissions to the Law Commission, the Bill could be amended to clarify the law by providing a statutory definition of 'first publication' or an unqualified statutory defence. The Bill would only require slight amendment to clause 37 achieve this, through modification of the proposed new defence. Clause 37 (5) introduces a new clause 4A into the Contempt of Court Act 1981. The adoption of Clauses 4 A (1) -(2) and (7) - (8) would introduce such a defence, restore the previous understanding of the 1981 Act and put beyond doubt that publishers are not at any risk of strict liability contempt for material published by them prior to proceedings becoming active, whether such material remains' continuously available in online archives or otherwise. After all, for many years, successive Attorney Generals and Lord Chancellors have all advised that the media is not at risk of contempt proceedings being brought against them if they do not publish links to historic/archived material in new reports published after proceedings have become active under the Contempt of Court Act 1981.

7. Indeed, the government's own Impact Assessment suggests at para 43 that there is neither a problem with the mainstream media or individual tweeters. The Impact Assessment states that the Attorney General's Office are aware of only two potential cases where the proposed notice procedure in the Bill would have been appropriate during the last two years (It is not clear whether or not these are the two cases adopting the problematic interpretation of the Contempt of Court Act 1981 and Senior Courts Act 1981).Even then, had it been available they would expect the mainstream media to comply with notices as they do now with advisory notices, rather than risk court proceedings, even if they disagreed with the notice.

8. Moreover, according to the Impact Assessment, the AGO think it unlikely that it would even issue notices, much less mount contempt proceedings against anyone outside the mainstream media, as individual tweeters would not meet the test for a notice, as they would not have enough followers to create a substantial risk of serious prejudice to constitute liability for contempt under the Contempt of Court Act 1981(para 43).

9. The Impact Assessment also acknowledges that the strict liability rule for contempt helps to reduce the availability of relevant material accessible by jurors.

10. We hope that the Government will consider amendment of the Bill to produce an unqualified defence covering online archives and other material lawfully published prior to proceedings becoming active which is still available.

11. We do have concerns about the operation of clause 37 and the statutory recognition of an injunctive power under the Senior Courts act 1981 by virtue of clause 38. We would therefore welcome the opportunity to meet and discuss such concerns in more detail with the Ministry of Justice and the Attorney General's Office.

12. Clause 37 of the Bill would establish a formal statutory framework for the Attorney General to issue notices stipulating that previously lawfully published material (including past court reports) should be withdrawn from public access, backed by direct legal sanction, deprivation of defence and indirect trigger of court order. Clause 38 then indirectly validates the criminal court's powers of prior restraint to prevent publication to forestall a feared contempt, to require the withdrawal of material from the public through halt of current publication and take down of material published prior to proceeding becoming active.

13. From the point of principle, it is a potentially dangerous step for the Attorney General (a member of the Government of the day) to be given the statutory power to dispense notices to anyone—editor, publisher of newspapers, magazines, books or other material in any media, broadcaster, website owner, library, individual —suggesting that lawfully published archive material be removed from public view as a forerunner to court

injunction and threat of contempt proceedings, with the service of that notice then removing a defence that would otherwise be available to the recipient if the server of the notice, the AG chooses to bring contempt proceedings. It appears that it is the service and receipt of the notice, not the validity of the AG's legal opinion as to contempt, that would actually deprive any or all recipients of any defence which would otherwise available to them in contempt proceedings which the server of the notice, the Attorney General, might then bring against them. The issue of a notice by the AG is also apparently meant to act as a trigger to the court to injunct such material, presumably prior to any actual contempt proceedings in respect of that material and court rulings on whether the recipient was liable for contempt for its publication under the 1981 Act. The Government's policy objective according to the Impact Assessment appears also to be deterrence by notice alone—it expects the mainstream media to take material down on receipt of a notice from the AG, through threat of court proceedings and risk of liability, (punishable by unlimited fine and imprisonment), even if they disagreed with the AG's interpretation of the law and the AG's view was actually wrong so that continued publication of the material would not actually constitute contempt of court, under the strict liability rule under the 1981 Act or otherwise. Local and regional media organisations would be very fearful of incurring the financial costs of challenge the AG's view or formally contesting a notice, contempt proceedings and court order, even where they had strong legal grounds for doing so. They might also be fearful of some additional threat by a trial judge of third party costs order, even if the media organisation's conduct was not in fact unlawful, due to delay or non-compliance. Thus the media's responsible approach could be used against it to effect unjustified removal of material from public access, if sufficient safeguards are not built it into the operation of the new regime.

14. The media's concerns are increased because the Bill simply sketches out the procedure, without defining the precise nature of the Attorney General's powers, or the precise purpose, effect and procedure of the notices, or whether there will be any safeguards for freedom of expression to curb the otherwise discretionary use of notices by the Attorney General and injunctions by the court.

15. It would be immensely helpful if the Ministry of Justice and AGO could provide detailed information, including drafts of the regulations and embark upon discussion and consultation with the media now, while the Bill is actually progressing through Parliament. This would allow any difficulties to be identified and necessary changes made, in tandem, to the content of the Bill and proposed text of the draft regulations. This would enable proper consideration of the Bill's provisions in context. This is currently impossible in the absence of the regulations or any indication as to their proposed operation and content. More information and discussion would allow potential problems to be spotted and addressed, avoiding difficulties in practice for AG, court and media, with any necessary freedom of expression and open justice safeguards included.

16. This is important to the NS. While media organisations which do not receive a notice will have a new statutory defence to the new statutory extension of the contempt laws, the Impact Assessment does suggest that the media will be the prime target of the AG's notices and notice system and also assumes that in practice the media will take down of material on receipt of a notice through fear of liability for contempt on receipt of a notice, even if they disagree with the AG's assessment of contempt liability. The Bill and the regulations therefore need to prevent any possibility of unwarranted use of the notice and notice system to restrict availability of material which was lawfully published.

17. As the regulations have yet to be drafted, the Bill's operation in practice is open to speculation, as the Bill does not define the ambit of the new function and powers of the AG and court in clauses 37 and 38. For example, the Impact Assessment suggests that the Attorney General and the trial judge are expected to work in tandem to ensure removal of material after issue of the notice. The Explanatory Notes suggest that the AG's notice may simply indicate that proceedings are active in respect of which the publication may be contemptuous, without reference to any additional action by the court as well, but that its service then deprives the recipient of the new statutory defence in respect of actions for contempt, in respect of those proceedings: 'if the Attorney General gives the person a notice informing the person that there are active proceedings in respect of which the publication may be contemptuous, this defence ceases to be available to the person in connection with those proceedings.'(para 295). However, para 40 of the impact assessment evidence base for the summary sheets says that 'The notice procedure would allow the Attorney General to put a publisher on notice that relevant proceedings have become active and the Attorney General would locate or be notified of the relevant publication which should be removed. If after such notice the publisher did not remove the material following a hearing, the judge would have the power to order the temporary removal as under the current law if he or she was of the view that the strict liability test was met in the circumstances'.

18. We therefore submit that the Bill and regulations need to be evaluated together and in any event will require the incorporation of substantive and procedural safeguards for freedom of expression and open justice, both substantive and procedural (especially as orders affecting freedom of expression in criminal proceedings are excluded from the freedom of expression safeguards in section 12 of the Human Rights Act 1998). For example, the NS would welcome consideration and consultation on the following matters:

19. What safeguards are to be introduced to prevent routine issue of such notices by the AG, especially in respect of criminal proceedings? How would they operate in civil proceedings?

20. What safeguards are to be introduced, beyond a right of appeal under s 159 Criminal Justice Act 1988 in respect of orders under the Senior Courts at 1981 to prevent courts from routinely injuncting material which is the subject of a notice, even if the AG's view is erroneous?

21. Can measures be taken to curb the powers of the courts, in order to deter routine applications and near automatic grant of such orders, perhaps as a 'fail safe', even if the media has already removed the material from public access, on receipt of a notice from the AG or by its own volition?

22. What safeguards will there be to ensure that any action by the AGO, AG or courts, be it deterrent threat or actual restriction, on media publication and availability will be kept to a minimum and actually be necessary, proportionate and temporary?

23. We do fear that routine 'notification' of the AG and routine issue of notices by the AG could develop into institutional practice of AG and AGO, or they could be put under pressure to do so. Trial judges, prosecution, defence, police, other enforcement authorities, defendants' associates, or indeed lobby groups and members of the public, might press for such action by the AG, as soon as they become aware or are alerted to the mere existence of any previously published online archive material held by local, regional or national media, which might refer to the defendant, or parties to the proceedings or anyone connected with the trial or the incident and pressing for issue of notices. What measures will be put in place to prevent this?

24. What procedures will the AG and AGO introduce prior to issue of notice, to investigate the previously lawfully published material and manner of publication/availability to the public and to evaluate the legal basis for any legal action by them?

25. In high profile cases, what safeguards are to be introduced to prevent blanket service of such notices upon media organisations by the AG? What safeguards will be introduced to ensure that notices are not issued merely because of concerns about the extent and effect of lawful media coverage, or perhaps the combination of lawful social media activity by anyone and lawful mainstream media publications, (as opposed to concern about any possible actual strict liability contempt in relation to any actual content of any individual publication by any media organisation or individual?).

26. What statutory provisions and safeguards will be created to ensure that the Attorney General can withdraw or vary the notice?

27. What safeguards will there be after any such withdrawal or variation or expiry of a notice to ensure that media organisation can thereupon continue to benefit from the new defence, once a notice has been issued and/or the material had been taken down, either prior to issue of the notice, or as a result of issue of the notice as a precautionary measure, as though its publication had been continuous for the purposes of a defence in those or other active legal proceedings?

28. How will the regulations ensure that the notice is issued by the AG and brought to the attention of the relevant media organisation in an appropriate fashion and in appropriate time for the media organisation to assess the notice, identify the material and implement any action necessary, including any provision for the media to seek clarification from the AG?

29. How will the Bill and regulations ensure that matters are considered coherently and consistently, with reference to other reporting restrictions and guidance as need be? It is vital that restrictions on publication are not decided in haste as the trial starts, without adequate notice to the media and opportunity to hear its submission, ensuring comprehensive consideration of the relevant law and its application to the actual circumstances of the case? It is essential the AG and court give any media organisations who might be the subject of a notice or application for an order, ample notice, enough time for informal discussion with the AG or court, both the opportunity and time to make informal and formal representations both prior to the making of the order and for variation and lifting of an order or withdrawal of a notice.

30. The media must be given the opportunity to query the notice, discuss it with the AG and ask the AG for clarification, review, variation and withdrawal. It must also have a swift route of legal challenge.

31. The media must also be given good notice of any application for a court order and the grounds for the application. Obviously, the court itself must notify the media in advance if the court itself is considering whether to make such an order and provide advance notice of the grounds for it. The media must have the opportunity to make informal representations as well as to be formally heard prior to the making of any such order, as well as for clarification, variation or lifting of the order when made, in addition to any formal right of appeal.

32. What safeguards will be introduced to ensure that the media can continue to benefit from the new defence in respect of those (or other) legal proceedings, if it has had to take material down voluntarily or in accordance with a notice or order which has subsequently not been made, withdrawn, or lifted, or expired or varied? Will it still be able to claim the defence in those or other later legal proceedings or be disqualified from doing so due to the requirement for 'continuous' publication?

33. How will the Bill and regulations ensure that any notice issues by the AG contains all essential information needed by the media recipient: the precise identification of the proceedings which are active, the precise identification of the publication causing concern to the Attorney General—by way of specification of media organisation, the titles of the publication and identification of the relevant media platform, date, URL, headline, the precise subject of the notice—the precise text, image, extract; the legal basis for alleged liability, together with supporting reasons and evidence and why this particular course of action was necessary in the circumstances of the relevant active proceedings; the precise duration of the temporary restriction on publication

or availability; when the notice will cease to apply; how the recipient can make an application for varying and lifting the notice in respect of any such material, in whole or in part, prior to that time, both immediately and in the event of any developments which would merit such an application; how the AG will notify the recipient of any variation of lifting or expiry of such a notice if the AG decides that there is no risk of contempt due to reconsideration or later developments.

34. How will the Bill and regulations ensure that any application for an order or consideration of by the court or any action by the court of its own motion to make such an order will contain the same requirements for precise identification of the material and grounds for the application?

35. The media has queried whether the cases were correctly decided in respect of courts' power to injunct under the Senior Courts Act 1981. Clause 38 provides both statutory recognition and a right of appeal under s 159 CJA 1988. If this is the case, what will or can be done to fetter the use of such injunctive powers by trial judges? How will the regulations or the Bill prevent any trial judge from bypassing any safeguards, such as the imposition of an order only in the event of non-compliance with a notice served by the AG and liability under the strict liability rule, and stop the court from proceeding straight to making an order under the Senior Courts Act 1981 and injunction of any such archive or other material?

36. We would also like clarification of other matters:

37. How will the provisions interact with common-law contempt, since the Bill provides that this will not be affected by its amendments to the Contempt of Court Act 1981?

39. The effect of service of a notice could have wider chilling effect - what measures will be taken to avoid this? For example, if the Attorney General publicises that a notice has been served against one person in respect of a certain matter, would a publisher/distributor lose the innocent publication and distribution defence, i.e. could such publicity or knowledge mean that they have a reason for relevant suspicion? If so, could the helpful intention of the provision be neutralised and would publishers still be at risk of contempt proceedings, unless they searched out and suppressed all such previously lawfully published material which they were making available to the public or a section of it in any form?

40. Is there a danger that the 'continuously over a period' could be interpreted instead as 'non-stop', or other way contrary to that intended (to protect previously published material, perhaps in online archives, which is available when proceedings become active)? Is there any danger that non-availability of such material at any time for any reason for seconds, minutes, hours, days, weeks, months might be held to invalidate a defence? Would even website redesign and relaunch or a temporary website crash, prior to proceedings becoming active, mean that the defence could not apply, because the material had therefore not been made available to the public or a section of the public 'continuously'? Would any intentional but temporary removal of the material which interrupted its continuous availability to the public invalidate the defence- removal while updating a story, making legal or compliance checks, for example due to additional information received, or investigation of complaint, or legal dispute, or in accordance with an earlier AG notice or court order or other reporting restriction in respect of the same material in the same proceedings but which had meanwhile been varied or lifted or expired?

41. The NS would welcome further consultation and discussion on these issues and careful consideration of Bill and regulations to address such concerns.

Clause 38

42. We recognise that the clause 38 has the helpful intention of enabling appeals to be brought to the Court of Appeal (but not beyond) under section 159 of the Criminal Justice Act 1988. The recent case law on the scope and use of such injunctive powers against media archives is of concern to the regional press. These powers are not reserved for rare use in high profile cases by the courts and have been used in other circumstances. The mere threat of use of such powers can also have a chilling effect upon publication and availability of material in practice. For example, if the courts insist upon formal applications for variation or lifting, rather than entertain the media's informal representations, the potential costs of formal legal challenge will deter editors and publishers from pursuing legitimate challenges.

Jury research

43. We suggest that the Bill enables academic research into jury decision making, in order to enable comprehensive and accurate assessment of the operation of the contempt laws, including the impact of any changes introduced by the Bill itself.

Other open justice and freedom of expression issues

Part 2

44. We note clause 15 on wrongful disclosure of information relating to persons in youth detention accommodation and the criminal offence designed to prevent disclosure of information relating to a particular offender. However, there could be additional circumstances where the employee should be allowed to lawfully make such a disclosure, which are not explicitly covered by the Bill, e.g. as a whistle blower, where public

interest disclosure could include revelation of wrongdoing, which also requires disclosure of information about a particular individual (e.g. as its victim); or in the context of a variety of legal action, where information about a particular individuals might be relevant to the issues and prohibition upon its disclosure render pursuit of the case difficult or impossible by the employee or any particular individual them self.

Part 3 Courts and tribunals

45. The regional and local press have interest in Part 3 Trial by single justice on the papers. Clauses 24 -28

46. We share the concern expressed during the Second Reading debate about the proposed departure of the fundamental principle of open justice, by the Bill's introduction of a procedure whereby a single justice can try a case upon papers sitting in private and not in open court, (especially as the decision reached not just upon guilty pleas received but on the grounds of non- response, without proof that the accused had received the relevant notices that legal proceedings had been instigated against them).

47. The regional and local press wants to maintain public oversight of such cases and to report the work of the court. It may also want to investigate and report the effect of this departure from open justice in criminal cases, in relation to defendants or those concerned in any individual case or the wider ramifications for court process. We therefore welcome the Secretary of State's and Minister's assurances that, should the Bill 's provisions be implemented, all such cases will be included in advance court lists supplied to the local press and the Protocol agreed between the HM Courts and Tribunal Service, Newspaper Society and Society of Editors should continue to apply.

(See www.newspapersoc.org.uk

Protocol for Sharing Court Registers and Court Lists with Local Newspapers

— View the Protocol
— Letter
— Announcement by Jack Straw)

48. For avoidance of doubt, the Protocol applies to both supply of court lists and copies of the court register, the latter to enable publication of the 'court results roundups – the courts' decisions in each and every individual case by the local and regional media, with details of the defendant, charge, acquittal or conviction and sentence where relevant. It is very important that the court registers as well as the advance court lists should continue to be supplied and continue to contain sufficient information to precisely and accurately identify defendants and the precise outcome of the precise charge pertaining to them. This enables comprehensive accurate reporting, while reducing the risk of confusion with others sharing the same name in the locality and attendant risk of legal action against the newspaper.

49. The local press and its reporters should also have access to the relevant court documentation which would assist accurate reporting of the cases, with any necessary changes made to criminal court procedure rules to enable this.

50. We also suggest that the Bill ought to be amended to include defences in respect of any information so provided so that its publications for the purposes of defamation and contempt benefit from the same defences as if it had been presented in cases considered in open court.

Part 4 Judicial Review

51. We would be concerned if the Bill would make it more difficult for challenges to official secrecy, challenges to restrictions on freedom of expression or challenges restrictions on open justice to be brought and to succeed, because of the importance of clarification of important points of law might be at issue, due to the new criteria or costs provisions in respect of bringing of actions or interventions.

52. The Newspaper Society hopes that all the above matters these points will be given careful consideration and we would obviously welcome the opportunity to discuss these issues in more detail.

March 2014

Written Evidence submitted by the Campaign Against Censorship (CJC 25)

Introduction: About CAC

The Campaign Against Censorship is the successor to the Defence of Literature and the Arts Society, which was founded in 1968 to assist writers, artists and others threatened by censorship and to campaign for reform of our censorship laws. In 1983 DLAS was re-launched as the Campaign Against Censorship with the object of promoting freedom of expression in all its forms and combating restrictions on that freedom and on its exercise.

The guiding principles of the Campaign are:

1. The right to obtain and impart knowledge

2. Freedom from censorship

3. Freedom for creative artists to present their perceptions, interpretations and ideas

4. Support for victims of censorship without discrimination on the grounds of sex, sexual orientation, race, politics or religion.

For further information please visit the website at www.dlas.org.uk

WRITTEN EVIDENCE

1. The Criminal Justice and Immigration Act 2008 criminalized possession of "extreme pornographic images". The activities whose depiction were covered by the Act did not specifically include rape, either actual or simulated. Clause 16 of the Criminal Justice and Courts Bill, now being considered, is intended to add rape, defined as non-consensual penetration, to the list.

2. The clause is not about preventing rape. It is about preventing people looking at pictures which may or may not depict rape.

3. In spite of some alarmist comments, the Campaign recognises that works of art known as "The Rape of So-and-so" are not affected because they do not show penetration. Their titles are a legacy of a time when "rape" could mean nothing more than "abduction". However, some paintings, drawings, prints and engravings might fall foul of the Bill because although the people who drafted it, when they wrote "image", probably had photographic and digital images in mind they did not say so, either this time or in Section 63 of the 2008 Act. It is specified that an illegal image should be "explicit and realistic" and it is possible that those who chose the wording believed that no image other than some kind of photograph could be realistic, but again, they do not say so.

4. There is no exemption for works of art and no defence of artistic or other merit. The drafters may have believed that no image can be both pornographic (defined as "produced solely or principally for the purpose of sexual arousal") and the work of a famous artist. The risk is small, but enough to cause a "chill factor", as sometimes happens at exhibitions when the organisers feel constrained to remove an item from display because someone thinks it may be illegal. The same applies to images published in hard copy or displayed online unless they are specifically exempt, which we feel that they should be. The Bill should provide defences of artistic merit or historical record.

5. Section 64 of the 2008 Act, which also applies in the current Bill, states that classified films, including R18, are excluded from the prohibition of "extreme images". It then goes on to exclude from the exclusion an extract from a classified film if it is "of such a nature that it must reasonably be assumed to have been extracted solely or principally for the purpose of sexual arousal". An image would be illegal if it portrayed non-consensual penetration and a "reasonable person" is expected to decide whether or not the persons in the image are real. There is nothing about whether or not the act is real. It seems to be assumed that there is no such thing as an image of a simulated rape, such as might be extracted from a film. It would be constructive for the law to be made clear; are images of simulated non-consensual sex acts meant to be illegal or not?

6. Subsection (3) of Clause 16 provides a very limited defence. It is a defence for a person to prove that they "directly participated in the act or any of the acts portrayed", "that the act or acts did not involve the infliction of non-consensual harm on any person" and that "what is portrayed as non-consensual penetration was in fact consensual". People charged with possession of what appears to be a rape image, who do not themselves appear in that image, cannot easily plead in their defence that the act shown was consensual even if they were present when it took place. People who simply possess the image cannot, of course, say whether it was consensual or not. We suggest that there is something amiss if an alleged perpetrator has a defence but everybody else has not. Also it should be for the prosecution to prove lack of consent, not for defendants to prove that consent was given.

7. Law-abiding people whose sexual fantasies happen to include violence are already treated as sex offenders solely for what they imagine and their lives may well be wrecked even if they are then acquitted. This clause would increase their numbers. (Though female masochists appear to be excluded from these.) The legislation, existing and proposed, is so confusedly worded that failed prosecutions are likely, bringing the law into disrepute.

8. In 2008 it was promised that guidance would be issued to define what Sections 63 to 68 of the Criminal Justice and Immigration Act were intended to mean and how they should be used. This guidance has never appeared. It should be issued before any cases are brought under amended legislation.

9. The Campaign holds that mere possession of any material, no matter how distasteful to others, should not be a criminal offence. If the material is fiction, prosecution for possessing it is an attempt to control what people think. Trying to control what people think is the behaviour of a dictatorship; it has no place in a democracy. It is also futile; no state apparatus, however oppressive, has ever succeeded in doing it. If the material is factual, it may or may not be evidence that a serious crime has been committed. (In the present example, depending on whether or not there was consent.) To criminalize possession not only makes a criminal of someone who has only thought about it, it makes it unlikely that he or she will voluntarily hand the evidence to the authorities.

Summary

We ask that:

1) guidance be provided to clarify the terms in both the 2008 Act and the Bill, in particular what is meant by "image"

2) the law distinguish clearly between images that show real events and those that do not

3) the law provide a defence for fictional images that are both sexually explicit and treated with skill and

4) it refrain from treating people who do not and cannot know whether or not an act was consensual as though they were complicit in it.

March 2014

Written evidence submitted by JUSTICE (CJC 26)

Summary

— Resources must be assured for the increase in Parole Board scrutiny prior to release.
— Electronic monitoring of people released from prison on licence should only be imposed on a case by case, not mandatory, basis, as the law already allows.
— In considering release after recall, Parole Boards must review licence conditions to ensure the person is able to comply.
— Powers of restraint to enforce 'good order and discipline' should not be available to staff in secure colleges.
— Trial by justices on the papers must only be available where the courts are satisfied that the defendant has unequivocally waived their right to a public hearing, be tried by a minimum of two justices, and the process be published.
— Court charges in criminal cases must not be imposed unless it is just and reasonable to do so in the circumstances of each case, and upon a detailed impact assessment of the proposed charges and costs of enforcement.

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system—administrative, civil and criminal—in the United Kingdom. It is the UK section of the International Commission of Jurists. The issues raised in this briefing should not be taken as our sole concerns with regard to the proposals contained in the Bill.

2. This briefing deals with the criminal justice proposals in Parts 1, 2 and 3 of the Bill. We have prepared and circulated separate briefing on the changes to civil justice and judicial review in Parts 3 and 4.

Clause 4 Parole Board release when serving extended sentences

Proposed Amendment

Page 4, after line 39 insert:

'(4) The Secretary of State shall review the operation of this clause after 12 months to ensure that sufficient resources are available to enable prisoners to satisfy the Parole Board that they should no longer be confined'

Briefing

3. Clause 4 changes the automatic release rules for prisoners serving extended sentences. The provision makes it necessary for prisoners to satisfy the Parole Board that it is no longer necessary for the protection of the public that they be confined, pursuant to section 246A(6)(b). While this may seem reasonable in principle, it will have a significant impact upon both the resources of the Parole Board and the programmes available to prisoners to demonstrate they are suitable for release. The provision will be utilised to encompass prisoners formally detained under indeterminate sentences for public protection (IPP). It was accepted by Parliament in the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LASPO), that the IPP had become unworkable, and the sentence was abolished. As we said in our briefing on the Bill, "These sentences have proved unworkable and unlawfully detained many prisoners passed the appropriate sentence that they should have served due to an ill thought out regime which was almost impossible to satisfy."[204] This was because, as the Prison Reform Trust (PRT) reported in 2010, the Parole Board is overstretched and highly risk averse, the necessary 'offending behaviour programmes' are scarcely available and limited in their scope and effectiveness,

[204] JUSTICE, LASPO, Part 3 Briefing for House of Lords Report Stage (March 2012), available at: http://www.justice.org.uk/data/files/resources/284/JUSTICE-Briefing-LASPO-HLCS.pdf

and it is inherently difficult to demonstrate reduced dangerousness and pass the high safety threshold for release.[205]

4. As at 31 December 2013, there were 5,335 IPP prisoners, of which 3,561 had passed their tariff. There were also 7,463 prisoners serving life sentences, of which 2,584 had passed their tariff.[206] Widening the category of cases that must be qualitatively assessed before release by the Parole Board, without increasing its resources, or the courses available to prisoners, may lead to further cases of unlawful and unnecessary detention. As the Howard League[207] and PRT[208] record in their briefings, the Parole Board is under considerable strain as a result of cuts to staff and an increase in oral hearings.[209] This provision, together with further assessment prior to release following recall and the potential of increased breaches of licence should electronic monitoring of people's whereabouts be introduced (see below), without additional resources will risk the Parole Board being unable to cope with its case load. That is without knowing the impact of the cuts to legal aid introduced by LASPO, which will result in more prisoners applying to the Parole Board without legal representation in a wide range of circumstances. Unrepresented applicants almost inevitably extend the length of proceedings.[210]

5. Our amendment serves to highlight this risk and require review of the resources in prisons to ensure that more prisoners are not being unlawfully detained through the inadvertent effect of legislation.

Clause 6 Electronic monitoring following release on licence etc

Proposed Amendment

Page 5, Line 36, leave out new section 62A

Briefing

6. Section 62 of the Criminal Justice and Courts Act 2000 currently provides the Secretary of State with the discretion to attach electronic monitoring conditions to the release of a person from prison on licence. Clause 6 amends the legislation through clause 6(3), which provides for the Secretary of State by order to require the mandatory imposition of electronic tracking of people released on licence. JUSTICE considers that this would give far too much power to the Secretary of State without proper scrutiny of Parliament, or of the individual's circumstances. The power is in any event unnecessary and disproportionate and should be deleted from the Bill.

7. Currently, an electronic monitor (or 'tag') can be imposed to monitor compliance with other conditions, such as a curfew or exclusion zone, or, on a discretionary and individual basis, the movements and location ('whereabouts') of the released person. The proposal in the Bill would require:

— the mandatory imposition of electronic tracking;

— of a whole class of persons, potentially all those released on licence,

— for an unspecified period, simply to monitor a person's whereabouts.

8. The Impact Assessment[211] explains that the purpose of this measure is to (1) reduce re-offending, (2) protect victims and witnesses, and (3) assist police in the detection and investigation of crime. We cannot see how the use of a 'tag' will reduce re-offending or protect victims or witnesses without being attached to an exclusion condition, which must be imposed on a case by case basis. Tracking can only show where a person is, not what they are doing there. We find it difficult to see which group of offenders will be suitable for a general

[205] J Jacobson, M Hough, *Unjust Deserts: imprisonment for public protection* (PRT, 2010)

[206] Ministry of Justice, *Prison Population Tables* (30 January 2014), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276084/prison-population-tables-q3-2013.xls

[207] Committee Stage Briefing available at: https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Briefings/Briefing_for_Criminal_Justice_and_Courts_Bill_Committee_Stage_in_House_of_Commons_March_2014.pdf

[208] Second Reading Briefing available at: http://www.prisonreformtrust.org.uk/Portals/0/Documents/CJJ%20Bill/PRT%20Briefing%20CJ&J%20Bill%20HoC%202nd%20Reading.pdf

[209] Due in the immediate past to the decision in *Osborn v the Parole Board* [2013] UKSC 61, that prisoners are entitled to an oral hearing in a wider set of circumstances than was previously provided. See Parole Board website (update February 2014) for the impact on hearings, and in particular: We listed 558 cases in total for March 2014, which is at the maximum capacity within current resources. There were 467 cases that were ready to be listed which did not secure a date. These cases have been put forward for the April 2014 listing exercise. If this trend continues we are likely to see delays of at least three months over and above the usual timeframe for cases waiting to secure an oral hearing date. https://www.justice.gov.uk/offenders/parole-board/osborn,-booth-and-reilly-supreme-court-judgment

[210] W. Foxton, 'How legal aid reforms are clogging up the courts', The Spectator, 20 February 2014, available at: http://blogs.spectator.co.uk/coffeehouse/2014/02/how-legal-aid-reforms-are-clogging-up-the-courts/

[211] Ministry of Justice, *Electronic monitoring of whereabouts as a compulsory licence condition*, IA No: MoJ004/14, (5th February 2014) p 8, available at http://www.parliament.uk/documents/impact-assessments/IA14-03D.pdf

'whereabouts' monitor that is not already identified as appropriate for a curfew or exclusion order, despite the existing power to impose tracking.[212]

9. The third justification is founded on an inappropriate assumption that all those released from custody are likely to re-offend. It would be a significant and concerning departure to allow tracking of a whole class of persons for the purposes of preventing future crime. Without a focussed assessment of each case, we consider that such a broad order will undermine the presumption of innocence and impose a disproportionate restriction on people's movements. Even the Pilot Study that looked at tracking offenders when the Criminal Justice and Court Services Act came into force only focussed on prolific and priority offenders, sex, violent and domestic violent offenders, many of which were given curfew and exclusion requirements by way of individual assessment.[213] We are concerned that without provision for express limits and safeguards, this form of surveillance will become routine and widespread without adequate opportunity for oversight. 52% of tracked people interviewed for the Pilot Study said that satellite tracking could best be described as 'like being watched'.[214] This is all the more concerning given that the body undertaking the monitoring is likely to be a private company.[215]

10. In the recent Supreme Court case of *Osborn v the Parole Board* [2013] UKSC 61 (9 October 2013) Lord Reed explained the importance of ensuring procedural fairness:

> [J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ("How Law Protects Dignity" [2012] CLJ 200, 210):
>
> > "Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves."

It cannot be right that a condition which would so invade the life of a released person can be imposed without proper consideration of their individual circumstances. In JUSTICE's view, such a process would be procedurally unfair.

11. It could also pose a disproportionate invasion of privacy. There has already been significant intrusion into people's lives resulting from wide powers available under the Regulation of Investigatory Powers Act 2000,[216] and through existing powers to impose substantive licence conditions. In *S and Marper v UK* (2009) 48 EHRR 50 the European Court of Human Rights (ECtHR) held that the blanket and indiscriminate powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences by the police was a disproportionate interference with the right to respect for private life protected by article 8 ECHR, that could not be regarded as necessary in a democratic society. Without stronger justification, we consider that the same principles apply to the proposal for blanket electronic tracking and the data obtained through it. Moreover, licence periods will vary significantly, dependent upon the type of sentence imposed upon the convicted person, since a licence period will last until the end of the person's sentence. For those serving an indeterminate sentence for public protection, a licence period is for life, subject to the possibility of review after ten years. The use of broad tracking pursuant to this power could become disproportionate if it is imposed for too lengthy a period.

12. Rather than support the desistance of released persons by integrating them back into society, this measure will engender suspicion and contact with the police from the outset because tracking data will be the first

[212] We are not aware that the existing power in s62(2)(b) is being exercised. Prison Service Order 6000 (Parole Release and Recall), Issue no. 226, re-issue date 26/11/12 (PSO) https://www.justice.gov.uk/downloads/offenders/psipso/pso/pso-6000.pdf makes no mention of the power to release on condition pursuant to s62 Criminal Justice and Court Services Act. This is because the Criminal Justice (Sentencing) (Licence Conditions) Order 2005 paragraph 3 – other conditions of licence – does not include a provision for electronic monitoring as a condition of a licence. Chapter 14 of the PSO indicates that tracking conditions were only to be used in the course of the Pilot Study (see note 9 below), which concluded in 2006. Prison Service Instruction 40/2012 (Licences and Licence Conditions) (valid until 30 November 2016) restricts the use of electronic monitoring to home detention curfew or multi-agency public protection cases of high risk offenders or where the case is likely to attract national media interest, and then only in conjunction with a curfew. Parliamentarians may wish to ask Government whether the existing power is being used and why this cannot be exercised more frequently without this new power in the Bill.

[213] S. Shute, *Satelite tracking of offenders: A Study of the Pilots in England and Wales*, Research Summary 4 (Ministry of Justice, 2007), available at: http://webarchive.nationalarchives.gov.uk/20100505212400/http:/www.justice.gov.uk/publications/docs/satellite-tracking-of-offenders.pdf (Pilot Study) The pilot study conducted was in 2005 and 2006 and reviewed tags of 336 offenders.

[214] *Ibid*. p 14.

[215] The remarkable findings last year surrounding the G4S electronic monitoring contract provides a sobering example, see BBC, 'G4S probe after tag firms' multi-million over charging confirmed', 11 July 2013, available at http://www.bbc.co.uk/news/uk-23272708 NAPO in *Electronic tagging: A flawed system* (2012) available at: http://www.napo.org.uk/templates/asset-relay.cfm?frmAssetFileID=1388, records recent problems with the private firm tagging process – faulty equipment, communication breakdown between private companies operating the equipment and probation staff, lack of discretion being used or dismissal of valid explanations in circumstances of breach, failure to take into account the offence history and personal circumstances of the offender.

[216] See our report *Freedom From Suspicion: Surveillance Reform for a Digital Age* (JUSTICE, 2011)

place the police look when crime is committed. The Offender Rehabilitation Bill provides the possibility for convicted people to receive support to prevent them re-offending. This measure will counteract those efforts.

13. We understand that electronic monitoring can increase the effectiveness of imposed conditions upon licences. If better technology is available, this should be utilised under existing legislation. A wide-ranging power to impose by order mandatory electronic tracking of a whole class of people is wholly unjustified.

Clause 7 Test for release after recall: determinate sentences

Proposed Amendments

Page 6, line 45: after section '4A(b)' insert new sub-section:

(-) In considering whether the person is highly likely to breach a condition included in the person's licence the conditions shall be reviewed and amended as appropriate to ensure that the person is able to comply

(consequential amendments will apply throughout the clause).

Briefing

14. Clause 7 creates a significant new test for release on licence once a person has been recalled to prison. The Secretary of State, or the Parole Board, dependent upon which release provision applies, will have the additional burden of only releasing the person where it appears that the person is *highly unlikely* to breach a condition in their licence. This is an onerous task that will seriously affect the liberty of those who would otherwise be suitable for release. The decision should require a careful review of the circumstances of breach and conditions placed upon the licence so that where it is clear that the person will be unable to meet a particular condition due to vulnerability or circumstances beyond their control, it is removed. Our amendment seeks to ensure that this takes place. The Howard League is concerned that the provision will "affect those prisoners who are deemed to be less likely to be able to comply, such as children, the mentally ill and people with learning disabilities" and lead to an increase in the number of these people in prison, who are not a risk to the public, but otherwise have difficulty managing their licence.[217] We consider it wholly inappropriate that the young and vulnerable be caught by this provision.

Clauses 17 and 18, Schedules 3 and 4 – Detention of Young Offenders in Secure Colleges

Proposed Amendment

Page 75, line 13, leave out sub-section '(c)'

Briefing

15. While we welcome the Government's intention set out in *Transforming Youth Custody: Putting education at the heart of detention*[218] to give education prominence in sentences of detention imposed upon children, we are concerned that the secure colleges proposed at section 17 may, pursuant to section 18, be run by contracting out the service to private companies. We also share the concerns expressed by the Howard League, Prison Reform Trust and other groups in their briefings that a secure college housing over 300 children is unlikely to be an effective way of educating children and reducing their propensity to re-offend. Much more information is required from Government as to how children housed in the college will be appropriately educated.[219]

16. More specifically, those private companies providing a secure educational environment will have the power to use reasonable force against the children detained there. Schedule 4, paragraph 8 provides for custodial duties as regards children: (a) to prevent their escape from lawful custody, (b) to prevent, or detect and report on, the commission or attempted commission by them of other unlawful acts, (c) *to ensure good order and discipline on their part*, and (d) to attend to their well-being. Paragraph 9 provides for the power to search children. Paragraph 10 provides that a custody officer may use reasonable force where necessary in carrying out the duties in paragraphs 8 and 9.

17. As Frances Crook has said, "the Howard League holds that restraining children for not doing what they are told is dangerous and gives the erroneous lesson that might is right."[220] Moreover, the Court of Appeal found in *R (C) v Secretary of State for Justice* [2009] QB 657 that restraint for 'good order and discipline' engages article 3 ECHR, and the Secretary of State must justify the necessity of force. The scenarios proffered by the private company running the secure training centres as to where restraint was necessary to ensure discipline and

[217] Committee Stage Briefing, supra.
[218] Ministry of Justice, *Transforming Youth Custody – Government response to consultation*, CM 8792 (TSO, January 2014)
[219] This is particularly unclear given that a child serves a detention period of months, each one of which commences on a different day. There are many questions currently unanswered as to how the facility will operate. For example: Is it envisaged that children will attend lessons in classrooms? How many children will be in each class? Will they be taught by age group? Will girls and boys be taught together? How is the curriculum to be delivered with such a transient population? What provision will be made for those with particular behavioural difficulties and educational needs?
[220] Frances Crook, 'Criminal Justice and Courts Bill and Restraint', 12th February 2014, available at http://www.howardleague.org/francescrookblog/criminal-justice-and-courts-bill-and-restraint/

a safe custodial environment were not accepted by the court. The Joint Committee on Human Rights has also expressed concern regarding the purpose and imposition of this power:

> In our Report focusing on the use of restraint on children and young people, we concluded that it was contrary to the UK's human rights obligations for restraint to be used in order to maintain "good order and discipline". The statutory instrument which sought to enable restraint to be used for this purpose, which the Government claimed was necessary in order to clarify the law, has now been quashed by the courts. Before this, restraint was used to maintain good order and discipline 16 times between April and September 2008. Following the concerns expressed about the use of restraint, the Government established an independent review. Its report and the Government's response were published in December 2008. The review made over 50 recommendations, most of which have been adopted, including discontinuing use of the "nose distraction" technique. The review concluded, however, that "a degree of pain compliance may be necessary in exceptional circumstances" but recognised that this would be "irreconcilable" with the UNCRC and would be unpopular with the Children's Commissioners, our Committee and others.[221]

18. We consider that a provision for the use of force in a secure educational facility to enable 'good order and discipline' would appear to be unlawful, and go against the intentions of the introduction of a facility 'where learning, vocational training and life skills will be the central pillar of a regime focused on educating and rehabilitating young offenders.'[222] At a time when the Government has announced an independent review of deaths of people aged 18-24 in custody, given the concerning numbers of deaths of young people over the past decade,[223] the inclusion of this provision is particularly unsavoury. It should be deleted from the Bill.

Clauses 24 – 28 – Trial by single justice on the papers

Proposed Amendments

Page 23, line 12: leave out 'single justice' and insert 'paper'

(consequential amendments are required throughout clauses 24 – 28)

Page 25, line 15: after 'Trial by' leave out 'single justice' and insert 'justices'

Page 25, line 16: after 'Trial by' leave out 'single justice' and insert 'justices'

Page 26, line 13: leave out sub-clause (9)

Page 26, line 39: leave out sub-clause (4)

Page 28, line 44: leave out sub-clause (9)

Page 29, line 1: after 'Trial by' leave out 'single justice' and insert 'justices'

Page 26, line 18: insert

> '(12) Prior to a paper procedure the court must publish the cases to which it will apply and when it will take place.
>
> (13) Following a paper procedure the court must publish the outcome'.

Briefing

19. The first section of Part 3 provides for a new power to deal with summary cases not punishable by imprisonment in the magistrates' court, on the papers. The procedure may apply in circumstances where the defendant does not serve a notice indicating either a desire to plead not guilty, or to be tried in court, thereby providing consent to a trial on the papers by omission. The defendant may submit written representations by way of mitigation of sentence. Whether the procedure is followed is at the discretion of the court, and may not be followed where the defendant gives notice that they do not wish it to be. The procedure can also be set aside where the defendant makes a statutory declaration to the effect that they did not know of the single justice procedure.

20. We understand the purposes behind the proposal set out in the impact assessment[224] to be primarily aimed at reducing costs and achieving efficiencies in the courts to hear more cases. While we do not object to the proposal per se, we have two concerns about its operation in practice. First, the single justice procedure notice issued pursuant to proposed section 16A(2)(a) must comply with the article 6 ECHR right to a fair and public hearing. Where this right is waived, it must be established in an unequivocal manner and be attended by

[221] JCHR, 25th Report of Session 2008-2009, *Children's Rights*, HL 157/HC 318 (20th November 2009), paras 88-94, available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157.pdf

[222] Lord Chancellor and Deputy Prime Minister, *Transforming Youth Custody*, *ibid*, p 3.

[223] See BBC, 'Government to review young deaths in custody', 6th February 2014, available at http://www.bbc.co.uk/news/uk-26061816 and NGO letter to the Daily Telegraph, 'Young People are still dying in prison', 5th February 2014 http://www.telegraph.co.uk/comment/letters/10617755/Young-people-are-still-dying-in-prison.html and INQUEST website for further details http://www.inquest.org.uk/media/pr/inquest-calls-for-independent-review-into-deaths-children-young-people

[224] Ministry of Justice, *Streamlining high-volume, low-level 'regulatory cases' in magistrates' courts*, IA no. 227 (5th February 2014), available at http://www.parliament.uk/documents/impact-assessments/IA14-03J.pdf

safeguards commensurate with its importance. In this particular type of case, it must be shown that the defendant understood what the consequences of waiver would be.[225] The notice must therefore explain the procedure in clear terms, setting out what a paper process will entail as compared to a public court hearing. While the Bill provides for the setting aside of the procedure where a person can show that they did not know of the notice, this does not provide for a lack of *understanding* concerning the contents of the notice. It is important that this new procedure can be clearly understood, particularly since legal aid is not available for these types of offences, and the defendant will not have the benefit of an explanation from court staff. We therefore suggest that the Government consult on the proposed wording of the notice prior to it being finalised. It is particularly important that this information is communicated in a manner which will allow all people, including those from groups with language and communication difficulties, to understand the implications of waiver.

21. Second, we do not consider it appropriate for these cases to be dealt with by a single magistrate. Magistrates perform the role of a jury in the summary justice system. This entails lay persons reaching a collective decision as to the appropriate outcome of a case against another member of the public. It is justifiable as trial by ones' peers. The Magistrates' Courts Act 1980 reflects this by requiring that trial and sentence be presided over by a court of no fewer than two justices. This new procedure would subvert this key safeguard by allowing a decision to be taken by one lay magistrate by reading the papers alone. We consider the requirement for a minimum of two justices to try and sentence a case should continue to apply for the purposes of the new paper procedure, to ensure that the proceedings are administered in accordance with common law principles of fairness. This means affording the appropriate checks and balances that are provided when a decision has to be reached by consensus. A process with at least two justices on the papers will continue to deliver significant savings as court formalities will not be required, while ensuring an important safeguard remains in place. Our amendments would enable this to take place. They would also not prevent the paper process being presided over by a district judge, who has the benefit of legal qualification and expertise, and can already sit alone to hear trials and pass sentence in the Magistrates' Court.

22. We agree with the Magistrates' Court Association that so as to avoid the paper procedure being seen as a secret process not open to scrutiny,[226] courts must publish the details of when it uses the paper procedure and the outcomes in each case. Our second amendment gives effect to this.

Clause 29 – Criminal courts charge

Proposed Amendments

Page 30, line 7: after 'section 21B' leave out 'must' and insert 'may'

Page 30, line 12: insert '(c) it being just and reasonable to do so'

Page 30, line 30: after 'magistrates' court' leave out 'must' and insert 'may'

Page 30, line 33: after 'crown court' leave out 'must' and insert 'may'

Page 31, line 10: after 'Court of Appeal' leave out 'must' and insert 'may'

Briefing

23. Clause 29 creates a new requirement for all criminal courts (Magistrates, Crown and Court of Appeal) to impose a costs order upon convicted people. This is a significant change to the current regime. We are concerned that the imposition of a charge may have an unfair bearing on the exercise of a person's right to plead not guilty, and therefore the presumption of innocence. Proceedings are brought against an individual by the State, following which they have the right to contest any charge, which must be proven by the Crown. The imposition of court costs may further increase the perverse incentives placed on accused people to plead guilty, despite their protestations of innocence; not only will a higher sentence be imposed if the defendant proceeds to trial, but a potentially substantial, mandatory, court charge as well as prosecution costs. Moreover, since further charges will be sought if a convicted person pursues an appeal, they may be unduly dissuaded from appealing by the potential costs of doing so. A restriction placed on access to a court or tribunal will not be compatible with article 6(1) ECHR unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[227] As drafted, a mandatory court costs order that does not take into account the circumstances of each case may infringe article 6 ECHR.

24. Our amendments seek to introduce a discretionary order that will only be imposed where the presiding judge considers it just and reasonable in the circumstances of the case. This is a familiar test. The Prosecution

[225] See *Jones v the UK* , App No. 30900/02, admissibility decision 9th September 2003, where the ECtHR held that "the applicant, as a layman, cannot have been expected to appreciate that his failure to attend on the date set for the commencement would result in his being tried and convicted in his absence and in the absence of legal representation. It cannot be said, therefore, that he unequivocally and intentionally waived his rights under Article 6". The case was deemed inadmissible for other reasons.

[226] Magistrates' Association, *Briefing for House of Commons 2nd* Reading of Criminal Justice and Courts Bill 2014, 19 February 2014, available at http://www.magistrates-association.org.uk/dox/briefings/1394563832_mp-briefing-2nd-reading-criminal-justice-courts-bill-21-feb-2014.pdf

[227] *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (1999) EHRR 249, para 72; Kreuz v Poland, App. No. 28249/95 (unreported, 19th June 2001).

of Offences Act 1985, s18 gives the courts the discretion to award prosecution costs against a convicted person only where it considers it just and reasonable to do so.[228] No such discretion is provided in the new provision, which suggests that the intention is to apply court charges irrespective of the means and circumstances of the convicted person. This is concerning and draconian, particularly where the person is sentenced to a term of imprisonment or a hospital order by reason of a mental illness, or has an addiction at the root of their criminal conduct. It is fair and appropriate for the courts imposing charges to have the discretion in the circumstances to review whether it is just and reasonable to impose a charge, otherwise it may be impossible for the person to pay.

25. During Second Reading the Secretary of State asserted the following:

> We will not change the order of the collection of fines and victims' charges. The collection of court costs will come after that. It is worth saying that the repayment of the charge will, as is normally the case in the courts in relation to fines and victim surcharges, be set at a rate that offenders can afford, so there will always be an incentive for them to find a job and to work hard. Offenders will be able to earn their way out of the charge if they do not reoffend. We will make provision for the charge, or any outstanding sums of money, to be written off if the offender does not reoffend. [229]

This suggests that some level of discretion is envisaged, yet this is not reflected in the Bill. The Government must make clear how it intends this procedure to operate and, at a minimum, provide the discretion our amendments seek to achieve.

26. Moreover, no impact assessment has been carried out to indicate the anticipated charge, nor the costs of enforcing any charge made, nor whether the amount likely to be recovered is worth the costs of the process. The cost of running courts is complex and varied. Courts employ many staff whose salaries, national insurance, pensions and employment rights must be paid for. They incur utility, IT, insurance and other maintenance costs for the court buildings and capital costs for the court estate. Are all these costs to be included in a charge?

27. Likewise, each case will involve differing complexities such as type of offence; length of trial; complexity of issues which must be factored into a court charge. For example:

- Should multiple defendant cases bear the costs evenly? What if a co-defendant has a minor part in the commission of an offence? Would they only be required to pay the portion of court time devoted to their aspect of the proceedings?
- What if during the course of proceedings it appears that evidence has been obtained in breach of the Police and Criminal Evidence Act 1984 and an application to exclude evidence is necessary, which takes a further court day and deliberations of the judge? Should the prosecution bear these costs if the judge excludes the evidence but a finding of guilt is still made out?

28. Statistical information concerning the cost per-case, per-day is unavailable and there is no information regarding the likely recovery of these charges on top of fines, compensation awards, victim surcharges and prosecution costs that are already imposed in criminal trials. Of the information publicly available it seems that a significant amount of money is already owed by court users for various orders made. The total overdue debt to HM Courts & Tribunals Service in all cases was £2 billion as at March 2013. Of this, £1.3 billion amounts to confiscation order debt and £0.7 billion is described as "other".[230] The Courts Act 2003 provides for a fines collection scheme. A collection order made by a magistrate usually groups all financial impositions, including fines, compensation, costs and victims' surcharge unless there is a good reason for it not to be included.[231] In 2010/11[232] there was a total financial imposition of £413m though it is not clear if this includes costs, surcharges, etc. for cases not dealt with solely by way of fines. These figures do not provide accurate information to assist in understanding the impact of court charges. The Government must produce proposals for regulating the charge process as soon as possible in order for these complex and important details to be properly considered by Parliament.

29. With regard to enforcement of penalties, in 2011/12 the cost to HM Courts and Tribunals Service for the enforcement of fines, penalty notices and confiscation orders was £54m. The service employs 340 Civilian Enforcement Officers and 1500 enforcement administrative staff.[233] As of December 2010, the total outstanding debt for all criminal financial penalties was £608m. Aged debt (>12 months) was £420m, made up of 1.2 million

[228] The operation of this award is further understood by reference to the CPS Guidance on costs, which provides that an application for costs need not be made where it would be unmeritorious or impractical. The guidance gives examples of where it would not be appropriate for a prosecutor to seek costs, such as: the defendant does not have the means to pay, i.e. where a lengthy term of imprisonment, hospital order or substantial compensation is likely to be ordered, see http://www.cps.gov.uk/legal/a_to_c/costs/; and the Practice Direction on Costs in Criminal Proceedings at para 3.4: An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay. The order is not intended to be in the nature of a penalty which can only be satisfied on the defendant's release from prison, available at http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/costs-in-criminal-proceedings.pdf.

[229] Criminal Justice and Courts Bill, House of Commons Second Reading, 24th February 2014, col 53, per Chris Grayling MP

[230] http://www.nao.org.uk/wp-content/uploads/2015/02/Managing-debt-owed-to-central-government.pdf, at p14.

[231] https://www.justice.gov.uk/downloads/publications/policy/moj/hmcts-aged-debt-pilot-report.pdf at [10]. Nearly 900,000 offenders were sentenced to a fine in criminal courts; some 65% of criminal cases were dealt with by way of financial penalty.

[232] Ibid at [2].

[233] Ibid at [3].

individual accounts.[234] It also appears that HM Courts & Tribunals Service plans to outsource its enforcement activity to the private sector in 2014, under its Compliance and Enforcement Services Project.[235]

30. With little explanation of how the costs recovery scheme will operate, or any safeguards to protect the integrity of the criminal justice system, we consider the demand for court charges to be unprincipled, unjustified and unnecessary. The Government must make available information regarding the current demands upon convicted persons before Parliament is asked if they are able to sustain more. It must also make clear how it intends to recover these charges without incurring disproportionate enforcement costs, and in a way which is fair to the convicted person. We currently do not see how this will be possible.

March 2014

Supplementary written evidence submitted by JUSTICE (CJC 27)

JUSTICE regrets that many of the civil justice proposals in the Criminal Justice and Courts Bill are ill-evidenced and ill-advised. Whether by design or coincidence, we are concerned that measures which will change the funding structures for judicial review will significantly limit the ability of groups and organisations without independent means to hold the Government, local authorities and public agencies to account.

This briefing focuses principally on Part 4 of the Bill and judicial review. It proposes that Clauses 50 – 53 should not stand part of the Bill. In the alternative, we propose detailed amendments to retain the discretion of the court to control its procedures commensurate with the public interest.

Specifically, we propose that the hands of the court should not be bound to apply the "no-difference" test at permission stage in any case where a Respondent asks for it. This test should remain a high hurdle. The alternative—as proposed in the Bill—would see judges stepping into the shoes of decision makers. This would be constitutionally inappropriate and costly as decisions on permission become dress-rehearsals of the merits of a claim.

If the proposals on financial disclosure remain in the Bill, they must be significantly amended to give the Court the power to waive the requirements in appropriate cases and to control the processing and storage of the information through the use of reporting restrictions and other safeguards.

JUSTICE considers that the proposals on interveners' costs are unnecessary and contrary to the public interest. We propose amendment to reflect the practice of the Supreme Court which leaves adequate discretion with individual judges to control both the scope and cost of any intervention in the public interest. There is no evidence that intervention is anything other than a tool to assist the court predominantly exercised for the public interest alone and entirely controlled by judicial discretion. In the circumstances we urge Parliamentarians to subject this part of the Bill to close scrutiny.

We suggest that extremely broad Henry VIII powers would fundamentally undermine the operation of the Protective Costs Order regime which would be codified by Clauses 54 and 55. Similarly, the Henry VIII powers provided in Clause 58 are overly broad and should be removed from the Bill or significantly limited.

While we see the attraction of reducing delay by ensuring that claims which will ultimately be determined by the Supreme Court are considered quickly, we are concerned that the proposals to expand the use of "leapfrog" appeals should not be permitted to deprive an individual of a right to appeal in practice or to overwhelm the resources of the Supreme Court. We express particular concern that "leapfrog" appeals from the Special Immigration Appeals Tribunal may inadvertently lead to greater use of the Closed Material Procedure by the Supreme Court. We suggest amendments which would require Ministers to justify the proposed model for the expansion of leapfrog appeals.

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law.

[234] Ibid at [27].
[235] Ibid, at p43.

2. JUSTICE has worked actively on issues of good administration, oversight and accountability since our inception.[236]

3. In this briefing, we suggest amendments to the proposals in the Bill on judicial review and civil appeals. We consider that Part 4 of the Bill is a priority for Parliament and focus on this section primarily. However, we also suggest a number of amendments designed to clarify the Government's proposals to expand the use of leapfrog appeals to the Supreme Court in Part 3. We have produced separate briefings on our concerns about the criminal justice sections of the Bill. Our second reading briefing provides a fuller background on the role of judicial review.

The constitutional significance of judicial review

4. Judicial review and associated administrative law provide an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again. In a country with no written constitution to control the relationship between the citizen and the State, this function takes on a particular constitutional significance.[237]

5. Clearly, it must be open to the Government—and to Parliament—to review whether the existing arrangements for judicial review are working, including whether the procedure adopted is disproportionate, unduly restrictive or overly burdensome. However, the constitutional importance of judicial review places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place to preserve access to justice, accountability and good administration. Parliament should ensure that the Government takes this obligation seriously.

6. We consider that no reliable evidence has been produced to support the Government's claim that judicial review is open to abuse or that an expansion in the use of judicial review is such that significant restriction is necessary. The financial savings which the Government estimates that these proposals will make are limited (in the region of £6 million). We consider that Government's calculation of these limited savings remains doubtful. Importantly, the likely on-cost associated with reducing access to advice and representation has not been considered. Costs associated with the proposed changes have not been quantified or considered and no estimate of the benefit to the taxpayer of judicial reviews which save public money has been conducted. Alternative suggestions designed to enhance the efficiency of the Administrative Court have been rejected by the Government.[238] The bulk of responses to the Government consultation opposed the case for any further change to judicial review. However, the Government has determined to press ahead with these changes. JUSTICE is concerned that the Government's approach is flawed for two substantive reasons:

a. its proposals are unbalanced, focusing primarily on individuals bringing judicial review, with changes to legal aid and on the face of the Bill likely, by coincidence or design to deter or prevent claims against Government or public agencies; and

b. it will restrict the discretion of courts to control litigation brought in the public interest.

A) PART 4

New Clause 1—Legal Aid, Judicial Review and Delegated Legislation

Proposed Amendment

(1) The Legal Aid Sentencing and Punishment of Offenders Act 2012 is amended as follows.

(2) In section 2, after subsection (3), insert the following new subsection:

(-) Any regulations made under subsection (3) must be consistent with the intention that the services specified in this Act and its Schedules should continue to be available to individuals pursuant to this Act.

(3) In section 9, after "(schedule)" insert the following new subsection:

[236] See for example, *The Citizen and the Administration* (1961), *The Citizen and his Council* (1969), and *Administration under the Law* (1971) during the early development of modern administrative law in England and Wales. We briefed on the retention of the constitutional duties of the Lord Chancellor in connection with the rule of law, independence of the judiciary and the public interest in the administration of justice, during the passage of the Constitutional Reform Act 2005. We regularly intervene in constitutionally significant proceedings as a third party, including in cases arising by way of judicial review. Most recently, we argued in *R (Cart) v Upper Tribunal*, for the retention of judicial review for the determinations of the Upper Tribunal and other similar specialist tribunals. In that case, Lord Dyson stressed the fundamental nature of the function of judicial review: "*There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review*." Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122.

[237] We consider the full constitutional function of judicial review and its evolution in our Second Consultation Response, at paras 9 – 15.

[238] For example, in the response of the Senior Judiciary, they questioned why the LAA should administer the proposed ex gratia scheme and not an individual judge. See Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform* (2013). http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf. In JUSTICE's response to the First and Second Consultations on judicial review, we comment on the possibility of using costs orders to deter Respondents from pursuing poor defences or resisting permission in cases where a clearly arguable claim exists.

(-) No order made pursuant to subsection 2(b) may vary or omit any services specified in paragraph 19, Part 1, Schedule 1 (Judicial Review).

Briefing

7. This amendment would restrict the power of the Secretary of State in Section 9, LASPO to amend, vary or restrict eligibility for legal aid for services connected with judicial review by secondary legislation. It would make clear that the broader power of the Secretary of State, under Section 2, to make provision for the "arrangements" governing the payment of legal aid should not be exercised in a manner which is inconsistent with the intention of Parliament that individuals should continue to be able to access legal aid for the services deemed in scope by LASPO.

8. The Secretary of State proposes to use delegated powers pursuant to LASPO to remove funding for any judicial review application issued which is not granted permission by the Court. The Civil Legal Aid (Renumeration) (Amendment) (No 3) Regulations 2014 have been tabled in parallel to this Bill to give effect to the Government's proposals. The Regulations are scheduled to come into force on 22 April 2014. These Regulations are made pursuant to Section 2, LASPO. This section gives the Secretary of State the power to make arrangements for the payment of "remuneration" for legal aid. Where an application for judicial review is issued, the new Regulations will prohibit the Lord Chancellor for making any payment for legal aid services except in cases where permission is granted, or subject to an ex gratia scheme.[239]

9. JUSTICE is concerned that this major part of the Government's package of proposals for reform of judicial review is subject only to secondary legislation without opportunity for full parliamentary debate. Debate on LASPO and its remaining provision for civil legal aid – including for judicial review – was lengthy and contentious. It seems remarkable that Parliament could have intended the Minister to be able to make such sweeping changes to funding without further primary legislation. Members may wish to table this amendment to restrict further reform by delegated legislation and to ensure that Ministers explain why the Government considers that the current package of changes can be made properly by delegated legislation within the scope of LASPO.

Background

10. The proposed shift in the burden of risk faced by solicitors providing advice and representation to legally aided claimants in judicial review cases is highly relevant to Parliament's consideration of many of the proposals in this Bill.[240] Yet, since these measures will be contained in secondary legislation, Parliamentarians will have no real opportunity to debate the merits of the proposed changes or any proposed alternatives.

11. The Government proposes that legal aid should not be recoverable in judicial review claims except where permission is granted. In cases where applications are withdrawn before a permission hearing, the Legal Aid Agency ("LAA") will have limited discretion to make ex gratia payments in connection with work done. The consultation exercise thus far has focused upon this discretion and a promise by the Lord Chancellor that pre-action advice and investigation will continue to be funded, together with any necessary applications for interim relief. JUSTICE considers that these assurances will not resolve the risk which this change will pose to the practice of judicial review. The determination that the risk of public law litigation should be met by lawyers representing vulnerable people without other means to challenge life-changing decisions, in our view, shows a profound misunderstanding of administrative law in practice. As the senior judiciary have themselves explained, many cases are currently settled prior to any hearing on permission.[241] The ethical position of both solicitors and barristers who accept instructions subject to a legal aid certificate and who subsequently seek to withdraw before issue is far from clear. As cases evolve, the nature of judicial review means that actions entirely outside the knowledge and control of claimants or their representatives, the likelihood that a case will proceed to permission or succeed at that stage may shift. Given the risks involved, the likelihood that many providers will turn away from providing any public law assistance at all in legally aided cases is high.[242] Yet, despite this risk Parliament is not invited to debate the detail of these proposals.

12. That the scope of the change proposed should be subject to primary legislation is illustrated by the Regulations themselves. Despite commitments made by the Lord Chancellor, they contain very little detail. No clear provision is made to preserve funding for pre-application work, nor for interim relief. No criteria are set for the determination of ex-gratia payments. Perhaps most worryingly, the ex-gratia payments are to be made subject to the discretion of the Lord Chancellor with no provision made for independent review or appeal. The implications of this proposal are most stark for cases brought against the Ministry of Justice or its agencies. These and many other concerns raised about the drafting—not the principle—of the changes proposed remain yet to be resolved. The Government proposes that the changes must take effect on 22 April 2014 and will apply to all individuals seeking legal aid to challenge a public decision after that date. In light of the limited evidence

[239] In light of the nature of judicial review, Parliamentarians may, in due course, wish to consider whether these powers are properly exercised under Section 2, or whether they provide a *de facto* limitation on access to services more properly considered.
[240] Also, to Parliament's consideration of numerous other Bills, including for example, the Immigration Bill.
[241] See paras 23-25. Response of the Senior Judiciary of England and Wales, Judicial Review: Proposals for further reform (2013) http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf
[242] The Committee heard clear evidence from Nicola Mackintosh and Nick Armstrong on the risk facing solicitors and barristers who practice principally on judicial review, PBC Deb, 13 March 2014.

produced to support the Government's case for change and that there is no immediate risk to the operation of the Administrative Court, Members may wish to consider whether such speedy implementation is either necessary or wise.

New Clause 2 – Permission hearings, costs and balanced reform

Proposed Amendment

(1) The High Court shall order the costs of any hearing to determine an application for leave pursuant to section 31 of the Supreme Courts Act 1981 to be paid by the unsuccessful party unless there are exceptional circumstances which would make such an order unjust.

(2) In this section, "unsuccessful party" means:

(a) The respondent in cases where leave is granted; or

(b) The claimant in cases where leave is refused.

Briefing

13. This amendment would clarify that costs following an oral hearing on permission should normally be paid by the losing party. As explained above, a number of alternative suggestions for the reform of judicial review procedures have been made, which the Government has rejected. This amendment would put one of these suggestions on a statutory footing and would allow Members to ask the Government why this and a number of alternatives which would represent a more balanced approach to judicial review reform (affecting both claimants and respondents) have been rejected.

Background

14. A volume of procedural and substantive changes, for example, have been proposed by a recent report by the Bingham Centre for the Rule of Law on *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*.[243] This amendment reflects one of its recommendations, albeit that statutory change would not be necessary to give it effect in practice. It argues that where a Respondent resists permission on the papers, then the claimants costs should be treated as "costs in the case" (that is, they would be recoverable if the claim succeeds). Different considerations apply on a renewal hearing. However:

> We do not think that a defendant or an interested party who unsuccessfully contests an oral permission hearing should be in any better position than one who applies unsuccessfully for summary judgment: both have caused the court to hold a hearing which has turned out to be unnecessary.
>
> …
>
> However, if our logic …is correct in principle, then the corollary is also right. Claimants must bear the equivalent responsibility for continuing to maintain that their claim is properly arguable." [244]

15. Unfortunately, the Government now proposes that an unsuccessful claimant should usually pay the Respondents costs. If successful, they would only recover costs should their claim proceed to judgment and succeed. The senior judiciary had openly criticised this lack of balance in the Government's approach:

> To the extent that the Government intends to discourage the bringing of weak claims by the readier grant of costs against unsuccessful claimants, discouragement of defendants from delaying the progression of hearings by unsuccessfully opposing the grant of permission should be an equal consideration.[245]

16. This amendment will allow Members to ask the Minister to challenge the Government's justification for reform, which it continues to base on the need to save money and deter the expanding use of court time on judicial review. Alternatives designed to save money and increase efficiency—including by deterring respondents from resisting permission in well-founded cases or from pursuing "hopeless" defences in practice —have been proposed. The Minister should explain why the unbalanced approach to reform proposed is justifiable. JUSTICE and others have produced extensive commentary to illustrate that this proposal will deter claims from proceeding, to the detriment of the ability of those without independent means to hold Government to account. In those cases that proceed, the proposals are likely to increase costs and delay in practice.

Part 4: Judicial Review

Clause 50: Procedural illegality

Proposed Amendments

Clause 50 should not stand part of the Bill.

[243] Published in February, the full text of the Review Report is available here: http://www.biicl.org/files/6813_bingham_jr_report_web.pdf

[244] See Bingham JR Report, paras, 6.3 – 6.5

[245] Response of the Senior Judiciary", 1 November 2013, para 29.

Alternatively:

Page 52, Line 3, leave out "must" and insert "may"

Page 52, Line 7, leave out "highly likely" and insert "inevitable"

Page 52, Line 15, leave out "and"

Page 53, Line 16, leave out subsection (b)

Page 52, Line 18, leave out "highly likely" and insert "inevitable"

Page 52, Line 19, leave out "must" and insert "may"

Page 52, Line 38, leave out "and"

Page 53, Line 39, leave out subsection (b)

Page 52, Line 44, leave out "highly likely" and insert "inevitable"

Page 52, Line 45, leave out "must" and insert "may"

Briefing

17. The Bill would restrict the scope of the Administrative Court to consider claims for judicial review which raise questions of procedure. It proposes that in every case where a respondent authority asks, the Court must consider whether, had the relevant authority acted lawfully, it would be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

18. JUSTICE considers that Clause 50 is unnecessary and inappropriate and should not stand part of the Bill. Our alternative amendments would place it within the discretion of the Court to consider whether to refuse relief in any case where it would be inevitable that the outcome would not differ. Importantly, this would maintain the proper supervisory function of the judiciary on judicial review. If the "highly likely" test is adopted, there is a significant risk that judges will be invited to step into the shoes of an individual decision maker and to second guess how they might have acted had they acted lawfully. In addition, these amendments would leave the timing of the Court's consideration of any "no-difference" test to its discretion. The Bill would force the Court to consider this question at permission stage on the prompting of a respondent. This will lead to additional cost and delay as the merits of a decision and its likely outcome are explored at an early stage in the process.

Background

19. The proposals in Clause 50 illustrate a significant lack of understanding about the purpose of administrative law and the function of judicial review. The Second Consultation asked for examples of cases "brought solely on the grounds of procedural defects" and seemed grounded in the implication that it should be easier for the Court to dismiss, or refuse a full hearing in cases which raise issues of procedure. This is reflected in the Impact Assessment which explains: "In some cases, whilst technically successful, some of these challenges may result in no substantive change to the original decision".

20. Judicial Review is a supervisory remedy. One of its core purposes is to ensure that administrative decision makers act within the bounds of the law, including by following fair processes that reflect the principles of natural justice. Where statute or policy requires that a particular process be followed, in order to ensure that a decision takes into account all of the relevant factors deemed necessary by Parliament, administrative law requires that those procedures be followed for good reason. Every lawyer—and every decision maker—has encountered a "cut and dried" case which turns out, after consideration, not to be so straightforward. Just as due process exists in criminal procedure to deal with the risk of wrongful conviction in cases where individuals might be deemed "clearly guilty"; administrative procedures exist to encourage good administrative practice and to ensure that the varied interests of those affected are taken into account. It is extremely difficult to second guess how a disputed decision might have been different if a lawful procedure had been followed. This is particularly significant where the procedural flaw in play is a failure to comply with an obligation to consult. The lowering of the threshold of "no difference" should not be allowed to undermine the process of engagement in democratic decision making. Where an individual would have had the opportunity to make representations if an authority had acted lawfully, it is difficult to second-guess what would have been said by the applicant—and other respondents to the consultation—but also how the authority might have reacted to the representations made.[246] The case law is clear. Caution must be exercised in applying the "no difference" test.[247] In *R v Tandridge District Council ex p Al Fayed* [2000] 1 PLR 58, 63C-D, the Court explained:

> "Once it is appraised of a procedural impropriety the court will always be slow to say in effect, 'no harm has been done'. That usually would involve arrogating to itself a value judgement which Parliament has left to others."

[246] See, for example, *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, para 352.
[247] See for example, *R v Broxtowe Borough Council ex p Bradford* [2000] LGR 386at 387f-g; *R v Life Assurance and Unit Trust Regulatory Organisation Ltd ex p Tee* (1995) 7 Admin LR 289, 307F.

Clauses 51 and 52: Financial Information and Judicial Review

Proposed Amendments

Clauses 51 and 52 should not stand part of the Bill.

Alternatively:

Clause 51

Page 53, Line 16, insert "or the Court has ordered that such prescribed information need not be provided in whole or in part."

Page 53, Line 21, leave out "likely to be available"

Page 53, Line 22, leave out "and"

Page 53, Line 23, leave out subsection (b)

Page 53, Line 43, leave out "likely to be available"

Page 53, Line 44, leave out "and"

Page 53, Line 45, leave out subsection (b)

Clause 52

Page 54, Line 7, leave out "must" and insert "may"

Page 54, Line 13, leave out "must" and insert "may"

Page 54, Line 12, insert:

(-) Where the information in subsection (2) includes confidential information about the financial position of a natural person, the Court may to the extent necessary to protect the confidentiality of such information –

(a) sit in private; and

(b) impose reporting restrictions

Briefing

21. The Bill proposes that certain financial information must be provided by all claimants with their application for judicial review before their claim can proceed. Clause 52 provides that a Court must always consider whether to make an order for costs against any organisation or individual named in that information, including parties other than the claimant. Very little information has been given about how this information will be processed or how the Court will be expected to approach the obligations in Clause 52.

22. The amendments we propose would limit the information to be provided to information about the ascertainable financial resources of the claimant, including any third party financing. At present it would require any claimant to disclose information about financing "likely to be available". JUSTICE considers that this test is extremely uncertain and likely to have a chilling and unjustifiable impact on applicants for judicial review. We would remove a specific requirement for bodies corporate to name their members and their ability to resource litigation. Ministers should provide a fuller explanation as to their understanding of this clause and its relationship with the law on the ordinary liabilities of corporate entities and their members. It is as yet unclear how this measure is intended to apply in practice.

23. The other amendments would permit the Court to waive the need to disclose financial information at its discretion. Amendments to Clause 52 would permit the Court to take steps to protect such information as is disclosed by use of private sittings and reporting restrictions, if justified and proportionate. At present, it is unclear how claimants who wish to protect information about their finances, including commercially sensitive information, might be permitted to pursue an application for judicial review. These draft safeguards are designed to give the Court some flexibility to protect the rights of an individual litigant in practice.

Background

24. While it may appear reasonable for the court to pursue all avenues for the enforcement of costs orders legitimately made against unsuccessful applicants, the requirement for would-be applicants to provide any significant information about their financial information at the outset of a claim is new. In the context of this package of reforms, JUSTICE is concerned that these measures will—by design or coincidence—further deter the use of judicial review by people without independent means.[248] Cumulatively, this approach will limit the ability of groups of people, including vulnerable people, to access judicial remedies for the unlawful activities of Government.

[248] This could prove a general deterrent. If the extent of the information required will involve, for example, disclosure of sensitive financial information, including that which raises commercial sensitivities, this could create a particular hurdle for even corporate litigants.

25. It would seem inappropriate in many cases to distribute this information to the parties in a case, particularly where the information is personal or may relate to commercial sensitivities. If the information is to be gathered solely for the purposes of aiding costs recovery, Ministers should be asked to explain why this information should be provided at the point of application rather than during the enforcement process after it is determined that an individual party is liable for costs. In this regard, we note that there is already a considerable body of existing law which governs the ability of the court to pursue costs from "unseen" funders and backers of litigation.[249] We are concerned that measures designed to improve recovery of costs should not ultimately be used to limit access to judicial review only to those with substantial independent means by deterring others from pursuing litigation even where their claims are strong. By proposing to limit the ability to access PCOs and by limiting access to legal aid, it is likely that individuals and groups without significant funds will explore other avenues of support for litigation. If the mechanism for the handling of information in connection with the recovery of costs is unclear, or the means by which the court might pursue an individual are uncertain, these avenues are likely to be similarly constrained. For example, if a charity obtains a grant from a third party organisation for the purposes of pursuing litigation capped at £5,000, will the court be capable of enforcing a costs order against the donor for any sum over that amount? What about a solicitors firm or a law centre that acts *pro bono* where a claimant is unable to secure legal aid? Would family members who support litigation brought by a vulnerable or disabled relative seeking to challenge withdrawal of services be affected? These are questions which have not yet been explored and which should be better defined before Parliament approves the changes proposed in Clauses 51–52.

Clause 53: Interventions, costs and the public interest

Proposed Amendments

Clause 53 should not stand part of the Bill.

Alternatively:

Page 54, Line 37, leave out "must" and insert "may"

Page 54, Line 36, leave out subsections (4), (5) and (6) and insert:

(-) On an application to the High Court or the Court of Appeal by a relevant party to the proceedings, the court may order the intervener to pay such costs as the court considers just.

(-) An order under subsection (4) will not be considered just unless exceptional circumstances apply.

(-) For the purposes of subsection (5), exceptional circumstances include where an intervener has in substance acted as if it were the principal applicant, appellant or respondent in the case.

Briefing

26. The Bill would require the High Court or the Court of Appeal to order costs against an intervener on an application by any party except in exceptional circumstances. Exceptional circumstances are to be defined in the rules of court. The Bill does not distinguish between successful and unsuccessful parties. On application by either, the Court would, on the Government's proposals, generally be bound to make an order against an intervener.

27. These amendments would restore the discretion of the Court to control the application of costs against interveners. They reflect the current practice of the Supreme Court (and other domestic courts) as formalised in the Rules of the Supreme Court.

Background

28. Courts currently hold the discretion to make an order as to costs against any intervener. In practice, the general approach of the UK courts has been that the costs which result from an intervention are treated as costs in the case (in practice meaning that the losing party pays their own and the other party's costs of preparation and representation, but not the intervener's costs, who bears their own). This reflects the nature of a public interest intervention being to assist the court and add objective value to the court's determination of a case. It underlines the special position of an intervener, who participates in any case only with the consent of the court. This position has been formalised in the Supreme Court Rules, where Rule 15 provides that there will generally be no order for costs, for or against, an intervener. The court does however retain the discretion

[249] See for example, *Hamilton v Al Fayed (No 2)* [2003] QB 1175.

to order costs, particularly where an intervener effectively steps into the shoes of one party or another.[250] This reflects earlier practice in the House of Lords and open to other courts. This settlement reflects the value of reasonable intervention to the court by ensuring that interveners must be in a position to support the costs of their own contribution, yet retains a discretion to act where an intervener imposes an unreasonable burden on the parties to the case.

29. The proposals in Clause 53(2) appear designed to deter any applicant from pursuing an intervention in the public interest, except before the Supreme Court (where it appears that the Rules of the Supreme Court will continue to apply).[251] Requiring the court to order an intervener to pay any costs of the original parties arising as a result of its intervention is likely to act as a significant bar on participation to many third party interveners. Many interveners – JUSTICE included - operate with very limited resources, and are subject to the oversight of a Board of Trustees, for whom risk management is a primary concern. A significant number are charitable organisations with an obligation to account for their activities to the Charity Commission. The threat of an as-yet-undetermined costs risk will operate as a significantfactor in whether to pursue a particular application.

30. By contrast, these changes are unlikely to have a significant impact on interveners for whom a costs risk will not be a major consideration. It is unlikely that Government Departments, major commercial organisations or corporations will be affected.

31. The Government has produced no evidence to support any claim that the current arrangements have caused a significant problem for litigants or the courts. We are concerned that these proposals should not proceed on the basis of a misunderstanding about the role and function of a public interest intervener. In particular:

— The Court as gate-keeper: The Government refers to individuals who "choose to intervene".[252] For example, in its response to the Second Consultation, it explains:

The Government considers that those who choose to become involved in litigation should have a more proportionate financial interest in the outcome and this should extend to interveners.

While parties may choose to pursue an intervention, the scope and character of any intervention is ultimately at the discretion of the court hearing the relevant claim. While procedural rules may vary in the High Court, the Court of Appeal and the Supreme Court, in each instance a would-be intervener must make an application to intervene supported by grounds. As we explain in *To Assist the Court*, this will in most cases require an intervener to illustrate that they will bring value to a case not likely to be met by the parties and their contribution will assist the court in its consideration of the case. For example, in the Supreme Court Rules, Rule 15, expressly refers to interventions by individuals with an interest in proceedings brought by way of judicial review or:

any official body or non-governmental organization seeking to make submissions in the public interest.

Further guidance is provided in Practice Direction 8, which references the guidance of Lord Hoffmann that:

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything.[253]

Although no such specific guidance is given in connection with reasonable intervention in the High Court and the Court of Appeal, it is understood by practice that submissions made must assist the court by adding something tangible to its consideration of the case, in order that such intervention will serve the public interest.

Thus, in the strictest sense, in every case, an intervener is invited by the court to play a role which is defined ultimately by the court.

The Government intends costs to be divided proportionately to the assumption of financial interest in the case. This appears to subvert the role of the traditional public interest intervener, where their involvement has no direct interest for the organisation. In any case, an intervener can neither win nor lose. Instead, their contribution to the case is made in the public interest, to assist the court. They are contributing the cost of their own involvement to assist the court in reaching a conclusion in the case, which is objectively improved

[250] Supreme Court Rule 15: "will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent). This reflects earlier practice in the House of Lords and open to other courts. Courts have been comfortable exercising this discretion in the face of unreasonable behaviour. For example, in *R (Barker) v London Borough of Bromley* [2006] UKHL 52 at paras 32 -33, where Lord Hope ordered costs against the Secretary of State, intervening in the appeal, explaining that the Secretary of State had in fact joined the appeal against the claim that there was a defect in regulations which bound the respondent local authority, but for which the Minister had been responsible. In the event, the Secretary of State ran his intervention as if he had been joined as a party to the case and it was only proper that the costs of the appeal should be met jointly with the local authority. See also, *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 681, para 4. In that case, the United Synagogue was granted permission to intervene, but in practice played the primary role in opposing the claim. The Court of Appeal determined accordingly that it should meet the costs of the case.

[251] See also, Jaffey, B., and Hickman, T., '*Loading the dice in judicial review: the Crime and Courts Bill 2014*', U.K. Const. L. Blog, (6 Febuary 2014). Available at: http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/

[252] See for example, Second Consultation, Government Response, page 16.

[253] *In Re A Child (Northern Ireland)* [2008] UKHL 66

by a consideration of the law going beyond the dispute between the parties. In JUSTICE's experience, our interventions generally focus on making good law, consistent with the rule of law, comparative practice and the UK's international obligations.

— The public interest in interventions: The Government recognises that the purpose of most interventions is to serve the public interest by placing information or argument which will add value to a case before the court.[254] It is extremely unusual – but not unknown - for third parties to be granted permission to intervene (rather than be joined) to represent their own personal interests.[255] It is regrettable that neither the Second Consultation document nor the Government's Response attempted to assess or quantify the value to the public interest of interventions undertaken for that purpose. Nor does it consider when an intervention might be beneficial to parties in a case where an intervener addresses issues – such as comparative practice – which the parties might otherwise be invited to consider by the court. The long term benefit to the development of the law of interveners willing to put objectively sourced information and argument before our judges to help ensure that the development of precedent is informed by the wider public interest outside the immediate demands of a case is not explored. Although these benefits may be difficult to quantify in monetary terms, the support of the senior judiciary for reasonable third party interventions is clear. As Baroness Hale recently pointed out:

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. […]

But from our—or at least my—point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied.[256]

Judges have regularly expressed their view—judicially and extra-judicially—that the involvement of third party interveners in the public interest is beneficial.[257] In the response of the senior judiciary to the Second Consultation, they explain:

The court is already empowered to make costs orders against non-parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court.

In an adversarial system where few resources are allocated towards research facilities and support of our senior judiciary, it is unsurprising that judges, and specifically the senior judiciary, find interventions helpful in determining claims where significant issues of public interest are raised. In this context, it is understandable that the Government was unable to produce any specific evidence in its Consultation of a problem posed by individual interventions, or the role of interveners more generally.

— The scope of an intervention: Whether in the Supreme Court, Court of Appeal or the High Court, the scope of an intervention can be controlled by the court, with specific guidance provided by the Supreme Court Rules on the conduct of a reasonable intervener. For example, although the consent of the parties to an intervention is not required, it is always sought before an intervention is pursued. Similarly, the scope of an intervention is expected to be reasonable and proportionate to the value to be added, with specific guidelines offered by the Supreme Court that written submissions should usually be less than 20 pages. It is for the court to decide whether oral submissions from an intervener might assist, and for the court to determine how long those submissions should be. Where an intervener acts unreasonably, it is open to the court to make an order as to costs. We return to this issue below, but the desire to avoid imposing any unreasonable burden on the parties and to avoid increased costs associated with disproportionate additions to a case will be foremost in the mind of a reasonable intervener and their representatives.

32. The Government has given no indication of having considered the practical implications of the costs presumption in Clause 53(2).[258] The impact on the initiation of individual interventions aside, the practical implications for the allocation of costs between parties and interveners is yet to be explored. While cases of obvious time wasting by third party interveners are easily addressed under the rules currently in place, how will the court be able to determine whether additional costs are in fact attributable to an intervention? If an

[254] See for example, Second Consultation, Government Response, page 62.

[255] See for example, EM *(Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. In this immigration removal cases, the appellant's 12 year old son intervened to put before the court representation on the impact that removal would have on him personally.

[256] Who Guards the Guardians, Public Law Project Conference: Judicial Review Trends and Forecasts, 14 October 2013. http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians

[257] *I.A. (Appellant) v The Secretary of State for the Home Department (Respondent) (Scotland)* [2014] UKSC 6 at [25] "Extremely helpful". Lord Kerr has described JUSTICE's intervention in Rahmatullah as 'powerful and significant'. http://www.justice.org.uk/data/files/Rahmatullah_JUSTICE_PRESS_RELEASE_FINAL_-_311012.pdf (Lord Kerr)

[258] Judicial Review: Proposals for Further Reform, *Consultation Response of the Constitutional and Administrative Bar Association*, [112]. Available at:http://www.adminlaw.org.uk/docs/ALBA%20JR%20Consultation%2010%202013.pdf

intervener acts within the bounds of his permission to intervene, with written and oral submissions made only as directed by the court, will they avoid costs? On the language of "exceptional circumstances" proposed in the Bill, it would appear not. If an intervener provides clear, concise reasoning which clarifies the issues and saves everybody time, will saved costs be deducted from those otherwise payable by the intervener? In fact, it may be the case that, the more useful an intervention, the more costly it will be for the organisation concerned. In any event, the allocation of costs referable to an intervention is unlikely to be straightforward. The implications of this are two-fold – increasing the uncertainty of any potential costs risk for a putative intervener and increasing administrative costs for the court in connection with any intervention it accepts.

Clauses 54 and 55: Protective costs orders and the public interest

Proposed Amendments

Clause 54

Page 55, Line 22, leave out subsection (3)

Page 55, Line 25, after "judicial review", insert "or any intervener"

Page 56, Line 10, leave out subsections (9), (10) and (11)

Clause 55

Page 57, Line 8, leave out "must" and insert "may"

Page 57, Line 12, leave out subsections (3), (4) and (5)

Briefing

33. The Bill proposes to place the making of Protective Costs Orders (PCOs) on a statutory footing. JUSTICE does not object to codification of this process in principle, although we are not persuaded it is necessary or justified by any evidence that PCO cases are problematic. However, we are concerned that, as drafted, the statute would fundamentally undermine the utility of the PCO to preserve public interest litigation and unduly restrict the discretion of the court to do justice in the limited number of cases where such protection is considered justifiable.

34. These amendments would:

(a) Allow the court to consider a PCO before permission is granted (in line with current practice);

(b) Enable interveners to make applications for PCOs (in line with current practice);

(c) Remove Henry VIII powers which would enable the Minister to revisit the circumstances when a PCO might be available, including when such orders might be in the public interest; and

(d) Restore the discretion of the Court to consider when a reciprocal order capping the costs of any applicant would be in the public interest (in line with current practice).

Background

35. Although PCOs affect a limited number of cases. This limited number is perhaps explained as PCOs may only be considered in cases where the court determines that there is an especial public interest in the claim being heard.[259]

36. In judicial review, and specifically the types of cases in which PCOs are generally sought, the pre-permission hearing costs can be significant. Jaffey and Hickman cite recent instances where the parties have incurred pre-permission costs in excess of £30,000.[260] If a PCO cannot be obtained to protect the claimant against the risk of liability for the entirety of unknown and potentially substantial costs, it is very likely that claims that raise issues of wider public interest will not be brought. In addition, the link to permission reflects a misunderstanding of the operation of judicial review more generally. Legitimate claims may settle before permission is granted, securing an effective remedy in practice for the applicant and others and ensuring that a Government decision is retaken within the bounds of the law. Yet, in some public interest cases, without the protection of a PCO, there will be no-one to issue proceedings and no incentive on a wayward Government body or public authority to change its ways. This seemingly minor procedural change could ultimately undermine the purpose of the PCO and its codification.

37. Currently, the determination of whether a PCO serves the public interest remains a matter for the court's discretion. Following a line of existing case-law, the court will consider a number of factors including whether the issue is a matter of public importance and whether the proceedings are likely to proceed otherwise.[261] These factors are reflected in Clause 54. Regrettably, Clause 54 provides for the Lord Chancellor to amend the definition of public interest, removing or adding relevant factors in secondary legislation, albeit subject to the affirmative procedure. We can see no justification for permitting the Lord Chancellor to determine the

[259] http://www.publiclawproject.org.uk/data/resources/147/PLP_consultation-response_JR_further_reforms_1_11_13.pdf See para 60.

[260] Jaffey, B., and Hickman, T., '*Loading the dice in judicial review: the Crime and Courts Bill 2014*' See above.

[261] R *(Corner House) v Secretary of State for Trade and Industry et seq*.

principles applicable to PCOs without the opportunity for full parliamentary oversight. In effect, this measure would displace the power of the court to determine factors relevant to the public interest. If the Bill proposes that this should be the case, Parliament should take full responsibility for setting those criteria. In the majority of cases where a PCO is likely to be sought, a Government Department or public authority is likely to be the respondent.

38. Clause 55 provides for the criteria which the court should apply when considering the terms of any costs cap to be applied to either party's cost liability under a PCO. Again, these broadly reflect a codification of existing rules applied by the courts, including the financial resources of the parties and anyone supporting the litigation and whether the party which benefits from the cap is represented *pro bono*. However, Clause 55(3) provides for the Lord Chancellor to revisit any of these criteria in future regulations, albeit again subject to the affirmative procedure. Changes to these criteria could significantly alter the purpose and scope of any PCO. JUSTICE considers that such changes should be properly subject to parliamentary scrutiny if a new statutory regime is to displace the discretion of the court.

39. Clause 55 currently would require the court to make a reciprocal order in every case where a PCO is made in favour of the respondent, to limit the costs recoverable by the claimant in the event that they would win the case. The Government originally proposed that in every case the orders must not only be reciprocal, but mirrored. Existing case law requires the court to consider the necessity for a "cross-cap" in every case. JUSTICE considers that the court should retain the discretion to consider when a reciprocal order truly serves the public interest. The level of a PCO is determined in order to ensure that a claimant is able to bring a claim – a claim where there is a public interest in its determination that would otherwise not be brought – and will be set at a level designed to allow the litigation to proceed according to the means of the claimant. The PCO serves the public interest. While a costs-cap ensures that the claimant, benefitting from this exceptional procedure, does not act unreasonably, whether a public body found to have acted unlawfully is to be excused from paying recoverable costs at a reasonable rate raises different public interest questions.

Clause 58: Delegated powers and transitional measures

Proposed Amendments

Page 58, Line 36, leave out "supplementary" and "or saving provision"

Page 58, Line 38, leave out subsection (2)

Briefing and background

40. These amendments would remove the Henry VIII power and would limit the power to make "supplementary" or "saving" provisions. The power to make consequential and supplementary provision in the Bill is extremely broad. We share the concerns expressed by others, including the Bar Council, that this section, providing as it does, for an extremely wide Henry VIII power, is exceptional and should be closely examined by members of both Houses.

41. Parliamentarians may wish to consider the application of these powers to the amendment of procedures for judicial review in Part 4. Given the constitutional significance of these measures, explained above, we consider that a Henry VIII clause of this kind is entirely inappropriate.

PART 3

Leapfrogging (Clauses 32-35)

Proposed Amendments

Closed material proceedings and leapfrog

Page 35, Line 18, insert the following new subsection

(-) In section 15 (Cases excluded from s.12) after subsection (4), insert-

(5) No certificate shall be granted under section 12 of this Act in any case where a declaration pursuant to section 6 of the Justice and Security Act 2013 (c18) has been made.

Page 37, Line 30, after subsection (4), insert-

(5) No certificate shall be granted under section 12 of this Act in any case where a declaration pursuant to section 6 of the Justice and Security Act 2013 (c18) has been made.

Page 39, Line 30, after subsection (4), insert-

(5) No certificate shall be granted under section 12 of this Act in any proceedings where closed material proceedings under Rule 54 of the Employment Tribunals Rules of Procedure pursuant to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) have been used.

Clause 35 should not stand part of the Bill.

Who should authorise leapfrogging in cases of "national importance"?

Page 34, Line 34, delete "insert "or that the conditions" to the end of subsection (2)(a).

Page 34, Line 39, delete subsection (3) and insert the following new subsection:

(-) After Section 12, the following new section is inserted:

(-) *(Application to the Supreme Court for permission to appeal in cases of national importance)*

(1) In the alternative conditions, any party may apply to the Supreme Court for a certificate enabling an appeal to be made directly to the Supreme Court.

(2) The alternative conditions are that a point of law of general public importance is involved in the decision and that:

(a) The proceedings entail a decision relating to a matter of national importance or consideration of such a matter;

(b) The result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, a hearing by the Supreme Court is justified; and

(c) The benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

Briefing

42. The first group of amendments would prevent leapfrog in any case where a court or tribunal has used the closed material procedure authorised under specific statutory frameworks or under the Justice and Security Act 2013. While the Government clearly intends the procedure to be available in these cases, JUSTICE is concerned that removing the consideration of the Court of Appeal will inadvertently expand the number of claims where the Supreme Court is invited to sit subject to Closed Material Procedures ("CMP"). The Supreme Court Justices have themselves expressed their concern about the use of these procedures. The ability of the Court of Appeal to narrow the legal issues which require determination by the Supreme Court in these cases is arguably crucial to the minimisation of the number of closed judgments which the Supreme Court may be required to make. Parliamentarians may wish to consider whether, if leapfrog is appropriate at all in these cases, whether particular provision should be made for consideration of whether the Supreme Court is likely to be required to sit in closed session in order to determine a claim. If so, this factor should vitiate against any leapfrog appeal.

43. The Bill proposes to amend the current procedure which applies to leapfrog appeals to expand the circumstances when they will be available, to include cases where the first instance court considers that a case is one of "national importance" and so significant that early consideration by the Supreme Court outweighs the benefits of consideration by the Court of Appeal. The second group of amendments would require an application to be made to the Supreme Court to approve of the use of the leapfrog procedure in these cases. It would also make the criteria proposed cumulative. The current approach in the Bill is modeled on the existing procedure for leapfrog. However, this test will provide for a much expanded set of circumstances, more subjectively determined, when a curtailed provision for appeal is deemed appropriate. That the test hinges on a lower court's assessment of national importance (determined most likely after hearing argument from a Government department or public agency) must be considered carefully. While the Supreme Court will retain the power to refuse to hear an appeal, and a route back to the Court of Appeal is maintained, we are concerned that, in these cases, referral will put significant pressure on the Supreme Court to add cases assessed as "nationally important" to its docket. The claims are, by their nature, likely to be subject to a high level of public scrutiny. Whether a route back to the Court of Appeal will realistically remain open in these circumstances is as yet untested. Parliamentarians should ask the Minister to explain why the existing model for the management of leapfrog appeals is appropriate for the consideration of a much expanded group of cases when the existing requirement for the parties' consent is removed.

Background

44. JUSTICE recognises the attraction of reducing delay in some cases where a determination of the Supreme Court may be the only sensible means to resolve a case (for example, where a party seeks to challenge binding precedent from the Court of Appeal, House of Lords or the Supreme Court).

45. We are concerned that the Supreme Court has limited time and resources and must remain in control of its own listings, in order to ensure the fair management of its time and the prompt consideration of the most pressing issues for determination, whether according to the individual impact of an issue or the constitutional significance of any case. While these provisions in the Bill retain the power of the Supreme Court to refuse permission to appeal, this form of docket control will be exercised in circumstances where the case involved is likely to be subject to significant public scrutiny, having been assessed by the lower courts—and most likely the Executive—to be of particular national significance. In these circumstances, the Justices may be more reluctant to refuse permission. The lower courts and tribunals will retain the power to certify any appeal suitable for the Supreme Court without consideration by the Court of Appeal. While it is important that a route back to the Court of Appeal is retained by the Bill, it is unclear whether an applicant, refused permission by the Supreme

Court will, in practice, retain a realistic prospect of successfully securing a hearing before the Court of Appeal and whether any subsequent hearing might be impacted by a refusal by the Justices to consider the case on leapfrog.

46. Respondents to the consultation— including the senior judiciary—highlighted that the Court of Appeal performs an important function, narrowing issues subject to appeal and honing the arguments of the parties.[262] It is regrettable that the Government has not engaged with the significance of the leapfrog procedure in its justification for reform. The Supreme Court is a court of last resort, designed to consider limited, significant issues of law in the public interest. It has far fewer judges than the Court of Appeal. The judges of the Supreme Court—and the parties in any individual case—may benefit from the consideration of the Court of Appeal where an interim judgment might act to narrow the issues in dispute and better clarify the applicable law. Without this interim exercise, the appeals heard by the Supreme Court are likely to be more complex and more time-consuming. Parliamentarians may wish to consider whether—in light of the expanded number of courts capable of certifying a leapfrog referral and the significant expansion of the grounds available—it may be preferable for the Supreme Court to control both referral and permission to appeal in "national significance" cases.

47. We have particular concern over the function of a leapfrog appeal from the Special Immigration Appeals Commission (SIAC). Most of the cases considered by SIAC involve the hearing of evidence in closed material proceedings (CMP) (where one party and their legal team may be excluded entirely from part of a case and represented instead by a security vetted special advocate who cannot communicate with them directly). Although it is within the power of the Supreme Court to consider CMP material, the Justices have expressed their concern that this should be an exceptional exercise given the constitutional function of the Court in setting binding precedent.[263] In SIAC cases, the Court of Appeal is more appropriately placed to sit in closed session in order better to define the legal issues subject to appeal, separate from the contested facts in the case, including material considered in CMP. If the Court of Appeal is more routinely bypassed, it is arguable that the Supreme Court may be required to sit more regularly in closed session. JUSTICE agrees with the guidance of the Justices in Bank Mellat and considers that this would be an undesirable development. There is nothing on the face of the Bill which would make special provision for SIAC to consider whether—in cases involving CMP—consideration by the Court of Appeal might better resolve the issues in the case and might resolve any closed matter before necessary consideration by the Supreme Court. JUSTICE considers that this must be a minimum safeguard before any leap frogging procedure is considered for SIAC or in any other case where CMP is utilised.

March 2014

Written evidence submitted by Equality and Diversity Forum (EDF) (CJC 28)

1. The Equality and Diversity Forum (EDF) is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation. Further information about our work is available at www.edf.org.uk and a list of our members is attached. Our member organisations represent people who have any or all of the characteristics protected in the Equality Act 2010 and one of our key concerns is that each should have access to equal rights of access to justice regardless of their age, disability, gender and gender identity, race, religion or belief, and sexual orientation (unless there is a good reason why this is not appropriate).

2. The Equality and Diversity Forum (EDF) considers that Judicial Review is a vital remedy and one of the most important ways for citizens to hold Government and other public bodies to account. Lord Dyson, now Master of the Rolls has said—'*there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review*'.[264] The power to judicially review public decisions is an important reserve power enabling citizens to ensure good governance and we consider that further constraints on its use should be approached with very considerable caution.

3. Members of the EDF are concerned that these proposed changes will have a seriously chilling and adverse effect on the availability of Judicial Review and are concerned that, if these provisions are implemented, they may adversely affect the ability of people in the UK to secure their legal rights. In particular we are concerned about clauses 50, 53, 54 & 55.

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[262] See para 40. Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform (2013)*. http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

[263] *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38, paras 67 – 74.

[264] R (in the application of Cart) v Upper Tribunal [2011] UKSC 28 at para 122

Clause 50—Requiring the court to consider the likelihood of whether there would have been a substantially different outcome for the applicant

4. This clause modifies the existing approach (which was developed by the courts in case law) so that the Court must refuse an application for Judicial Review if it thinks that it is 'highly likely' that the outcome for the applicant would not be substantially different if the decision in question had been taken properly.

5. This clause risks creating further delay, duplication and cost. Judicial Review has two stages, a permission stage and a full hearing of the issues. If this provision is implemented there is a danger that the permission stage hearing will have to be enlarged and will become a mini-trial of the substantive issues in a case. Furthermore, it could significantly change the supervisory function of our judges on Judicial Review applications. A judge seeking to determine how 'highly likely' a decision maker would have been to act differently had he complied with the law would be forced to reach a decision on what another body would decide if they are required to re-consider their decision. This is not currently the role of the Court and we do not think it is appropriate for a court to substitute itself for a public decision maker in this way.

6. We urge the Committee to remove clause 50.

Third party interventions

Clause 53 - Establishing a presumption that interveners in Judicial Review cases in courts will pay their own costs and any costs incurred by any other party because of their intervention

7. The role of interveners is to assist the Court. They are only permitted to intervene with the permission of the Court when the Court considers that they have something to add to the legal argument and the intervention will lead to better justice. In many cases interveners have raised important legal aspects of cases that may not have been raised by the parties themselves. We are therefore concerned at the possibility of third party interventions in Judicial Review cases being prevented or deterred.

8. Under the Civil Procedure Rules any person who is interested in the issues being considered in a Judicial Review case can seek permission from the court to intervene in the case usually by filing evidence or making representations. At the end of the Judicial Review case the court will consider who should bear the costs that arise from any intervention. The courts have powers to make an award of costs against a person who is not a party to a claim, such as an intervener.

9. However, clause 53 goes further than this by establishing a presumption that those who intervene in a Judicial Review case will have to pay any costs they have caused to the parties to the hearing that arise from their intervention, even when the points they make in their intervention are accepted by the Court. This will inevitably deter organisations from seeking to intervene in cases and is consequently likely to reduce the quality of decision making.

10. In the vast majority of cases interveners act thoughtfully and the Court will limit their intervention in a way that does not impose undue burdens on the parties. Administrative Court Judges are used to limiting interventions and are highly costs conscious. This means that there are not normally significant extra costs incurred as a result of interventions.

11. The Equality and Human Rights Commission (EHRC) and other relevant bodies often intervene and affect the outcome. This provision creates an expectation that a costs order will be made against an intervener unless they can show 'exceptional circumstances' why this should not happen. If the EHRC and other relevant bodies are at risk of a costs order they may become significantly more reluctant to intervene and this would, in our view, jeopardise the good administration of justice.

12. We urge the Committee to remove clause 53.

Costs—Cost Capping Orders

Clause 54–55—Restricting the situations where a cost capping order can be made—A cost capping order limits the costs which a party may recover from another party at the conclusion of the case

13. Costs Capping Orders (referred to by the Courts as Protective Costs Orders) have been developed by the Courts in order to ensure that there is an equality of arms between the claimant/s and the defendant. These orders act principally to limit the costs liability of claimants, to ensure individuals can afford and predict the cost of litigation. They are only used when cases are considered to raise a serious issue which affects or may affect the public generally, or a significant section of it. It enables claimants to bring cases where they might otherwise be reluctant because of the risk of an adverse costs order. A body of case law has developed and the Courts have set out the principles to be applied in considering when and how Costs Capping Orders can be made.

14. There are two aspects of this clause that concern us. Firstly, this clause means that a cost capping order can only be made at the permission stage of proceedings. At this point considerable costs could have been accrued for which the applicant could be made liable. For a costs capping order to be useful for an applicant they would need to be available at an earlier stage. The risk of unknown and potentially substantial pre-permission costs is a risk that those who would otherwise qualify for costs protection cannot possibly

take. If a costs capping order cannot be obtained to protect against such a costs risk, very many claims with substantial wider public interest will not be brought. Secondly, clause 54(9) gives the Lord Chancellor very wide powers to add, omit or amend the 'matters to which the court must have regard when determining whether proceedings are public interest proceedings' by regulation. We agree with the Public Law Project when they say that this would be—'unprecedented and constitutionally improper given that the Government stands to benefit (as a regular party to litigation) from its ability to make rules governing the courts' discretion.'[265]

15. We urge the Committee to remove clauses 54–55.

March 2014

Annex

EQUALITY AND DIVERSITY FORUM MEMBERS

Action on Hearing Loss
Age UK
British Humanist Association
British Institute of Human Rights
Children's Rights Alliance for England (CRAE)
Citizens Advice
Disability Rights UK
Discrimination Law Association
End Violence Against Women Coalition
Equality Challenge Unit
EREN—The English Regions Equality and Human Rights Network
Fawcett Society
Friends, Families and Travellers
Gender Identity Research and Education Society (GIRES)
JUSTICE
Law Centres Network
Mind
National AIDS Trust
National Alliance of Women's Organisations (NAWO)
Press for Change
Race on the Agenda (ROTA)
Refugee Council
RNIB
Runnymede Trust
Scope
Stonewall
The Age and Employment Network (TAEN)
Trades Union Congress (TUC)
UKREN (UK Race in Europe Network)
UNISON
Women's Budget Group
Women's Resource Centre

Written evidence submitted by Ismail Abdulhai Bhamjee (CJC 29)

1. Criminal Proceedings- Information can be laid before any Court or Tribunal in any Part of the United Kingdom before any Circuit Judge or High Court Judge or any Judge of the Court of Appeal any Division.

Civil Proceedings should be stayed by virtue of Section 49 (3) of the SCA 1981 or The Criminal Justice Act 1988.

2. The HM Attorney General should have the Power to Appeal in the Supreme Court of the United Kingdom against any Judgment before any High Court Judge or UPPER TRIBUNAL in a Criminal Cause or Matter.

3. When laying an Information for a Volunteer Bill of Indictment under Section 2 of the Administration Justice (Miscellaneous Provisions) Act 1933. This can be laid before any Crown Court, any Upper Tribunal and Any County Court Circuit Judge for the Offence of Perjury—Subornation of Perjury and Collective Harassment.

4. The Civil Procedure Rules 3–11—Civil Restraint Orders should be repealed

5. The HM Attorney General should review the decision of the Solicitor General who has authorised an Application for a Section 42 of the SCA 1981 Order, and there should be exemption on Court Fees for Persons who are subject to Section 42 of the SCA 1981 where the Orders should be for a period of not exceeding more than Five Years.

[265] Public Law Project Briefing Parliamentary Briefing Paper, Part 4 Criminal Justice & Courts Bill (Judicial Review), February 2014 p7 at http://www.publiclawproject.org.uk/data/resources/159/PLP-Parliamentary-Briefing-Paper-11-March-LONG.pdf

6. Malicious Prosecution applies to Civil and Criminal Proceedings. There is a Judgment given in the Privy Council.

7. The Information Commissioner's Office should be abolished for failing to obey the Family Law Act 1986 Part 3 Declaration of Marital Status and M. F. P. A. 1984 Part 3.

It should be open for any Person to lay an information before any Court of Law or Tribunal for a Disclosure Order-Production Order before proceedings are commenced—and Section 32 of the Freedom of Information Act 2000 should no longer be exempt Information by Virtue of the Civil Procedure Rules—Criminal Procedure Rules, Family Procedure Rules.

8. Officers in the Citizens Advice Bureau should not be immune from any Legal Proceedings—Civil or Criminal Proceedings.

Since there is a House of Lords Judgment given on the 20th July 2000 in Arthur J S Hall Versus Simmons and Others where it was ordered that Advocates have no Immunity whether Civil or Criminal Proceedings.

I believe that the above is true.

March 2014

Written evidence submitted by Steve Symonds (CJC 30)

CRIMINAL JUSTICE AND COURTS BILL—PART 4: JUDICIAL REVIEW

1. I am no longer a practising lawyer, and have never been in private practice. I have previously represented for free individual claimants and appellants before a range of tribunals in a paid or voluntary capacity over many years. I have also provided free advice to various NGOs and one statutory body on the merit or otherwise of engaging in judicial review litigation, again sometimes in a paid and sometimes in a voluntary capacity.

2. This submission concerns measures on judicial review in Part 4 of the Bill, in particular clause 50 ('no difference' cases), clause 53 (interveners and costs) and clause 54 (protective costs orders).

3. Having regard to what has been said in the media and Parliament over recent years,[266] and in the Ministry of Justice consultation preceding the measures in this Bill,[267] there is much confusion or misapprehension about judicial review—how it functions and its role in our constitutional settlement. This submission, therefore, addresses certain misconceptions before providing short observations upon the relevant clauses.

4. In recent years, a fashionable misconception has been that judicial review is a modern invention.[268] As the late senior Law Lord, Tom Bingham, has explained in his seminal book, *The Rule of Law*, judicial review concerns "*old powers, exercised for centuries*."[269]

5. While the rise in judicial review claims since the 1970s and 1980s has been striking, this is exaggerated by comparison with the previous period from the early part of the twentieth century onwards, a time which one former member of the senior judiciary has referred to as a "*long sleep*".[270] Another eminent jurist, Sir William Wade wrote:

> "*During and after the Second World War a deep gloom settled upon administrative law, which reduced it to the lowest ebb at which it had stood for centuries. The courts and the legal profession seemed to have forgotten the achievements of their predecessors and they showed little stomach for continuing their centuries-old work of imposing law on government...*"[271]

6. The volume of judicial review claims is at an all time high. However, in comparing past periods during which the exercise of these old powers has flourished, it is well to recall that an important reason for this lies in the democratizing effect of such matters as the law centre movement, the provision of legal aid and, as Tom Bingham explained in a lecture at the Hebrew University of Jerusalem in 1999, reform of the court:

> "*Apparently modest in scope, and made without statutory intervention, these procedural changes transformed judicial review from the part-time activity of the few to a mass sport for the many. In the*

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[266] There have e.g. been several statements made in recent years about success rates in judicial review, which have ignored or failed to comprehend that many cases succeed without the court being required to make any or a final decision because the public authority is persuaded to withdraw its decision and consider the matter again.

[267] Misconceptions evident in the consultation paper (*Judicial review: proposals for further reform*, Cm 8703, September 2013) included a failure to understand the importance of procedural justice (see later in this submission); and a failure to confront or understand concerns raised by around 150 Treasury Counsel (lawyers acting for the Government) on related legal aid proposals (see fn. 29, below).

[268] e.g. The former Home Secretary, the Rt Hon David Blunkett MP has made this claim: Blunkett, D, (2006) *The Blunkett Tapes: My Life in the Bear Pit*, Bloomsbury (London)

[269] Bingham, T (2011) *The Rule of Law*, Penguin Books (London), p60

[270] Sedley, S (2011) 'The Sound of Silence', *Ashes and Sparks: Essays on Law and Justice*, Cambridge University Press (Cambridge), p77

[271] Wade & Forsyth (1994) *Administrative Law*, 7th edition, at 18

> *process an old truth was demonstrated: that with courts, as with airlines, a demand only becomes evident when the means exist to meet it.*"[272]

7. It is not wrong in principle to consider whether this 'mass sport' can be made more efficient. However, whereas that term may now appear unfortunate, possibly even a little frivolous, it is surely to be celebrated, as Tom Bingham clearly intended it should be, that access to the courts and the powers to protect the individual against unlawful excesses by a state that by any measure is vast (whether measured in terms of powers, jurisdiction, officials or administrative bodies) is more equitably and widely distributed than previously. It should be a first concern that—with the widespread withdrawal of legal aid, and the sharp decline of the law centre movement in particular and of other advice agencies[273] — – measures in this Bill are likely to further reverse those gains.

8. As regards the more recent rise in judicial review claims over the last ten years or so, it has been shown by others that this is largely or completely explained by a rise in asylum and immigration claims.[274] It is significant that over this period there have been successive statutory measures introduced to curtail or remove asylum and immigration appeal rights,[275] an extraordinary expansion in the volume and complexity of immigration rules,[276] a significant expansion in the use of immigration detention,[277] the debacle of the Home Office asylum legacy backlog clearance,[278] and repeated failures of the Home Office to give effect to decisions of the courts.[279] These are but some of the reasons behind the rise in these claims. In the circumstances, it is remarkable that the Home Office is currently sponsoring another Bill to further remove appeal rights,[280] which—as it expressly acknowledges[281]—can be expected to drive still more judicial review claims.

9. The period of 'long sleep' was not without consequence for the legitimacy of government in the UK. This is attested by the titles of such publications as *The New Despotism* by then Lord Chief Justice, the Lord Hewart of Bury, and C K Allen's *Bureaucracy Triumphant* and *Bureaucracy Again*.[282] The following from 1928 provides for a sobering comparison:

> "*What we now find... is that large judicial duties of an important character have been given, not to persons holding judicial office, not even to known and ascertainable individuals, but to vast departments of the State, huge administrative organisations employing thousands of anonymous civil servants.*"[283]

10. Accordingly, Parliament should be slow to accede to any major revision in the area of judicial review. The judicial arm of our constitutional government may be less assured of respect in the public eye than it has been previously or than may be ideal. But Parliament is itself hardly immune from a lack of public esteem. If it is to act to deprive whole communities,[284] based upon their relative lack of means, of effective access to judicial review as a means to safeguard themselves against what many may regard as the machinery of an overweening

[272] Bingham, T (2000) 'The Old Despotism', *The Business of Judging: Selected Essays and Speeches 1985–1999*, Oxford University Press (Oxford), p208

[273] See http://www.legalvoice.org.uk/2014/02/05/more-law-centre-closures-as-laspo-cuts-bite/

[274] See e.g. evidence of Adam Wagner to the Committee (13 Mar 2014 : Column 131); and research by Varda Bondy and Maurice Sunkin to which reference is made on the UK Constitutional Law Group blog at http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

[275] e.g. the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the Immigration, Asylum and Nationality Act 2006 and the UK Borders Act 2007 each contained provisions to curtail the bringing and/or the scope of appeals.

[276] In *R (Alvi) v SSHD* [2012] UKSC 33, July 2012, para. 11, the Lord Hope observed on these rules that: *"The first versions of the rules were 17 and 20 pages long. The 1994 Statement of Changes in Immigration Rules (HC 395) extended to 80 pages. There have been over 90 statements of change since then, and HC 395 has become increasingly complex. The current consolidated version which is available on line from the UKBA website extends to 488 pages... 19 statements of changes in the Immigration Rules have been published on the website since February 2010. There have been four this year, the last of which was in June 2012... In DP (United States of America) v Secretary of State for the Home Department [2012] EWCA Civ 365, para 14 Longmore LJ lamented, with good reason, the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice and policy change in this field of law."*

[277] See e.g. http://www.globaldetentionproject.org/countries/europe/united-kingdom/introduction.html

[278] As briefly explained by the Chief Inspector of Borders and Immigration in his Foreword to his 2012 report on the legacy, the Home Office failed to meet its commitment to resolve this backlog by 2011, and compounded that failure by the lack of preparation to hand over the backlog to a new Unit: see http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/UK-Border-Agencys-handling-of-legacy-asylum-and-migration-cases-22.11.2012.pdf

[279] As was e.g. the case in relation to a plethora of applications and judicial review claims concerning fresh asylum claims and permission to work, leading up to the Supreme Court judgment in SSHD v ZO (Somalia) [2010] UKSC 36.

[280] Immigration Bill, HL Bill 84, Part 2

[281] The Impact Assessment on these measures (IA No. HO0096, July 2013) states: "*It is thought that the volume of judicial reviews may increase as a result of the policy changes. A judicial review is estimated to cost the Home Office between £1,500 and £2,000 per review, this relates to average legal fees. There would also be adverse costs and damages to consider, as well as costs to MoJ but these are currently unknown. As volumes are unknown, it is not possible to quantify this impact.*"

[282] see Bingham, T (2000) 'The Old Despotism', *The Business of Judging: Selected Essays and Speeches 1985–1999*, Oxford University Press (Oxford); and Sedley, S (2011) 'The Sound of Silence' op cit

[283] Robson, W A (1928) *Justice and Administrative Law*, Macmillan, at 91

[284] As Margaret H Kidd wrote in 1929: "*Everybody knows how difficult and expensive it is for the individual—even with a good measure of right on his side—to combat successfully a Government department.*" 'The Encroachment of Administrative Bodies on the Judicial Sphere', Scottish Law Review, vol xiv (Nov 1929), 323 at 329 cited in Bingham, T (2000) 'The Old Despotism', *op cit*

state and others may consider to be a state that has abandoned their interests and needs, this will hardly contrive to improve Parliament's standing.

11. Whatever individual parliamentarians may think about the powers necessary for an effective executive arm of our constitutional government, or the requirements of austerity, it is very unlikely that pleas to a democratic mandate based upon such electoral turnouts as have become normal will carry much sway.[285] This is, of course, not helped by the substantial delegation of considerable power to the executive, as has been Parliament's modus operandi for many decades,[286] in circumstances where Parliament is clearly unable to give effective scrutiny to the great volume and range of use of those powers.[287]

12. Others have provided evidence to the Committee concerning the clauses upon which I wish to comment. I can, therefore, address these clauses fairly briefly. However, before doing so, I hope it may be useful to provide a reminder of what judicial review is all about. For that, I can do no better that cite from another lecture of Tom Bingham, delivered in 1996 at King's College:

> *"In a democratic society governed by the rule of law no one—literally no one—is entrusted with unfettered power. The reason is obvious: unfettered power is tyranny or despotism, both of which are inconsistent with the rule of law. So, while the complexity of modern government leads to the conferment of wide powers and important discretions on particular bodies and office-holders, all such powers are conferred for a purpose which is either explicit or implicit and no discretion is so broad as to be subject to no limit at all. Much the same is true of non-statutory prerogative powers. Whatever the source of the power in question, the judge's task when reduced to essentials is always the same: to examine whether the power in question has been lawfully used. It will not have been lawfully used if it has been used for a purpose alien to that for which the power existed. It will not have been lawfully used if statutory conditions attaching to its exercise have not been observed. It will not have been lawfully exercised if the decision to exercise it has been swayed by irrelevant considerations or if the decision-maker has disregarded relevant considerations. It will not have been lawfully exercised if, in a situation where ordinary fairness required a certain procedure to be followed, and the decision was one calling for ordinary fairness, such a procedure has not been followed. It will not have been lawfully used if the decision to exercise the power was one which no one in his or her right mind could have made if properly advised in law. These are not new tests. They are, admittedly, judge-made tests. But they originated well before the recent boom in judicial review, at times when the judges were generally perceived to be overly respectful of government and, for that matter, excessively right-wing. The point I wish to emphasize, however, is that even where the judge finds one or other of these tests to be satisfied, and so quashes the decision under challenge, he does not thereby become the decision-maker. The judge's only role is to decide whether the challenged decision was lawful or not: if the challenge is upheld the consequence is not that the judge makes the decision but, almost invariably, that the decision is quashed, leaving the true decision-maker at liberty to make another decision, lawfully, whether to the same effect as the earlier decision or not."*[288]

Clause 50:

13. By this measure it is intended to require the court to consider whether quashing the decision of a public authority and requiring it to make a new, but lawful, decision would make no difference to the outcome. The measure is offensive. It ignores that the legitimacy of a public authority's decision-making is not a mere question of the outcomes produced. If we are to travel any further down that particular road we will be forced to confront the proposition that Government has or appears to have no legitimacy for the many who disagree with its decisions. Those who are quick to lay claim to 'democratic mandates' would do well to reflect that they are appealing to a procedural legitimacy not one based on outcomes alone or at all. As others have explained, the measure invites the court into an arena properly reserved to the public authority (the question of what would and should be the decision); and invites public authorities to eschew any commitment to adopt fair processes (even those for which Parliament may have legislated) on the ground that they may just as well argue that their decision would in any case have been the same had they followed such processes. It is remarkable that the one example provided in the Ministry of Justice consultation in support of this measure concerned a case where the court found the decision-maker to have acted unlawfully by reason of apparent bias or predetermination.[289]

Clause 53(4):

14. By this measure it is intended that an intervener should ordinarily be required to pay costs of the other parties insofar as the intervention may be considered to have caused such costs. No evidence has been forthcoming from the Government to establish that interventions are the cause of significant or disproportionate costs to public authorities. The measure would extend to requiring an intervener to pay costs even where the

[285] Turnout at each of the last three general elections has been below two-thirds, see http://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/chartists/contemporarycontext/electionturnout/

[286] Whether this is necessary may be arguable, but that it has taken and continues to take place is incontrovertible.

[287] This is not to deny the important work of Parliament in overseeing executive action—e.g. through its Select Committee work.

[288] Bingham, T (2000) 'The Courts and the Constitution', *The Business of Judging: Selected Essays and Speeches 1985–1999*, Oxford University Press (Oxford), pp232-3

[289] *R (Ghadami) v Harlow District Council* [2004] EWHC 1883 (Admin), referred to at para. 96 of *Judicial review: proposals for further reform, op cit*

court has accepted the intervener's submissions and the party's costs have been incurred in seeking to resist those. There is certainly nothing "exceptional' (clause 53(6)) in such circumstances. The measure appears designed to deter individuals, charities or NGOs of limited means from intervening. This is despite the fact that such interventions can only be by permission of the court on the ground that the intervention will assist the court.

Clause 54(3):

15. By this measure it is intended that protective costs orders may not be made unless and until the court has granted permission for the claim to be considered. The measure would constitute a strong deterrence against claims being brought by individuals, charities or NGOs of limited means. It would provide incentive for public authorities to exaggerate that deterrent effect by their conduct pre-litigation and before a permission decision, e.g.—by obstructing any efforts to discover the true measure and merit of any defence the authority may have.[290] Moreover, if the permission and final decision are left to a rolled-up hearing, the extent of the costs-liability that the claimant may be risking would be even more prohibitive.

Conclusion:

16. I would urge that these measures not be adopted. They would clearly impede or prohibit access to judicial review on grounds of means. They risk a return to the days where this vital safeguard for the individual against the exercise of state power was available to the few, not the many. As the 800th anniversary of Magna Carta approaches, it is well to remember the imperative that "*To no one will we sell, to no one deny or delay right or justice*."[291] Having severely curtailed access to the courts for those of restricted means by the widespread withdrawal of legal aid,[292] these measures will further the inequality of access to justice by severely restricting the capacity of civil society to assist individuals and communities by engaging in public interest judicial review litigation.

March 2014

Written evidence submitted by the Immigration Law Practitioners' Association (CJC 31)

Executive Summary

ILPA responded to the Ministry of Justice consultation Judicial Review: *proposals for further reform*[293] and our interest in this bill lies in the following proposals:

Part 3

Appeals in civil proceedings

Costs in civil proceedings

Part 4 Judicial review

As to appeals in civil proceedings, we have no objection to leapfrog appeals where both parties consent and where the permission of the courts is given in the appropriate form provided that the criteria for leap-frogging are objective and uncontentious. We oppose leap-frogging without consent and have particular concerns about leapfrogging from the Special Immigration Appeals Commission.

As to costs in civil proceedings, we have no objection to the proposals on wasted costs.

As to judicial review, it is somewhat bewildering for ILPA to be responding to a Bill that aims to reduce the number of applications for judicial review[294] at the same time as working on a bill that will increase substantially the number of such applications. The Appeals Impact Assessment produced for the current Immigration Bill models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission. This appears to be an under estimate, since the calculation that produces it takes as its starting point the number of appeals allowed by the Immigration and Asylum Chamber of the First-tier Tribunal, rather than the total number of appeals started.

We oppose clause 50 standing part of the bill.

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[290] The imbalance between the position of a clamant or prospective claimant and a defendant have previously been addressed to the Attorney General by around 150 Treasury Counsel (that is lawyers who act for the Government) in a letter of 4 June 2013, in respect of an earlier Ministry of Justice consultation (*Transforming legal aid*, CP14/2013, April 2013): "*...there is a misconception in the Consultation Paper as to the level of certainty which is achievable when advising on the outcome of claims... especially in the early stages, the defendant is likely to have more information to enable it to assess the merits of a claim.*"

[291] *The Rule of Law, op cit*, p10

[292] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed legal aid in several spheres of law; and the Government has since proposed further measures to restrict legal aid through a residence test and measures to restrict legal aid in judicial review proceedings.

[293] See http://www.ilpa.org.uk/resource/21180/ilpa-response-to-ministry-of-justice-consultation-on-judicial-review-proposals-for-further-reform-1- (accessed 20 February 2014).

[294] See the Ministerial foreword to *Judicial review—Proposals for further reform, the Government response*. Ministry of Justice, Cm 8811, February 2014.

We argue that clauses 51 and 52 fail to have sufficient regard to the position of the "pure funder" or to the need for such persons given cuts to legal aid.

We oppose clause 53 and argue that it fails to consider that interveners assist the court or to consider the financial pressures on many of those best placed to provide such assistance. Similarly clauses 54 and 55 fail to understand the inequality of arms between government and those who seek to litigate in the public interest.

ILPA supports JUSTICE's call for a new clause that would restrict the power of the Secretary of State in section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend, vary or restrict, by secondary legislation, eligibility for legal aid for services connected with judicial review.

Introduction

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA has worked with parliamentarians of all parties and none on and give oral and written evidence to parliamentary committees since its inception.

2. We have had sight of JUSTICE's *Criminal Justice and Courts bill: Civil Appeals and Judicial Review House of Commons' Committee Stage Briefing and suggested amendments* of 17 March 2014 to which we make reference in this response. It is available at http://www.justice.org.uk/data/files/resources/364/JUSTICE-Briefing-CJC-Bill-Committee-Stage-Civil-FINAL-March-2014.pdf

Part 3: Courts and Tribunals

Appeals in civil proceedings

3. This part concerns the leap-frogging of appeals to the Supreme Court. ILPA's particular interest is in Clause 32, appeals from the High Court, Clause 33, appeals from the Upper Tribunal and Clause 35, appeals from the Special Immigration Appeals Commission to the Supreme Court. The judge or tribunal judge provides a certificate and a party can then ask the Supreme Court for permission to appeal. That application is to be determined by the Supreme Court without a hearing.

4. We have no objection to leapfrog appeals where both parties consent and where the permission of the courts is given in the appropriate form[295] provided that the criteria for leap-frogging are objective and uncontentious or that the power is at large. Given the nature of the proceedings before the Special Immigration Appeals Commission we consider it highly unlikely that either the parties would consent or the courts give permission for such an appeal to be leapfrogged.

5. The clauses do not require the consent of the parties and clause 32 amends the Administration of Justice Act 1969 so that the need for the consent of the parties will be dispensed with in all cases. This we oppose. The parties are giving up a hearing before a court and should not be forced to do this. There are plenty of incentives for the parties to consent, including cost, speed and ensuring that the case is heard by the Supreme Court. Of particular concern would be cases where one party consents and the other does not.

6. As to matters of case management, there is a risk of lengthy and protracted debate about the merits and demerits of leapfrogging a particular case. Requiring consent is procedurally more straightforward and more efficient.

7. Although provisions that the application for permission is to be determined by the Supreme Court without a hearing replicate existing provisions in section 13 of the Administration of Justice Act 1969 we do not consider that they are appropriate in cases where the parties have not expressly consented to the leap-frogging and where the criteria for the issuing of a certificate are not objective and not uncontentious.

8. As to Clause 32, we suggest that questions of whether a matter is of national importance may be uncontentious but may in some instances involve political decisions and that it is not therefore a suitable criterion.

9. As to Clause 33, ILPA's interest lies primarily in appeals from the Immigration and Asylum Chamber although we also have an interest in other appeals that touch on immigration and free movement law, for example in social security appeals that determine certain points of European Union free movement law.

10. It is desirable that the issues in a case have been narrowed as far as is possible before they reach the Supreme Court, so that the court can provide a clear, accessible and authoritative judgment that will assist judges, tribunal judges and other decision-makers in the future. There is a risk that without the winnowing[296]

[295] See Supreme Court Practice Directions 1, paragraph 1.2.17 and 3, paragraph 3.6.1.

[296] See the Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform* (2013), paragraph 40 available at (accessed 19 March 2014): http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

that very often takes place in the Court of Appeal, considerable time and expense will be spent before the Supreme Court narrowing issues and clarifying questions. We recall Lord Neuberger's warning:

> *…we Judges could do better…We are often pretty prolix. … when Judges deal with the law, we are often setting out principles which strangers to the particular case, lay people, lawyers and other judges, should be able to understand and apply. We seem to feel the need to deal with every aspect of every point …and that makes the judgment often difficult and unrewarding to follow. Reading some judgments one rather loses the will to live—and that is particularly disconcerting when it's your own judgment that you are reading.*[297]

11. Issues are not always clearly identified in the tribunals, as the Court of Appeal has highlighted.[298] Determinations are often prolix and the precise approach to points of law difficult to isolate. It is arguably not in anyone's interest that the Supreme Court be involved in extensive preliminary work prior to isolating the point of law it is to determine. Where there is binding Supreme Court authority on a point it may be to everyone's advantage to have a judgment of the Court of Appeal that applies that authority and sets out the results to which it leads, before the Supreme Court considers whether it should depart from that authority. It is not obvious that it is more efficient to roll those tasks into one.

12. We do not consider that the criteria proposed in the Bill are objective and uncontentious. We consider that there is scope for dispute as to whether a case has been fully argued in the proceedings and fully considered in the judgment. We are mindful that in very many immigration, as opposed to asylum cases, there is now no legal aid and the person under immigration control or asserting free movement rights will have been unrepresented. We do not consider that the Upper Tribunal could assert that a case had been fully argued where a party before it was unrepresented.

13. We consider that is for the superior courts rather than the Tribunal itself to determine whether the Tribunal has considered a point of law fully.

14. New clause 14A(4)(b) inserted into the Tribunal, Courts and Enforcement Act 2007, which provides for cases to be leap-frogged where the Upper Tribunal is bound by a decision of an appellate court appears on its face to create a possibility of a case on which there is settled law being leap-frogged.

15. ILPA opposes Clause 35. The Special Immigration Appeals Commission is a first-instance tribunal and primary finder of fact. Proceedings before the Commission are complicated by the withholding of information and evidence from a party to the proceedings, which are weighted against the appellant. Removing a tier of judicial scrutiny risks compounding, or at least removing opportunities to mitigate, this prejudice. All our comments on Clause 32 apply, save that there is legal aid for proceedings before the Commission. There is a risk that attempts could be made to rely upon proposed new section 7B(5)(a) concerning 'national importance' as a matter of routine in such cases given that they transfer to the Commission because they concern questions of national security.

16. We support JUSTICE's proposal[299] for amendments that would prevent leapfrog in any case where a court or tribunal has used the closed material procedure. We agree with JUSTICE that removing the consideration of the Court of Appeal risks expanding the number of cases in which the highest court in the land is invited to adopt closed material procedures. The Justices have expressed the view that the use of closed material procedures by the Supreme Court should be exceptional given its constitutional role.[300]

Costs in civil proceedings

Clause 36 Wasted Costs in certain civil proceedings

17. Clause 36 provides that where a court makes a wasted costs order it "must inform such of the following as it considers appropriate" and names an approved regulator or the Director of Legal Aid casework. The explanatory note interprets this to mean that the court must consider notifying a regulator and/or the Director. ILPA has no quarrel with this save to ask whether the drafting could be improved to remove a potential ambiguity and make clear that it is for the Court to decide whether to make any referral.

Part 4 Judicial review

18. It is somewhat bewildering for ILPA to be responding to a Bill that aims to reduce the number of applications for judicial review[301] at the same time as working on a bill that will increase substantially the number of such applications. It is said in the Appeals Impact Assessment produced for the Immigration Bill currently before parliament that displacement onto judicial review resulting from the abolition of appeal rights

[297] Justice—Tom Sargant Memorial Lecture 2013 Justice in an Age of Austerity Lord Neuberger, President of The Supreme Court Tuesday 15 October 2013.
[298] A recent example is *ML (Nigeria) v SSHD* [2013] EWCA Civ 844.
[299] JUSTICE Criminal Justice and Courts Bill: *Civil Appeals and Judicial Review: House of Commons Committee State Briefing and Suggested Amendments*, 17 March 2014
[300] *Bank Mellat v Her Majesty's Treasury* (No. 1) [2013] UKSC 38, paragraphs 67–74.
[301] See the Ministerial foreword to *Judicial review—Proposals for further reform, the Government response*. Ministry of Justice, Cm 8811, February 2014.

in immigration cases cannot be quantified and therefore costs cannot be estimated. But the "sensitivity analysis" in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission. This appears to be an under estimate, since the calculation that produces it takes as its starting point the number of appeals allowed by the Immigration and Asylum Chamber of the First-tier Tribunal, rather than the total number of appeals started. Even with the erroneous basis of calculation, we should be looking at an extraordinary increase. In 2011 there were 8,711 immigration and asylum judicial reviews[302] in *toto* and only 4,630 reached the stage of a decision on permission. Judicial reviews cost more than appeals, costs can be sought from the other party, and damages may be claimed. Even as the Lord Chancellor protests that there are too many judicial reviews[303] the Home Office moves to increase the number. None of this increase can be attributed to migrants or their advisors.

19. This follows the trend of recent years that has seen the number of judicial review applications in immigration and asylum cases increase as a result of Home Office action in removing rights of appeal against its decisions and in making unlawful decisions in individual cases. While immigration and asylum judicial reviews make up a significant proportion of judicial reviews, it does not follow that these cases are brought as an abuse or delaying tactic[304]. Other factors contribute. The absence of rights of appeal against many immigration decisions already forces many migrants to use judicial review as a port of first (rather than last) resort when seeking to challenge an unlawful Home Office decision. Changes to the Immigration Rules also have an effect. Many applications for leave to remain made on family and private life grounds under the Immigration Rules (as amended in July 2012) have been refused without a right of appeal. The quality of many of these refusals has been poor, leading to a need to use the only legal remedy available, an application for judicial review. It has also been necessary for many applicants to challenge the rejection of applications for want of a fee. In addition, unreasonable delay in Home Office decision-making or the incorrect application of a 'no recourse to public funds' condition on a grant of leave has led to further challenges by way of judicial review. Any increase judicial review in these classes of case is squarely the fault of the Home Office.

20. In the statistical report released on 25 June 2013, data was provided showing that in cases of civil representation for immigration and nationality, 70% of cases where proceedings were issued had a benefit to the client.[305] This figure will include claims issued in the Court of Appeal and Supreme Court as well as the High Court. The data does not indicate a level of unsuccessful claims that is in any way unacceptable.

21. Any consideration of the use of judicial review in these cases must take account of the context which includes at the least the matters discussed in the following paragraphs.

22. The conduct of the Home Office Agency as a litigant:

— The consistently poor management, service delivery and decision-making of the former UK Border Agency. For just one example, refer to the Independent Chief Inspector of Borders and Immigration's report on his inspection of the handling of legacy asylum and migration cases by the UK Border Agency.[306]

— The consistent failure of the Home Office to respond to pre-action protocol letters in immigration cases in a timely manner or at all and to acknowledge service within the time limits set by the court.[307]

— The practice of the Home Office in serving non-appealable immigration decisions at the same time as or after detention and service of removal directions, leading to urgent applications for judicial review with little or no time for compliance with pre-action protocol procedures (see the evidence cited by Silber J in R (Medical Justice) v SSHD [2010] EWHC 1925 (Admin) at paragraphs 50-54).

— The consistent failure of Home Office to abide by court decisions, for example the refusal of the former UK Border Agency to grant permission to work to asylum seekers with outstanding 'fresh claims' in line with the Court of Appeal's decision in R (ZO (Somalia)) v SSHD [2009] EWCA

[302] *See Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

[303] *Judicial Review: proposals for further reform*, Ministry of Justice 6 September 2013.

[304] Paragraphs 28, 29, Consultation Paper CP25/2012.

[305] Legal Aid Statistics in England and Wales, Legal Services Commission 2012-2013, Ministry of Justice Statistics Bulletin, 25 June 2013, Table 14: Civil Representation Outcomes (page 41).

[306] Published 22 November 2012; available at http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/UK-Border-Agencys-handling-of-legacy-asylum-and-migration-cases-22.11.2012.pdf In his foreword, the Chief Inspector observed that '*I have commented previously about the importance of effective governance during major business change initiatives. I was therefore disappointed to find that a lack of governance was again a contributory factor in what turned out to be an extremely disjointed and inadequately planned transfer of work. Such was the inefficiency of this operation that at one point over 150 boxes of post, including correspondence from applicants, MPs and their legal representatives, lay unopened in a room in Liverpool.*
I found that a considerable number of cases dealt with by this new unit fell within CRD criteria but had not been progressed by CRD. Furthermore, an examination of controlled archive cases showed that the security checks – which the Agency stated were being done on these cases – had not been undertaken routinely or consistently since April 2011. I also found that no thorough comparison of data from controlled archive cases was undertaken with other government departments or financial institutions in order to trace applicants until April 2012. This was unacceptable and at odds with the assurances given to the Home Affairs Select Committee that 124,000 cases were only archived after 'exhaustive checks' to trace the applicant had been made.'

[307] *R(Bahta & Ors) v SSHD & Ors* [2011] EWCA Civ 895; *R (Jasbir Singh) v SSHD* [2013] EWHC 2873 (Admin).

442, pending the appeal to the Supreme Court, despite the fact that there was no stay of the Court of Appeal's order (see Bahta).[308]

— The delay in amending rules and/or guidance to caseworkers to implement such decisions, for example such as occurred following the decision of the Court of Justice of the European Union in Ruiz Zambrano (Case C-34/09).

— The refusal to stay like cases pending test case litigation save in cases where judicial reviews are actually issued (as has occurred for example in litigation about the safety of removal under the Dublin Regulation to Greece and Italy).

23. The complexity of immigration law and the frequency of change. There have been six Acts of Parliament in this field since 2002 and the bill described above, removing all appeal rights is currently before parliament; in 2012 alone there were nine statements of changes in the Immigration Rules and ten judgments were handed down by the Supreme Court in immigration-related cases. Lord Taylor of Holbeach, in the debate on the Crime and Courts Bill 2012, observed:

> "*I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them*."[309]

24. The importance of what is at stake in immigration and asylum cases. These cases were described by Lord Avebury in debate on the Crime and Courts Bill in July 2012 as 'the most sensitive of cases.'[310]

25. The complexity of appeal rights. Described by Lord Hope in *BA (Nigeria)* [2009] UKSC 7 as an "elaborate system". The removal of appeal rights through frequent legislative amendment.

26. The Immigration Bill aside, there is reason to expect a decrease in immigration and asylum judicial reviews. On 15 February 2010 immigration appeals were transferred to the unified tribunals system. Prior to transfer, applicants who wished to challenge an initial decision by the Asylum and Immigration Tribunal could apply for reconsideration pursuant to s 103A of the Nationality Immigration and Asylum Act 2002. Applications for reconsideration were considered initially by the Asylum and Immigration Tribunal, but, if rejected, could be renewed on the papers for reconsideration by a High Court Judge. Since transfer, applications for permission to appeal from the First-tier Tribunal are considered first by that Tribunal and then, if refused, may be renewed to the Upper Tribunal. While it is in principle possible to seek judicial review of a refusal of permission to appeal by the Upper Tribunal, the grounds on which judicial review may be sought are very limited: *R (Cart) v Upper Tribunal* [2011] UKSC 28. These changes to the appeal structure ought to have led or to lead to a reduction in the number of appeals requiring High Court supervision.

27. On 17 October 2011 "fresh claim" judicial reviews transferred to the Upper Tribunal. These are cases where a person makes a subsequent asylum claim and the Home Office does not accept that a new matter is raised and declines to treat the claim as a "fresh" claim for asylum. There is no right of appeal against this decision. Of the 77% of judicial review applications issued in 2010 which concerned immigration or asylum issues it is likely that a significant proportion were fresh claim judicial reviews. Then in November 2013, under powers taken in the Crime and Courts Act 2013, a much wider range of immigration and asylum judicial reviews were transferred to the Upper Tribunal[311]. Many of these concern challenges to certificates that remove rights of appeal. The burden on the High Court has been substantially reduced as a result. Further, as a result of the proposals in the Immigration bill to remove rights of appeal, it is likely that many judicial review cases brought before the Upper Tribunal in the future, will simply be against Home Office decisions where there might previously have been a right of appeal to the Tribunals (one legal remedy taking the place of another).

Clause 50 Likelihood of substantially different outcome for applicant

28. This prohibits a grant of leave to bring an application for judicial review or for relief to be granted and/or damages awarded where an application has been brought if it appears to the court or Upper Tribunal to be "highly likely" that the outcome for the applicant would not have been "substantially different" if the conduct complained of had not occurred. The point is one that the court /Upper Tribunal can take of its own motion, as well as on application by the defendant.

29. ILPA considers that this clause should not stand part of the Bill. If is to stand part of the Bill, we support the amendments to it proposed by JUSTICE. Judicial review is a procedural remedy. The Administrative Court hearing a judicial review is not exercising an appellate jurisdiction but looking at the lawfulness, including the procedural propriety, of the decision-making. Procedural defects are the proper subjects of judicial review. Substantive merits may be examined only insofar as a decision is irrational. A "no difference" principle has been expressly disapproved in certain areas, the scope of which are unresolved—*see AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269). In *AF (No 3)*, following the judgment of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625, the House of Lords

[308] *R(Bahta & Ors) v SSHD & Ors* [2011] EWCA Civ 895.

[309] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012: Column 1087; for examples of judicial comment on the complexity of immigration law, see the examples cited at pp. 16-17 of ILPA's response to the Ministry's Green Paper: Legal Aid Reforms, available at: http://www.ilpa.org.uk/data/resources/4121/11.02.503.pdf

[310] *Hansard*, HL Report, 2 July 2012, Columns 497–498.

[311] See the 21 August 2013 Direction of the Lord Chief Justice at http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/lcj-direction-jr-iac-21-08-2013.pdf

confirmed that the 'no difference' principle does not apply to the non-disclosure of security-sensitive material containing the case against an individual (at least in the context of control orders).

30. It is possible to argue "no difference" as early as in the Acknowledgment of Service letter. We have seen permission refused on the basis of "no difference" where it is clear that a procedural flaw has had no impact on outcome and there is no other reason, i.e. no general point of principle, to hear the claim.

31. We consider that in general the balance is struck correctly in the courts' present treatment of the 'no difference' principle. In the leading case in the immigration and asylum context—*SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 the inevitability threshold was satisfied. Whilst rare, it is by no means an anomaly and reflects the efficacy of the current position. Maintaining the status quo avoids the undesirable position in which the permission hearing becomes a dress rehearsal for the substantive claim but still permits recourse to 'no difference' arguments in clear-cut cases.

32. The costs of disputes over procedural defects could often be avoided if procedural disputes were resolved at a stage prior to litigation with improved procedures, at the outset or following the problem's being highlighted by a pre-action protocol letter if a government department is willing to respond at this stage.

33. The status quo provides the possibility of a 'no difference' challenge at the permission stage. It strikes the correct balance. It permits obvious cases to be decided at the permission stage. However, for cases where the question of whether the decision would have inevitably been the same absent the procedural irregularity is anything less than clear cut, or where other issues are raised by the challenge, the question should be heard at a substantive hearing. For a judge to undertake a full assessment at the permission stage, in particular an assessment that respects the requirements of anxious scrutiny[312] necessary in the immigration and asylum field, full disclosure and evidential preparation would be necessary. Effectively, this would amount to a mini-hearing, which would add to cost and delay of procedural challenges rather than mitigate the problems identified in the Consultation.

34. The drafting of the Bill is broad enough for "no difference" to encompass actual and/or apparent bias; and/or failure to apply a relevant and binding policy.

35. A test of "highly likely "would require the court or Tribunal to overstep its constitutional limits and engage in an assessment of the substantial merits of the decision. The point is made by Lord Bingham in *R v Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344:

> *[i]n considering whether the complainant's representatives would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.*

36. It is re-iterated in *R (Smith)* [2006] EWCA Civ 1291, [2006] 1 WLR 3315, in which the Court of Appeal said the following (at 3320-3321):

> *Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.*

37. And by Maurice Kay LJ in *R (Shoesmith) v Ofsted et ors* [2011] EWCA Civ 642 (para 72):

> *…this is not such a clear case that I feel able to say 'no difference' without risking inappropriate encroachment into "the forbidden territory of evaluating the substantial merits of the decision".*

38. The clause has the potential to produce the opposite outcome from that which is intended. It invites a court to get involved in the merits of administrative decision-making.

39. For the court to make a decision about what outcome was likely, or would have occurred, may require a detailed assessment of underlying evidence (which may be very extensive), which is at present not required. This will fundamentally alter the nature of the judicial review process, increasing the length and cost of proceedings considerably.

40. The application of the 'no difference' principle requires a court to second-guess the outcome of the case had the procedural irregularity not taken place. This is a process that is notoriously prone to error. The well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402 makes the point:

> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

[312] *R v SSHD, ex p Bugdaycay* [1987] AC 514.

41. As at present, the principle in John v Rees should be reflected in the threshold for assessing whether a procedural defect has made a difference.

42. Appearances matter and justice should be seen to be done. The words of Lord Widgery in *R v Thames Magistrates' Court, ex p Polemis* [1974] 1 WLR 1371 are instructive:

> *It is…absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me to be no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same.' This is mixing up the doing of justice with seeing that justice is done.*

43. If a court cannot be sure that an individual is not prejudiced, it should not withhold a remedy. Lord Donaldson MR in *R (Barrow) v Leicester City Justices* [1991] 2 QB 260 (290):

> *Any unfairness, whether apparent or actual and however inadvertent, strikes at the roots of justice. I cannot be sure that the applicants were not prejudiced and accordingly I have no doubt that the justices' order should be quashed.*

44. Rights to procedural protection are not to be lightly denied. The propriety of lowering the threshold from inevitability to "highly likely" has not been tested against the requirements of Article 6 of the European Convention on Human Rights and, for matters within the scope of EU law, Article 47 of the Charter of Fundamental Rights of the European Union. Although Article 6 does not apply to decisions on the entry, residence and expulsion of migrants,[313] there is no such restriction on Article 47. Moreover Article 5(4) of the European Convention on Human Rights provides protection to persons in immigration detention and there are implied procedural rights in Articles 3 and 8 of the Convention. Clause 50 is unlikely to be immune from challenge on EU and/or Strasbourg human rights grounds.

45. Prompt and detailed acknowledgements of service and early provision of all relevant information can result in a matter being resolved before it reaches the courts. Where it is clear that there has been non-compliance with a procedural requirement, the relevant department should set out at the earliest possible stage how it intends to address the error and within what timescale and give such undertakings as it is in a position to give as to its future conduct. This is far more likely to result in the matter being resolved pre-permission or, if it reaches the permission stage, to matters being clear-cut by then.

46. The Government continues to miss opportunities for early settlement of claims by its failure to provide instructions to her own lawyers and allow them to keep to deadlines for acknowledgment of service. In the recent case of *Kadyamarunga v SSSHD* [2014] EWHC 301 (Admin) (14 February 2014) Mr Justice Green stated at para 20:

> *…it is now more or less a notorious fact that the Defendant is overwhelmed by both applications for leave to remain and disputes over such decisions this is not in and of itself an excuse for not complying with the procedural rules governing judicial reviews. I acknowledge that lawyers acting for the Defendant (both in-house and external) may be under considerable strain in cases of this sort. However, it is not acceptable for the internal problems of the Defendant or her advisors to be visited upon the judicial system.*[314]

47. This clause places a further burden on claimants and their representatives while the State continues to increase the burden on the justice system through its conduct in litigation.

48. Procedural failings can make a difference to the substantive outcome in a case. *Thakur (PBS—common law fairness)*[315] is an example of a case in which a procedural defect (failure to provide an opportunity to make representations) led to a different substantive outcome.[316] See also *Walumba Lumba (Congo) v SSHD; Kadian Mighty (Jamaica) v SSHD* [2011] UKSC 12.

49. Further, this clause would raise the potential for complicated arguments at permission stage when a legally-aided claimant will have no guarantee of payment. The Ministry of Justice has decided to remove the guarantee of payment in legal aid cases before permission stage. This clause introduces a further disincentive for claims as it increases the costs risks. The senior judiciary has already warned about the "chilling effect" that could arise from removing the guarantee of payment in legal aid cases and the Ministry of Justice ignored the judiciary's proposal for judges to have control of decision making in discretionary payment system.[317]

50. Parties that do wish to obtain legal aid will be reliant on a positive decision at permission or they will be subject to a discretionary assessment about payment by the Legal Aid Agency on behalf of the Lord Chancellor. This clause will increase the likelihood that those claimants who pursue legal aid cases will have no incentive

[313] See *Maaouia v France* (2001) EHRR 22.
[314] http://www.bailii.org/ew/cases/EWHC/Admin/2014/301.html
[315] [2011] UKUT 00151 (IAC).
[316] See also *Patel (revocation of sponsor licence—fairness) India* [2011] UKUT 00211 (IAC) and *R (Kizhakudan) v SSHD* [2012] EWCA Civ 56.
[317] See http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf—paras 24-26, accessed 19 February 2014.

to settle at an early stage and will contest any application brought by the Defendant under clause 50, thus increasing costs all round.

Clause 51 Provision of information about financial resources and Clause 52 Use of information about financial resources

51. Clause 51 requires an applicant applying for permission for judicial review to provide information about the financing of the judicial review. Clause 52 requires the court or tribunal to have regard to such information when determining costs at the end of the case and to consider whether costs should be ordered against a person other than a party who is identified in the information provided as giving financial support for the proceedings "or is likely or able to do so". As we understand the drafting, the person "likely or able" is also person identified in the information provided, but this would be worth clarifying.

52. We, and we suspect others, had misunderstood the proposal on this point in the Government consultation and thought that it would concern only cases involving a protective costs order. In our experience, those trying to obtain such an order would be likely to disclose much of this information anyway. Much funding that charities and non-governmental organisations receive will be restricted funding, only to be spent for the purposes for which it is given. Those purposes will not normally include litigation since it is not straightforward for a funder to reconcile respect for its own charitable purposes and proper use of its funds, with the 'hands off' approach required of a pure funder.

53. There is a substantial body of case law to address the question of funders. A commercial funder will be expected to meet adverse costs, see for example *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055. But the situation is different where a "pure funder", assisting out for compassionate or charitable reasons, is concerned. The court retains a power to order a contribution but this will be rare. See *Hamilton v Al Fayed* (No. 2) [2003] QB 1175. A fighting fund had backed Mr Hamilton's libel action. Mr Hamilton lost and Mr Al Fayed sought to pursue contributors to the fund for costs. Nine settled, the rest contested liability. The court held that as "pure funders" they were not liable and the reasoning is instructive and very pertinent. It was held (per Simon Brown LJ) that:

> *… the pure funding of litigation…ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to a relative but rather should extend to anyone…whose contribution (whether described as charitable, philanthropic…) is animated by a wish to ensure that a genuine dispute is not lost by default…or inadequately contested.*

54. Some MPs will have experience of having acted as pure funders in this manner.

55. Those without legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 are increasingly reliant upon friends, family, church members or other supporters to help them fund judicial reviews. This is all the more the case with increased restrictions on getting legal aid, including as a result of the proposed residence test (if introduced) and the proposal that all legal work on the permission stage of a judicial review be "at risk". The clause may discourage such people from helping in cases where it would be both appropriate and desirable that they do so.

Clause 53 Intervenors and Costs

56. Clause 53 provides that where a person applies to intervene, as opposed to being invited to do so by the court then, save in exceptional circumstances, the court may not order a party to pay the intervenor's costs and must order the intervenor to pay costs a party has incurred because of their intervention. The former reflects the normal current position. The latter does not. At the moment, the courts have powers to depart from the usual "no order as to costs" when permitting an intervention[318] and have all their usual wasted costs powers against intervenors.

57. It is our experience that the usual approach is indeed "no order as to costs". Indeed, the Supreme Court Practice Directions provide at paragraph 6.9.6 "Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal".

58. There are good reasons for not turning these into rigid rules. An intervener intervenes to assist the court. The rules of the Supreme Court make express reference to "submissions in the public interest"[319]. It is only if the intervention is going to assist the court that it is permitted. It is not desirable to set liability for costs at a level where the court will not benefit from that assistance. The intervention may well save time and money both in the instant case and those that will come after which will benefit from the clearest and most informed

[318] See e.g. Rules of the Supreme Court, rule 46.3.
[319] The Supreme Court Rules 2009 (SI2009/1603) (L. 17), Rule 15(1)(a). See also Supreme Court Practice Direction 3.

judgment in the lead case.[320] We concur with the analysis given by the senior judiciary in its response[321] to the Government consultation:

> *37. The court is already empowered to impose cost orders against third parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court. Views may legitimately differ on the propriety of a presumption that interveners should be liable for the costs of parties, if costs can be shown to have been increased by their intervention, unless there is a corresponding possibility of their seeking costs.*

59. Lady Hale said in her speech to the Public Law Project Conference on 14 October 2013:

> *As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own, unless they have effectively been operating as a principal party (rule 46): if they behave properly, the principle that costs follow the event should not apply to them. But of course there will be some additional costs caused by the parties having at least to read and think about what the interveners have to say, so responsible moderation is called for.*

60. Lady Hale drew attention to a number of ways in which the courts act to keep the costs of such interventions down. The court has powers to limit the amount of evidence the intervener is allowed to adduce and can confine an intervener to written argument, both of which can be used to keep additional costs under control. Rule 6.9 of the Rules of the Supreme Court limits interveners' written submissions to 20 pages.

61. She highlighted that in the case of an intervention by a public body such as the Equality and Human Rights Commission, or a non-Governmental organisation such as Liberty, their intervening rather than acting for the claimant may make it easier to disentangle the private interests of the client from the broader public interests.

62. ILPA intervenes very rarely indeed. ILPA will normally give consent for its information to be used by members in litigation and similarly will provide them with witness statements on matters of fact or settled policy. Decisions as to whether to intervene are taken on the basis that we consider that we are in a position to assist the court with material relevant to the decision that cannot or will not be put before it by the parties. We consider our own objects and purposes in deciding whether or not to do so.

63. The United Nations High Commissioner for Refugees has intervened in a number of cases before the UK courts. These interventions are often acknowledged by the courts as having been of tremendous benefit to them. The interventions and the way in which the courts deal with them are often closely studied around the world.[322]

64. An intervener that will struggle to bear its own costs may for that reason be reluctant to intervene if it has no prospect of recovering them and this may lead to the most useful and desirable intervener being reluctant to participate. The courts should retain powers to allow interveners to claim their costs.

65. In cases where one of the parties is unrepresented, an intervention may make it unnecessary to appoint an 'advocate to the court', appointed by the Attorney General at the behest of the court to assist the court.[323]

66. It may be difficult to disentangle in a particular case whether costs would have been incurred in any event. If the intervener had said less, might the claimant or defendant have needed to say more, or put in more evidence, etc? We do not consider that the question of "additional" costs is straightforward and the time that could be spent trying to sort it out to give rise to costs comparable to, or in excess of, those that are the subject of dispute. The current approach is pragmatic and efficient.

67. The result of this clause will be that only the wealthy and those such as Government departments able to commit significant funds to the intervention,[324] will be able to intervene.

68. ILPA considers that clause 53 should not stand part of the Bill or, if it is to do so, supports the amendments proposed by JUSTICE to modify it.

Clause 54 Capping of Costs and 55 Capping of Costs: orders and their terms

69. These clauses concern general civil proceedings rather than environmental and planning cases: judicial reviews in the high court and as they progress on appeal. Costs capping is the successor to the "Protective Costs Order". Clause 54 provides that a costs capping order may be made only if leave to apply for judicial review is granted, if the Court is satisfied that the proceedings are of general public importance, the public interest requires that they be resolved and the proceedings are an appropriate means of resolution. The court must look at how many people will be affected, the effect, and whether a point of law of general public importance

[320] See e.g. *Lassal* C-162/09.

[321] Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf (accessed 20 February 2014).

[322] See e.g. *RT (Zimbabwe) & Ors v SSHD* [2012] UKSC 3, *Al- Sirri v SSHD* [2012] UKSC 54, *HJ (Iran) & HT (Cameroon) v SSHD* [2010] UKSC 31 (07 July 2010). For further examples see http://www.refworld.org/type,AMICUS,UNHCR,GBR,,,0.html#SRTop21 (accessed 27 October 2013).

[323] See e.g. Rules of the Supreme Court, rule 35.1.

[324] See e.g. *R(G) v LB Southwark* [2009] UKHL 26 (*SS for Children, Schools and Families intervening), Birmingham City Council v Ali et ors [2009] UKHL 36 (SS for Communities and Local Government intervening*).

is involved. The Lord Chancellor may by order, subject to the affirmative procedure, amend these criteria. In addition the court must be satisfied that absent the order the party would withdraw and that this would be reasonable. There is provision for rules of court to provide that a body corporate applying for an order must provide information about members' ability to pay.

70. Clause 54 addresses the terms of a costs capping order. The court must have regard to the financial resources of the parties and those providing or who "may provide" support to them, to the extent to which the party applying for the order and any person providing financial support will benefit if relief is granted to the applicant for judicial review, to whether lawyers are acting pro bono and whether the applicant is an appropriate person to represent the interests of others or the public interest. The Lord Chancellor may amend this list by regulations subject to the affirmative procedure.

71. In all cases where an order is granted, a cross order must be granted limiting the liability of the other party to pay the costs of the person benefitting from the costs capping.

72. Research by the Public Law Project and University of Essex, found that between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a protective costs order had been granted. Only three were not environmental cases. The organisations concerned were Child Poverty Action Group, Medical Justice and Children's Right Alliance, all respected organisations and all working with individuals ill-placed to bring a challenge themselves. This does not suggest that there is any widespread problem or indeed that there is a problem at all. The senior judiciary said in its response[325] to the consultation:

> *32. Our experience is that use of Protective Costs Orders (PCOs) is not widespread in areas other than Aarhus environmental claims … the consultation paper does not contain an estimate of the total costs which public authorities have been unable to recover as a result of PCOs following the* successful defence of a judicial review claim, and hence no estimate of the magnitude of the issue being addressed.
>
> *33. To the extent that PCOs are made, they function to protect access to justice. A body of rules and guidance on their application has been developed by the judiciary seeking to strike a balance between fairness to the defendant, the potential costs to the taxpayer, and the public interest in cases being brought. We would be concerned if this careful balance were to be undermined by rule change.*

73. If permission to claim judicial review is obtained, it means that the public authority has arguably erred in law. No public interest would be served and indeed it would be contrary to the public interest to deter, obstruct or preclude the bringing of such claims. It is in the public interest that where the court, at whoever's behest, has identified an arguable error of law the claim should be fully considered by the court. Judicial review is not primarily concerned with private interests, but public wrongs.[326] Where a public wrong is at issue then whether the individual claimant wins or loses, his or her case may clarify the law for everyone. There may also be cases where costs protection is necessary for a State to give effect to its positive obligations under, for example, Articles 2, 3 and 13 of the European Convention on Human Rights.

74. Currently, a protective costs order is just that. It is set at a level that an organisation can pay and if it loses the organisation will be liable to pay the other sides costs up to the sum of the order. A protective costs order makes it possible for a would-be claimant to litigate, but generally ensures that s/he is remains concerned about losing and paying costs. We see no reason why an organisation that has shown a government department to have been acting unlawfully should be worse off for having done so.

75. A wide range of orders can be given: there may be costs protection but permission to recover costs from the other party in the event of losing, or the order may be that there be no order as to costs. Or the costs a party is required to pay if it loses may be capped. In *Compton* [2009] 1 WLR 1436, a hospital closure case, the protective costs order required the claimant to seek pledges from the local community. Protective costs orders are a flexible tool.

76. In challenges in the field of immigration and asylum it is our experience that Government deploys strong teams, suggesting that it considers that it faces a strong and credible challenge. We are aware of no evidence that Government is deterred from fighting a case or is more prone to settle when the other side has costs protection and indeed from the cases we have seen in the field of immigration and asylum our experience is to the contrary.

77. In February 2011 ILPA responded[327] to the Ministry of Justice consultation *Proposals for reform of civil litigation funding in England and Wales*. We supported qualified one-way costs shifting being extended to judicial reviews and we also supported non-governmental organisations bringing challenges in the public interest being eligible for such qualified one-way costs shifting. That continues to be our position.

78. It is necessary to disclose who is funding the litigation when applying for a protective costs order. A witness statement indicates that, for example, lawyers are acting pro bono or that a charitable funder has agreed

[325] Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf (accessed 20 February 2014)
[326] *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 at 121.
[327] See http://www.ilpa.org.uk/data/resources/4120/11.02.502.pdf

to cover disbursements. If a funder is offering to indemnify the claimant against the other side's costs if the claimant loses, this would have to be disclosed. The court may consider that the proposed claimant and/or any funder could offer more and press them on this.

79. We oppose the mandatory imposition of a cross cap. It is of course open to the defendant in any case to ask for a cross cap. We consider that there are circumstances where it is not appropriate to cap the defendant's costs liability. The imbalance of power and resources between the parties when one is a Government department and the other has been able to satisfy the court that it is sufficiently at risk for a protective costs order to be justified, is very great. The claimant is limited by what they can afford and the protection they can secure. A defendant Government department is in a position to incur costs that it cannot recover. Further protection against paying the other side's costs increases this imbalance.

80. We are aware that there is a cross cap in Aarhus Convention claims, where the defendant's liability is capped at £35,000[328] and the claimant's at £5,000.[329] It would be instructive to look at the costs incurred by claimants and defendants in these cases, to understand how the caps have influenced their behaviour.

81. ILPA considers that clauses 54 and 55 should not stand part of the Bill. If they are to do so then we support the amendments proposed by JUSTICE that would allow the court to consider a protective costs orders before permission is granted (as now), enable intervenors to apply for protective costs orders (as now), remove powers for ministers to redefine what is in the public interest and when a protective costs order might be available and preserve the discretion of the court to consider when cross-capping would be appropriate and to what limit.

Support for new clause proposed by JUSTICE

82. ILPA supports JUSTICE's call for a new clause that would restrict the power of the Secretary of State in section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend, vary or restrict, by secondary legislation, eligibility for legal aid for services connected with judicial review.

March 2014

Written evidence submitted by Medical Justice (CJC 32)

1. This submission is concerned with Part 4 (Judicial Review) of the Bill. In particular, we shall make points regarding:

— Clause 50 (*Likelihood of substantially different outcome for applicant*)
— Clause 53 (*Interveners and costs*)
— Clause 54 (*Capping of costs*)

2. However, most of what we shall say will be way of general remarks intended to provide a context for Committee members to consider those clauses. We do not intend to indicate any particular view on any other matter addressed by this Bill by our silence in respect of other provisions.

Some general remarks:

3. Medical Justice is a charity with a particular expertise concerning those subjected to administrative detention in the UK under immigration powers, and how detention affects the health and healthcare of those detained under these powers.

4. We have brought judicial review claims and intervened in such litigation:

a. In 2009, we initiated judicial review proceedings against the Secretary of State for the Home Department to ensure access to independent medical practitioners to immigration detainees. The Secretary of State then conceded the matter without the need for it to proceed to a permission decision (that is a decision on whether permission should have been given for us to bring our claim before the High Court).

b. In 2010, we brought judicial review proceedings against the Secretary of State for the Home Department challenging her policy of removing persons from the UK without notice or with less notice than the standard minimum of 72 hours. That claim succeeded in the High Court, and the Secretary of State's appeal to the Court of Appeal against that decision was dismissed.[330]

c. In 2011, we intervened in proceedings brought by three claimants making claims against the Secretary of State for the Home Department of unlawful detention. The case concerned the Secretary of State's policy concerning the circumstances in which detention is to be considered unsuitable for those with serious illness, in the instant case the three claimants had each been diagnosed as HIV+. Whereas the Court of Appeal left open the question of whether the treatment of one of the claimants, in particular,

[328] Civil Procedure Rules Rule 45.43.
[329] *Ibid*.
[330] *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin); [2011] EWCA Civ 269

may have breached Article 3 of the European Convention on Human Rights, the claims of unlawful detention were rejected and the challenge to the Secretary of State's policy, with which our intervention was concerned, was unsuccessful.[331]

d. In 2012, we intervened in a claim brought against the Secretary of State for the Home Department. The case concerned the unlawful detention of a mentally ill person, and the Secretary of State's policy concerning the circumstances in which detention is to be considered unsuitable for those suffering with mental illness. The Secretary of State had lost before the High Court, and we sought to intervene on the Secretary of State's appeal to the Court of Appeal. However, after we had sought to intervene, the Secretary of State withdrew her appeal.[332]

e. In 2013, we intervened with Mind in a claim of unlawful detention against the Secretary of State for the Home Department. This case raised similar matters to those raised in the case in 2012 where we had sought to intervene, but where our intervention fell away by reason of the Secretary of State's withdrawal of her appeal. The claim of unlawful detention against the Secretary of State was successful, but the High Court decided that only nominal damages should be awarded. However, the Court of Appeal has since remitted the matter to the High Court because its decision had been founded on an overly restrictive interpretation of the Secretary of State's written policy—a matter of considerable importance to us and, more importantly, those who are detained while suffering from mental illness.[333]

5. We have two broad concerns in bringing or seeking to intervene in judicial review proceedings. Firstly, to ensure that the treatment of those detained under immigration powers is lawful and in accordance with published policy, where that policy is itself lawful. Secondly, to ensure that where the court is considering matters that will affect large numbers of people, it can do so on the basis of a full understanding of the implications of the arguments before it. This should have the advantage of reducing the need for individual claimants to bring further litigation, or reducing the complexity, length and cost of any such litigation. This should be achieved by a more fully considered and widely applicable ruling from the court, assisting the Secretary of State to better identify and avoid failings in her treatment of current and future detainees.

6. Given so much has been said, without any evidence-base being produced, about the misuse of judicial review by so-called campaigning organisations to attract attention or for 'campaigning purposes',[334] it is necessary that we should say a little more about the way in which we make decisions as to whether or not to bring a claim or seek to intervene.

7. We are very careful to consider the merits of bringing or engaging in litigation. As well as considering the merits internally among our experienced and expert staff and management committee, we have an advisory group of volunteers to assist us to consider merits and take advice from expert public lawyers when considering such matters. It is of considerable importance to us to exercise caution. Engaging in litigation can be costly in several respects. It consumes a considerable amount of our very busy staff's time, and that of our volunteers. While we may secure *pro bono* representation and may secure a protective costs order, were our claim thought to be so unmerited as to be frivolous we might nonetheless incur financial consequences. Indeed, not only could we be liable to a costs order by the court, unmerited litigation would be likely to jeopardise the confidence of current and prospective funders. Moreover, given that an important aspect of our policy work involves maintaining a dialogue with the Home Office in an effort to both avoid excesses on its part and more generally to seek to improve the circumstances of those liable to detention, it is not in our interests to engage in frivolous litigation. Further, unsuccessful litigation is something we would very much wish to avoid since an unhelpful ruling by the court is likely to be relied upon by the Home Office in resisting our attempts to influence it to amend its policy or practice.

8. Insofar as we may be considered to be a campaigning organisation by reason of our undertaking policy work, we do not accept there to be any conflict between our policy and public activities and our considering, and where appropriate, engaging in litigation. We should always prefer to secure a desired end without the need to litigate. Regrettably, this is not always possible. Even in what might be thought to have been the clearest of matters (for example, access of independent medical practitioners to places of detention), it was ultimately only through the threat and initiation of judicial review litigation that the Secretary of State for the Home Department agreed not to implement proposed new restrictions on access.

9. Finally, so that members of the Committee may more fully appreciate what is at stake in many of these cases, with which we concern ourselves, we highlight that since 2011 there have been five rulings by the High Court of treatment of detainees that has been contrary to the Article 3 prohibition of torture, inhuman and degrading treatment or punishment.[335]

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[331] *R (MD(Angola) & Ors) v SSHD* [2011] EWCA Civ 1238

[332] *R (HA(Nigeria)) v SSHD* [2012] EWHC 979 (Admin)

[333] *R (Das) v SSHD* [2013] EWHC 682 (Admin); [2014] EWCA Civ 45

[334] Similar claims were repeated by the Secretary of State for Justice at Second Reading—*Hansard* HC, 24 Feb 2014 : Columns 57 & 58

[335] *R (S) v SSHD* [2011] EWHC 2120 (Admin), *R (BA) v SSHD* [2011] EWHC 2748 (Admin), *R (HA(Nigeria)) v SSHD* [2012] EWHC 979 (Admin), *R (D) v SSHD* [2012] EWHC 2501 (Admin), and *R (S) v SSHD* [2014] 50 (Admin)

Clause 50

10. The intention behind clause 50 reveals a dangerous misunderstanding of judicial review and its purpose. Judicial review is essentially concerned not with outcomes, but with process. Decisions, actions or omissions, by public authorities should be reached or taken lawfully—that is they should be within the powers of those authorities, as decreed by Parliament, and be arrived at by a lawful process, in accordance with any published policy or statutory decree, and having regard to all relevant matters and discounting irrelevant matters. Subject to these considerations, the court is not concerned with the outcome.

11. We suggest that there is a very strong public interest in maintaining the court's capacity to deal with such matters, and not to interfere with the court's focus. Public authorities are often charged with making decisions that will be contentious to some individual or group or another. The legitimacy of such decision-making is greatly invested in the procedure by which the decision is reached. Where, for example, published policy is not followed, the legitimacy of a decision will generally be fundamentally undermined. Moreover, if public authorities are encouraged to think that they can avoid any consequences of their failure to abide by their published policies by advancing the argument that they would in any case have decided in the same way had they complied, it can be expected that they will more regularly flout their obligations.

12. The Home Office has an especially poor record in this regard.[336] Our experience strongly suggests that clause 50 if enacted will risk even more frequent and more serious breaches of policy and law by the Home Office.

13. As regards the court's focus, by requiring the court to routinely and squarely confront the question of what will the public authority do if required to revisit its decision, clause 50 will invite the court into the very arena that currently is reserved, and rightly so, to the public authority—that is the question of what should be the ultimate outcome or decision. In doing so, this may spark further litigation, if a litigant is encouraged to think that the public authority will not and should not make the same decision by reason of the court's reasoned decision that this is not expected.

Clauses 53 & 54:

14. We are a small charity. Clause 53 and 54 would introduce serious deterrents to our bringing or seeking to intervene in judicial review litigation.

15. We could not afford to face the all but inevitability of a costs order against us under clause 53 in a case where we intervened. We do not know what is meant by "exceptional circumstances" (clause 53(3) & (6)), which is a particularly unattractive term. If out of twenty or fifty cases, in all but one the intervention significantly aids the court and the public interest, and potentially saves future costs by assisting the public authority to better understand its obligations and avoid future unlawful action, does this mean these cases are not 'exceptional'? It would seem so. In any event, clause 53 will likely mean we cannot intervene because of the likely financial consequences. Having regard to those cases where we have intervened (see previous), this would likely mean that the High Court when considering such matters as whether the Home Office policy purporting to offer safeguards against the unnecessary, excessive and harmful detention of torture survivors and mentally ill persons will in future not have the benefit of our intervention; and many more and more complex and time-consuming claims may have to be brought successively by individual claimants for want of the capacity of the High Court to review the matter more fully and provide clear guidance to the Secretary of State for the Home Department to avoid continued mistreatment of detainees.

16. We would similarly face great difficulty in proceeding with litigation without knowing whether we would receive any costs protection, until a decision on whether we were to be granted permission (leave) to bring the matter before the High Court, as would be the case under clause 54(3) if implemented.

17. The approach which clause 54(3) would introduce would moreover greatly increase the capacity of a public authority, faced with a claimant of limited means, to bring pressure upon that claimant not to pursue litigation following a letter before claim, or to withdraw a claim, by emphasising or indeed exaggerating the public authority's potential costs and hence the risks to the claimant. In our experience, the Home Office is already far from a 'well-behaved' litigant, frequently failing to comply with directions of the court and failing

[336] There are far too many examples to attempt any comprehensive catalogue of the Home Office record, and many cases doubtless do not come to light, but among the most egregious of which we are aware are (i) the continued unlawful detention for removal to Somalia of a Dutch national whose Dutch passport lay ignored on a Home Office file for several months *(R (Muuse) v SSHD* [2010] EWCA Civ 453); (ii) the maintaining and operating of a secret and unlawful policy on detention for over two years *(R (Lumba) v SSHD* [2012] 1 AC 245); (iii) the application of an unlawful policy in circumstances to which it in any event plainly did not apply so as to remove a refugee to his country of origin without notice deliberately to avoid his being able to contact his lawyer or others *(R (N) v SSHD* [2009] EWHC 878 (Admin)); (iv) the continued detention of children in contravention of the statutory duty to have regard to their welfare *(R (Suppiah & Ors) v SSHD* [2011] EWHC 2 (Admin)); (v) the continued detention of torture survivors having failed to give effect to policy providing for safeguards against continued detention of torture survivors *(R (EO & Ors) v SSHD* [2013] EWHC 1236 (Admin)); (vi) operating unlawful policy on the use of force against pregnant women and children *(R (Chen & Ors) v SSHD* CO/1119/2013); and repeated examples of continued detention of mentally ill persons in circumstances violating the prohibition on torture, inhuman or degrading treatment or punishment (*op cit*).

to disclosure grounds or evidence in a timely fashion.[337] Clause 54(3), if implemented, would only increase incentives for it to continue to behave in such a way so as to increase the pressure upon a claimant to reconsider pursuit of a claim.

March 2014

Written evidence submitted by Richard Taylor (*an individual writing in a personal capacity*) (CJC 33)

I would like to make a submission in relation to two elements of the Criminal Justice and Courts Bill 2013–14; firstly on openness and transparency of the court system, addressed in paragraphs 1-9 below; and secondly on the proposed provisions relating to juries, addressed in paragraphs 10-15.

1. On the 24th of February 2014, in relation to clauses 26 and 27 of the Bill which provide for "Trial by single justice on the papers", Minister Chris Grayling told the House of Commons: "we cannot allow the new process to take place behind closed doors. I am a strong believer in transparency in the courts, and we will provide mechanisms to ensure that the public have access to court decisions. That is only right and proper: we cannot have secret judgments." (http://www.theyworkforyou.com/debates/?id=2014-02-24c.47.0#g55.3)

2. I hope the Government will bring new provisions describing the mechanisms to ensure transparency which the minister promised to the committee. If the new provisions are not proactively submitted I hope the committee will press the Government for them, or failing that committee members will propose their own.

3. Currently there is no effective public access to full court lists, providing details of upcoming cases, or of court registers, containing details of court decisions. While the doors to the courts are open and anyone can walk in and observe, without proactive publication of information on the court's activities proceedings are being effectively held in secret as it is very hard to find out when cases of interest are scheduled.

4. I think it would be bizarre and inconsistent to introduce mechanisms to ensure proactive publication of court lists and registers for cases to be heard under the proposed "Trial by single justice on the papers" provisions, but not to make the lists and registers information similarly available for those cases heard in court.

5. I have attempted to obtain full court lists and registers for specified days at my local magistrates courts, but have had my requests rejected both under the Criminal Procedural Rules and the Freedom of Information Act. In one instance some court listing information was released, but the Ministry of Justice / Courts Service later stated they had made the release in error. (http://www.rtaylor.co.uk/5890)

6. I am aware at least one MP is under the impression magistrates courts lists and registers are already published (http://www.rtaylor.co.uk/5890#comment-77508) so I think it's worth clarifying they are not. Only very limited information is published on noticeboards in courts, essentially a list of defendants names along with the court number and an indication of when the case is to be heard. Access to the full list, even for inspection in person at court, appears arbitrary, I have on a number of occasions been refused access to a copy.

7. The Government has set up an independently chaired Crime and Justice Transparency Sector Panel made up of experts from across the private, public and third sectors, to provide support and advice on greater transparency in the crime and justice sectors. The panel has been pushing for publication of court list and register information online, leading to the consideration of a proposed amendment to the Criminal Procedure Rules requiring online publication of information from court lists, but in February 2014 the panel was told by the Courts on Tribunals Service that their aspirations could not be met: (https://docs.google.com/document/d/1l_PPUflGuVeJ586a5mJtl7BFZzHwLvgpfqPLuMp1uJE/edit?usp=sharing)

8. Some elements of the proposed Criminal Procedure Rules amendments, and the justification for their rejection, appear out of touch with modern technology. The idea of publishing material online for two business days would surely be rendered irrelevant as search engines, archiving organisations, newspapers and others will be able to obtain, store, and re-publish the information. The argument that giving people access to information online inevitably creates a security risk in relation to other information held by an organisation is also nonsense. Does a newspaper publishing articles on a website make its internal IT systems more vulnerable?

9. The culture, and technology, within our courts system will need time to adapt to a more open and transparent way of working. I would suggest the Bill ought to allow a period of time for the transition to proactive publication of court lists and registers, but this shouldn't prevent legislating for an open and transparent courts system now.

10. I am concerned by the general tone and impression given by clauses 40–44 of the Bill. The courts are already an intimidating place for jurors. I think justice, and our society, is best served by jurors who feel empowered, and who can be focused on fulfilling their role to the best of their ability and who will not be overly concerned about committing a criminal offence or a contempt of court.

[337] It may be useful to reflect on the conduct of all parties to proceedings and the capacity of the court to regulate conduct, but it is clear that substantial savings could be made if the Home Office (as we expect other public authorities) were more astute to comply with court directions, respond to letters before action and generally improved its conduct of litigation; and gave effect to court rulings, desisting from repeat unlawful practices thereby necessitating new litigation.

11. I am concerned that jurors required to surrender electronic communications devices could be prevented from contacting their friends, families, employers and others while on jury service; particularly if that service involves the jury being sent to stay at a hotel. I think the proposed law gives too great a power over juries to the courts. I would like to see jurors where possible given notice of an intent to issue an order to surrender electronic communications devices so jurors could have the opportunity to leave them at home, or in their cars, for example.

12. I'm concerned that clause 42 "Research by jurors" is too broad. Making it an offence for a juror to research the law, or court procedure could make it illegal for a juror to even read up on the new laws introduced by the Bill, describing what conduct is and is not permissible. A juror who goes online to read official information about jury service, perhaps seeking to re-watch the introductory video, to find out about arrangements which apply to expenses, illness, etc. or to find out if a judge was within his powers to order the confiscation of their mobile phone, could find themselves committing an offence.

13. Jurors might legitimately wish to consider looking up aspects of court procedure, which may not be covered in material provided by the courts. A juror experiencing a judge asking a member of the jury to stand up and declare the defendant guilty, with no deliberation after a late guilty plea might want to research to see if that action was appropriate and permissible. A juror finding themselves on a jury considering jury nullification (an option which jurors may not be proactively be made aware of by the judge and court staff) may reasonably want to research to what extent a jury has to follow directions from the judge.

14. Jurors may gain more confidence to challenge court staff, or the judge, in relation to a ruling if they are able to check their understanding of the law, and court procedure, by researching the matter before raising the matter via a jury note. I want jurors to feel able to question proceedings; and feel confident in raising concerns with the judge via court staff.

15. Where a juror has acted in the public interest, or in the interests of justice, I think that ought to be a defence to those offences for jurors introduced by the Bill. In all but the most egregious cases where jurors have behaved recklessly and irresponsibly I suggest the worst that ought to happen to a juror is they get taken off jury service.

March 2014

Written evidence submitted by Dr Mark Coen, Durham Law School (CJC 34)

Introduction

1.1 This submission is concerned with certain provisions of the Bill which relate to jury service and the jury system. A summary of recommendations is provided at the end of the submission.

Proposed power to confiscate electronic devices from jurors

2.1 The usefulness of this power is questionable. Section 40 would permit the judge to order the confiscation of electronic devices while the jurors are in court buildings, visiting a place connected with the trial or staying in accommodation provided at the judge's request. The power does not extend (nor could it) to the removal of electronic devices from jurors who go home at the end of each day of the trial, which is what happens in almost all cases. The juror who is determined to breach judicial warnings about conducting research may do so on any number of electronic devices in the privacy of their own home. The removal of portable devices from jurors while at court is therefore a very limited and ineffective solution to an intractable problem. It may also create the undesirable impression, notwithstanding warnings and information to the contrary, that research in the deliberation room or court building is worse than research at home. For these reasons, I would suggest that this power be removed from the Bill.

Offence of research by jurors

3.1 The Bill creates an offence of research by jurors. For the reasons given by the Law Commission, particularly the need to clarify the existing law, this is a very welcome development. The offence is generally clear, for example by explicitly prohibiting research on the law and the rules of evidence in addition to research on people involved in the case. Jurors who have challenged their convictions for conducting internet research have argued that they did not know that certain activities were prohibited,[338] so a clear legislative ban (which will have to be explained in simple but thorough judicial warnings) is essential. For the most part the proposed offence of research by jurors achieves this.

3.2 One example of "information relevant to the case" which is not included in section 42 (or, more precisely, in the proposed section 20A (4) inserted by section 42 of the Bill) is a place involved in the case. Section 20A (3)(c) refers to "visiting or inspecting a place" but place should also be listed in section 20A (4) because information about a location can also be found through online searches or by asking third parties about it. Section 20A (4) uses the word "includes" so its list of "information relevant to the case" is not exhaustive,

[338] See, for example, *R v Dallas* [2012] 1 W.L.R. 991.

but the inclusion of place in the list would add to the clarity of the section, as currently its explicit focus is on researching people and legal rules.

Offence of sharing research with other jurors

4.1 It is highly questionable if an offence of sharing the prohibited research with other jurors (section 43) is necessary. The focus should be on the impermissibility of conducting the research, which is covered by section 42. That message becomes blurred if judges have to tell newly empaneled jurors that sharing the fruits of the prohibited research is considered so serious that there is a separate offence of doing this. That approach arguably underplays the core wrongful conduct—the decision to defy the instructions of the judge by doing independent research in the first place. The case law demonstrates that jurors need easily understandable and comprehensive instructions that research is a punishable offence. Having to explain the potential for the commission of a further offence if they commit that initial one will not assist judges in delivering that central message. Judicial instructions should not have to consider the legal situation of the juror who has done illicit research and is deciding whether or not to share it.

4.2 Furthermore, sharing what one has found is not an independent, separate act which deserves to be punished to the same extent as the initial act of research. One can also envisage that in cases where a juror is prosecuted for the two offences of conducting and sharing research and convicted of both, the imposition of concurrent sentences might well render the existence of the two distinct offences otiose.

4.3 The proposed section 43, containing this separate offence of disclosing the prohibited research, should be omitted from the Bill. A sub-section could be incorporated into section 42 (which creates the simple research offence) stating that the sharing with other jurors of information derived in contravention of the section is an aggravating factor when sentencing for that offence.

Omission of an exception permitting approved academic research into jury deliberations

5.1 It is striking that the Bill's provisions relating to the jury system, which clearly owe so much to the recommendations of the Law Commission, do not include the exception advocated by that body for the conduct of authorised academic research. The Commission's recommendation to this effect is the latest in a long line of recommendations by official studies over the years.[339] Professor Cheryl Thomas stated in her oral evidence on the Bill, as she has done frequently elsewhere, that interviews with jurors about their deliberations constitute "very poor methodology." This is a contestable assertion and one which should not justify the criminalisation of the interviewing of jurors about their deliberations. Professor Thomas has demonstrated that excellent jury research can be done within the current statutory constraints, but that is also not a reason to use the force of law to prevent other researchers from using post-trial interviews with jurors.

5.2 The present lack of an exception interferes with our ability to evaluate the workings of the jury system. For example, jurors can be asked if they did online research about the case they are trying. Such a question does not contravene section 8 of the Contempt of Court Act 1981 because it does not pertain to the deliberations. Professor Thomas herself asked jurors such a question in one of her studies.[340] However, she was unable to ask the jurors if any other juror revealed that they had done internet research, because such a question would come within the ban on questions about deliberations. It can be seen from this example that the current ban, which this Bill proposes to continue, limits our ability to investigate the jury system fully. Creating a tightly regulated exception for academic research would permit researchers to ask jurors about other jurors—their understanding, their behaviour, their prejudices as revealed in the course of the deliberations. Such an exception would also permit investigation of how juries deliberate[341]—when and how votes are taken, the role of the foreperson etc. Such wide-ranging interviews have been permitted for official purposes in other jurisdictions, most notably by the New Zealand Law Commission.[342]

5.3 Without the ability to interview jurors post-trial about their deliberations, with appropriate safeguards and authorisation procedures in place, our picture of how the jury system functions is necessarily incomplete. The exception permitting regulated academic research on jury deliberations post-trial, as recommended by the Law Commission, should be incorporated in the Bill.

In summary

— The proposed power to confiscate electronic devices should be omitted.
— In Section 42, Section 20A (4) should include "a place or location relevant to the case".
— The proposed offence of sharing research with other jurors (section 43) should be omitted.

[339] *Report of the Royal Commission on Criminal Justice* (July 1993) at 188; R. Matthews, L. Hancock and D. Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System*: A Study in Six Courts (2004, Home Office No.05/04); Department for Constitutional Affairs, Jury Research and Impropriety (CP 04/05), at 31-32; House of Commons Science and Technology Committee, Seventh Report of Session 2004-05, Forensic Science on Trial at 73.
[340] C Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010) at 13 and 43.
[341] At present little guidance is given on this issue. See the comments of Lord Judge in *R v Thompson* [2010] EWCA Crim 1623.
[342] W Young, N Cameron & Y Tinsley, *Juries in Criminal Trials, Part Two, Volume 2: A Summary of the Research Findings* (NZLC PP37, Wellington, 1999).

— An exception to the secrecy rule permitting authorised academic research into jury deliberations, as recommended by the Law Commission, should be included in the Bill/

March 2014

Written evidence submitted by Association of School and College Leaders (CJC 35)

1. The Association of School and College Leaders (ASCL) represents more than 18,000 heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of maintained and independent schools and colleges throughout the UK. ASCL has members in more than 90 per cent of secondary schools and colleges of all types, responsible for the education of more than four million young people. This places the association in a unique position to consider this issue from the viewpoint of the leaders of secondary schools and of colleges.

2. ASCL welcomes the attention being paid to the learning of young offenders. For many only improving their knowledge, skills, qualifications and employability will significantly reduce their chance of reoffending.

3. Therefore the thrust of the green paper, *Transforming Youth Custody: Putting education at the heart of detention* is also very welcome, and the concept of secure colleges well worth considering. But the idea needs to be fully examined, and its implementation planned and handled with great care, if it is to be a successful initiative.

4. It is important to learn from other recent initiatives in offender learning such as the introduction of OLASS (Offender Learning and Skills Service) 4 for older prisoners. This has enabled a much greater focus to be given to the skills agenda and to ensure that prisoners are equipped with the latest skills and expertise to enable progression to secure work when their sentence is completed. As such it has been a welcome move, but there were problems in its introduction, and it remains less than optimal. In particular, see the point at paragraph 8 below.

5. The idea of secure colleges is also welcome provided that it does mean that for young offenders education will become a much higher priority than it has been. The qualifications on offer must be those that can lead to sustainable employment or progression to higher levels of study.

6. It is imperative that there is recognition that many offenders, a far larger proportion than in the population as a whole, will have learning disabilities, special educational needs, mental health needs, or will fall into more than one of these groups.

7. Therefore for prisoners to succeed the funding that follows them must be sufficient, and used, to ensure that they have appropriate additional support tailored to their individual circumstance and needs.

8. Currently, under OLASS 4 methodologies, the levels of additional learning support available for older prisoners are significantly below that required. This mistake should not be repeated as the secure college concept is implemented.

9. As the concept paper from government suggests, secure colleges must achieve the very best educational provision combined with effective security. If these two objectives can be simultaneously achieved then there is a good chance that these new colleges could become a valuable route back into legitimate, productive and satisfying life for young people.

10. For that to happen the new institutions will need to draw on existing expertise in both security and education. The whole idea will be put at risk if either of these two elements is allowed to dominate.

11. ASCL is not in a position to advise on sources of security expertise, but in education it is colleges of further education (FE colleges) that are best placed to provide. Clearly all FE colleges have great expertise in the education and training of young people, and those that have engaged with offender learning under OLASS also have insight into the particular difficulties of offender education.

12. For that reason ASCL would recommend that **all secure colleges should be established only if they are led by a high-quality FE college (with full participation of an appropriate security provider), or at the very least include such a college as a main partner.**

13. Clearly issues of cost need to be very carefully considered. This should not be seen as a short-term cost-saving exercise or the very great long-term benefits of reducing recidivism and helping young people back into productive lives will be lost. But with costs and reoffending rates both currently so high there is scope for real improvement. It would be reasonable to aim at a reduction in recurrent costs over a period of time, once the implications of running a secure college are better understood, and once the colleges have established themselves and have been operating effectively for a number of years. If reoffending rates fall and hence the number of prisoners reduces, this will reduce the total cost. And consideration can be given, once the concept is proved, to how to operate most efficiently and perhaps reduce the cost per head.

14. If, however, secure colleges are formed by letting contracts to the lowest bidders the likelihood is that the initiative will fail to deliver the anticipated benefits. The record of the public sector in letting contracts that

effectively state what is needed and bind bidders to deliver it is not good. The first secure colleges will need to be very closely monitored to ensure that they are providing high-quality education and training appropriate to the needs of their inmates.

15. I hope that this is of value to your consultation, ASCL is willing to be further consulted and to assist in any way that it can.

March 2014

Written evidence submitted by Royal Society for the Protection of Birds (RSPB) and Friends of the Earth (FOE) (CJC 36)

Summary

This evidence is submitted on behalf of the Royal Society for the Protection of Birds (RSPB) and Friends of the Earth (FOE). It sets out our concerns about provisions of Part 4 of the Bill concerning Judicial Review (JR).

We do not, of course, support the use of legal mechanisms to delay sound decisions from being implemented. However, JR is one of the last mechanisms available to civil society through which they can challenge the decisions of public bodies. This is critical to uphold the rule of law and enable a functioning, just and democratic society. We are concerned that provisions in Part 4 of the Bill will deter civil society from bringing and intervening in environmental cases (regardless of the merits) by making the threat of costs uncertain and intimidating. This could return the UK to non-compliance with key provisions of EU and international law, as recently confirmed by the European Court of Justice, and result in a further loss of trust at the public and decision-makers.

The constraints imposed by Part 4 of the Bill compound recent amendments to the process of JR, which have little or no apparent evidential basis and which have been widely opposed by environmental and public interest groups.

Background

1. In order to understand our concerns about Part 4 of the Bill, it is important to summarise recent changes to the costs regime for environmental cases.

2. In 2005, the UK Government ratified the UNECE Aarhus Convention.[343] Article 9(4) of the Convention requires contracting Parties to ensure that legal review mechanisms in respect of the environment provide "adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

3. The wording of Article 9(4) of the Convention was subsequently imported into EU law via EC Directive 2003/35/EC[344] providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending existing EC Directives on Environmental Impact Assessment[345] and Integrated Pollution Prevention and Control[346] (IPPC).

4. In 2005, a Coalition of NGOs,[347] of which we are both members, submitted a complaint to the European Commission alleging the UK was in breach of the access to justice provisions of the PPD (and specifically the requirement that legal proceedings be not "prohibitively expensive")[348]. At around this time, the Coalition also acted as Amicus curiae to the Aarhus Convention Compliance Committee (ACCC) in Geneva in parallel proceedings against the UK on prohibitive expense.[349]

5. In October 2011, the ACCC concluded that the UK did not comply with Article 9(4) of the Aarhus Convention concerning prohibitive expense.[350] On 13th February 2014, the Court of Justice of the European Union (CJEU) handed down its final judgment in Case C-530/11 (*Commission v UK*),[351] holding that the UK was in breach of the provisions of the PPD concerning prohibitive expense. The judgment confirmed a number of requirements in relation to costs in environmental cases, including (inter alia) a requirement that claimants in environmental cases have certainty as to their legal rights and, thus, to the financial liability they may incur as a result of undertaking the proceedings[352].

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[343] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters —text available here: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[344] The Public Participation Directive or PPD
[345] EIA Directive
[346] IPPC Directive
[347] The Coalition for Access to Justice for the Environment (CAJE)
[348] Case C-530/11 *Commission v UK*
[349] Communication C33—documentation available here: http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html
[350] See http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf
[351] Judgment available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=34589
[352] *Commission v UK* (C-530/11), para 34

6. In response to the findings of the ACCC and the Commission's infraction proceedings, a new costs regime for environmental (Aarhus) cases was introduced in England and Wales on 1st April 2013. The regime limits adverse costs liability to £5,000 for individuals and £10,000 for all other cases. Special provisions were also introduced in relation to the granting of interim relief in environmental cases.

7. In order to ensure continuing compliance with the Aarhus Convention and the PPD, the UK must ensure that individual and groups embarking on environmental cases must not be exposed to prohibitive expense.

Part 4—Judicial Review

The importance of Judicial Review

8. JR very often represents a mechanism of last resort for individuals and civil society groups to protect the environment. The foundations of democracy require that citizens have access to effective mechanisms to ensure the decisions of public bodies are lawful—indeed a lawful process of decision making is a minimum requirement for environmental protection. Such cases are not minor matters. They often concern complex legal arguments of unlawful behaviour by public bodies. Individuals and groups should not be denied their fundamental constitutional right to check an abuse of power on the basis of saving Government money, speeding up decision-making processes or cutting red tape.

9. Proposed changes to the process of JR should therefore be afforded the highest scrutiny by the Public Bill Committee, which must ultimately be satisfied that its effectiveness is not undermined and that the UK remains fully in compliance with its obligations under EU and international law.

Information about financial resources (Clauses 51 and 52)

10. Clause 51 of the Bill requires applicants in JR to provide the court with any information about the financing of the application. Clause 52 requires the court to consider whether to order costs to be paid by a person, other than a party to the proceedings, who is identified in that information as someone who is providing financial support for the purposes of the proceedings or likely or able to do so.

11. We are concerned about these requirements for a number of reasons. First, the requirement to disclose financial information about non-parties is likely to deter people from making a decision to fund JR—and thus prevent applicants from being able to bring cases. In our experience, JR is already a sufficiently daunting prospect for local people, campaign groups and charities, and it is only used as a last resort. It should, however, remain an option available to people in order to hold decision-makers to account.

12. Secondly, the proposal conflicts with the findings of the CJEU in Case C-530/11, in that individuals and/or NGOs (who may not even be party to the proceedings) will be exposed to uncertainty as to whether they face any financial liability as a result of the claimant losing the case (and, if so, to what extent).

13. We recognise the need for appropriate transparency and for the court to have access to proportionate information. We are concerned, however, that these provisions could result in campaign groups and small informal groups in local communities being unable to fundraise and secure local support in order to progress cases (regardless of their merits) for fear that people will become liable for further costs being imposed on them by the court. We urge the Committee to recommend the removal of this provision from the Bill.

Interveners and capping of costs (Clause 53)

14. Clause 53 of the Bill enables the High Court and Court of Appeal (subject to exceptional circumstances) to order an intervener to pay any costs that the court considers have been incurred by a party to the proceedings as a result of the intervener's involvement in the proceedings.

15. We have always understood that those who apply to intervene in a case do so on the basis that they will be responsible for their own legal costs and will not seek to recover all, or any, of their legal costs from either party. Indeed, that is the basis upon which we, as members of CAJE, intervened in important environmental cases before the Court of Appeal, including *Morgan v Baker*[353] (in which the Court expressly recognised that the requirement that cases be "not prohibitively expensive" applies to the totality of a case, including potential liability for adverse costs - and that the Aarhus Convention is capable of applying to private law cases) and *Garner*[354] (in which the Court stated inter alia that a purely subjective approach as to whether review procedures be "not prohibitively expensive" under the PPD is inconsistent with the objectives underlying the Directive).

16. We believe the assumption that those seeking to intervene in a case may have to pay any additional costs incurred by a party would conflict with the aims of the Aarhus Convention. The rationale behind the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention enforced by law. Access to justice helps to create a level playing field for the public seeking to enforce these rights. It also helps to strengthen the Parties' implementation of, and compliance with, the Convention as well as the effective application of national laws relating to the

[353] (1) *Francis Morgan (2) Catherine Baker (Appellants) v Hinton Organics (WESSEX) LTD (Respondent) & CAJE (Intervenor)* [2010] 1 Costs LR 1

[354] *R (on the application of Garner) (Appellant) v Elmbridge Borough Council (Respondent) & (1) Gladedale Group Ltd (2) Network Rail Infrastructure Ltd (Interested Parties)* [2010] EWCA Civ 1006

environment. The public's ability to help enforce environmental law adds important resources to government efforts. Individuals and groups can fulfil this vital function not only by bringing cases, but also by highlighting or emphasising important environmental legal and/or factual issues by way of intervention. The imposition of measures that frustrate the ability of civil society to ensure the rights enshrined in the Convention are enforced are obstructive and retrograde.

17. Moreover, the Impact Assessment[355] (IA) published by the Ministry of Justice in support of this proposal contains no evidence that interveners impose additional costs on the parties (presumably because they are invariably focusing on the points raised by the case). The IA states: "*Treasury Solicitors and the Administrative Court do not hold a central record of the average costs which interveners generate for claimants or for defendants as a result of their intervention, and which interveners might be liable to pay in future as a result of the reforms. This was also not captured by MoJ's review of JR court case files*".

18. In order to monetise the impact of the reforms for the purpose of providing an EANCB figure, the Ministry of Justice has assumed that interveners might be liable to meet on average around 5% of total legal costs. We would question why the Government would press ahead with this proposal in the absence of empirical data and in light of an explicit recognition that interveners can "*add value, supporting the court to establish context and facts*".[356] We therefore urge the Committee to recommend Clause 53 is removed from the Bill.

19. We are also concerned that at present environmental cases will be included within clauses 54 and 55 unless separate regulations are made, as at present clause 56 is not an absolute requirement. We would request that regulations are required to ensure that specific provisions are provided for environmental cases and the individuals and groups that bring them.

Additional concerns

Procedural defects (clause 50)

20. Clause 50 of the Bill seeks to amend the Senior Courts Act 1981 so that a case could not proceed unless it was considered that it was "highly likely" that the outcome would have been different if the correct procedure had been followed.

21. We do not support this provision of the Bill for a number of reasons. Firstly, the judiciary is already able to consider cases against a "no difference" threshold, which we believe is the correct approach. Secondly, a substantial number of cases involving procedural flaws usually mean a failure to properly consult or hear the views of individuals. The imposition of a "no difference" threshold would be a very subjective assessment from the Court, making them step into the shoes of the executive.

22. We would also point out that JR is about fairness. If an unfair procedure is followed it is inevitably hard to find instances where it is clear that the outcome would have been the same under a fair process. So, for that reason the courts are rightly reluctant to hold that it would have made no difference. But the fact that the court already has a flexible power to reach this conclusion in appropriate cases means that this clause is in practice unnecessary.

23. The RSPB and FoE welcome clause 45.

Conclusion

24. The RSPB and FoE hope that this written evidence is helpful to the Committee in its forthcoming debate on Part 4 of the Bill. We can provide more information about many of the points raised upon request and would also welcome the opportunity to give oral evidence before the Committee if that would be of assistance.

March 2014

Supplementary written evidence submitted by the Bar Council (CJC 37)

IN RESPONSE TO AN INVITATION BY GUY OPPERMAN MP ON CLAUSE 54(2) AND (3)

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to Mr. Opperman's question, posed to Nicholas Lavender QC at the Committee's Second Sitting on 11 March 2014:

> "May I ask for your written submissions on subsections (2) and (3) of clause 54, specifically on whether the court can give a protective cost order or a cost capping order for an application for permission, and whether that would discourage potential applicants from making the application for permission, if they knew that they were going to be successful and get an application for a cost capping order at the end of the day? I would be interested in your views on that, especially in the light of *Corner House* and of *Compton v. Wiltshire Primary Care Trust*." (Report, Col. 92)

[355] See https://consult.justice.gov.uk/digital-communications/judicial-review, page 10

[356] See Paragraph 62 of the Ministry of Justice's Response to Further Reforms to Judicial Review available at: https://consult.justice.gov.uk/digital-communications/judicial-review

2. Subsection (2) defines a "costs capping order" as limiting or removing a party's costs liability "in connection with any stage of the proceedings." The permission application is a "stage" for this purpose: see subs. (12)(a). But subs. (3) prevents the court from making a costs capping order unless and until it grants permission.

3. That clash between subss. (2) and (3) is curious from a drafting point of view. But more importantly, if enacted in this form the Clause would emasculate the judge-made practice, developed in cases such as Corner House and Compton, of granting costs protection in respect of the permission stage. That is a matter of great concern from an access to justice standpoint.

4. It is well known that judicial review proceedings are highly "front-loaded". When commencing judicial review proceedings, a claimant is required to assemble all the documents relied on in support of the claim. The basis of the claim must be set out in a detailed statement of facts and grounds and, in most cases, one or more comprehensive witness statements. The effect of the permission requirement is that the claimant cannot cut corners: the case must be put forward on a fully reasoned basis, with all factual and legal propositions set out in much the same form as they will be argued at the eventual substantive hearing. In addition, the claimant owes a duty of candour (remaining from the pre-CPR days when the leave stage was dealt with *ex parte*), requiring him or her to acquaint the court with relevant material unhelpful to his or her case.

5. This is, incidentally, one of the reasons why the Bar Council is so concerned—as explained to the Committee—at the Government's accompanying proposals to require practitioners who undertake claimant legal aid cases to act "at risk" at the permission stage.

6. For present purposes, the important point is that the permission stage is an on-notice, contentious process. Just as the claimant incurs a greater proportion of its overall costs early in the proceedings than in ordinary civil cases, so too does the defendant. While defendant public authorities are encouraged to respond in economical terms (*Davey v Aylesbury Vale DC* [2008] 1 W.L.R. 878, C.A.), not surprisingly—given the comprehensive nature of the material the claimant is required to submit—the defendant will often respond at considerable length. Frequently, the response not only addresses the merits but adds new material to advance a discrete objection such as delay or lack of standing.

7. CPR Part 54 entitles the defendant to claim its costs of responding to the claim (including its costs of the pre-action protocol process) where permission is refused on the papers. The court will summarily assess those costs and order the claimant to pay them. Even in a straightforward case it is unusual for defendants to claim less than around £5,000 at that stage. In a case of any substance, novelty or complexity, the claimed costs are likely to be much higher—claims for £15,000-£20,000 are not unusual, and the amounts can be greater still.

8. It was against this background that the Court of Appeal in Corner House gave procedural guidance encouraging claimants to apply for a PCO on the papers at the earliest possible stage, generally before the court considers permission, so that the costs cap is in place before the defendant incurs significant costs. The court recognised, in other words, that exposure to uncertain costs liability at the permission stage itself has the potential to act as a significant deterrent to commencing proceedings at all.

9. Thus for costs capping orders to work effectively, and to create the early certainty that lies at the heart of their operation, it is essential that they should be available early on in the case. This assists defendants, because the procedural guidance given in *Corner House* subjects claimants to the discipline of including an application for a PCO in the papers at the start of the case, so that defendants are not surprised by a PCO application at a time when substantial costs have already been incurred.

10. Two features of the Government's reform proposals significantly amplify the claimant's costs risk at the permission stage. First, the proposal to alter the provision currently appearing at paragraph 8.6 of Practice Direction 54A, namely that where a permission hearing takes place (ie. where either the claimant seeks review of a paper refusal, or the court adjourns the permission application to a hearing), "the court will not generally make an order for costs against the claimant." At paragraph 47 of its February 2014 paper, "Judicial Review—proposals for further reform: the Government response", the Government announced that it would reverse this general rule. Second, Clause 53, if enacted, is likely to result in greater emphasis at the permission stage on the "counterfactual" of what would have happened if the alleged error of law had not been made. That means a resulting increase in the volume of evidence, and therefore in the level of costs, at the permission stage. Those proposals make the importance of costs certainty at the permission stage more, not less important.

11. The Bar Council therefore respectfully urges the Committee to reject Clause 54 in its present form.

March 2014

Written evidence submitted by Mr Jamie Grace (CJC 38)

(LL.B (Hons) LL.M PG Cert LTHE FHEA, Senior Lecturer in Law, Sheffield Hallam University)

Dear Sir/Madam,

RE: Clause 50—Criminal Justice and Courts Bill 2013-14

From my perspective as an active researcher and teacher in the field of judicial review and administrative law, I urge caution in relation to the wording, effect and purpose of Cl. 50 of the Criminal Justice and Courts Bill 2013-14 ('the Bill').

For your information about my professional and academic interests and expertise, I have attached an Appendix containing my CV to this submission of written evidence.

Clause 50 of the Bill introduces a test as to the 'likelihood of [a] substantially different outcome for [the] applicant' by way of amending section 31 of the Senior Courts Act 1981 (applications for judicial review), to the effect that the High Court must refuse to grant relief on an application for judicial review, "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred", or, in respect of deciding whether to grant leave for an application for judicial review, must refuse to grant such leave if so requested by the defendant public body, and it is in the view of the High Court that it is "highly likely that the outcome for the applicant would not have been substantially different", respectively.

This proposed amendment raises the awkward question of what will occur when the High Court is faced with a strong claim for judicial review—but a strong claim which would call for the courts to undertake a close scrutiny of a decision or policy with a high degree of political sensitivity. We have already seen a principle of judicial deference to political and democratic authority develop in the current function and spirit of judicial review, and a reluctance from the judiciary to determine as justiciable crucial legal issues in particular circumstances, relating to what is known as the 'political questions' doctrine.

So in essence, and for example, if there is a possible, particular political constraint on a judge from issuing an order for a remedy of some kind, and the proposed reform in Clause 50 of the Bill were to be enacted, then however important the case as an exercise in analysing the constitutional status of the legal rights and duties concerned, if it is very likely a remedy is not going to be offered due to judicial deference, and because of 'high politics', then the case could not be heard at all.

This is an overly narrow construction of the constitutional purpose of judicial review, from a political perspective—but also, this is a statutory reform, which, if enacted, would prevent certain individual claimants to air their understandable (and constitutionally significant) grievances in the courts, though the vital process of judicial review. This is a real concern in relation to the notions of both open justice as a constitutional value and component of the rule of law, and the right to a fair hearing in the determination of civil rights under Article 6 of the European Convention on Human Rights.

Our development in the United Kingdom of a constitutional principle of judicial deference means that in some cases in the arena of judicial review, it is already permissible for judges to find (perhaps even only minor) legal fault, say, on the part of a government minister, as in the case of *R (Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin), without then issuing a remedy other than a declaration that what was done (or not done, as the case may be) was unlawful conduct on the part of that government minister. This could be because, as in *Hurley and Moore*, that to otherwise offer a prerogative remedy such as a quashing order to a claimant whose arguments are persuasive, might create 'administrative chaos' (*Hurley and Moore* at para. 99). In the case of *Hurley & Moore*, this was because the Secretary of State for Business, Innovation and Skills had not correctly had 'due regard' to all potential equality issues over the design of a potential new fees system for Higher Education, as would now be required under the general 'public sector equality duty' under S.149 of the Equality Act 2010—but as Elias LJ noted, putting it mildly, there would have been "significant economic consequences" (para. 99) in undoing the work of the Secretary of State through a quashing order aimed at removing the offending regulations creating the new fees system.

So there are currently times when judicial review case are extremely politically significant, and we are all the better off as part of a democratic society for hearing about what more a government minister, for example, could have done to better or more comprehensively uphold the legal obligations placed on them by Parliament—even, perhaps particularly so, in cases where the judiciary already see fit to use their discretion not to issue an order for a remedy of some kind that would greatly disrupt the ongoing work of government.

This is a delicately, and rather beautifully, balanced and nuanced constitutional arrangement. Clause 50 of the Bill would disrupt this clever mechanism to our detriment as a society, I feel. Judges would then, if the Clause was enacted, in some admittedly infrequent cases, not only have to consider claims with particularly sensitive and important political ramifications but would have to do this at a very early stage in the judicial process—so early, in fact, that we would not benefit from the transparency that comes from the judicial scrutiny of the work of government in judgments of the High Court that do not result in a remedy, and thus no 'substantially different outcome for the claimant', but result in a better understanding of our governance for each citizen in this nation as a whole.

April 2014

Written evidence submitted by the Law Society (CJC 39)

1. The Law Society is the representative body of over 166,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators, governments and others.

2. The Law Society supports amendment number 5 and new clauses 1–8 which have been tabled in the name of Mr Bob Neill MP.

3. The Society supports the introduction of a leave stage in section 288 applications under clause 57 of the Bill. We agree that the opportunity should be taken to introduce other improvements to the High Court procedures for planning challenges under other provisions. We consider that these provisions would help to speed up planning litigation and reduce costs for the parties involved. We also consider there to be advantages in harmonising procedures across the range of planning challenges.

4. The Law Society hopes that the amendment and new clauses will be agreed by the Public Bill Committee considering the Criminal Justice and Courts Bill.

April 2014

Written evidence submitted by the Criminal Bar Association of England and Wales (CJC 40)

Introduction

1. The Criminal Bar Association (CBA) represents about 5,000 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Part 1: Criminal Justice

Clauses 1-3: additional schedule 15B offences

2. A mandatory life sentence should be reserved for the most serious offences and most dangerous offenders only. The two strike mandatory life sentence under s.224A CJA 2003 has already significantly widened the circumstances in which a life sentences must be imposed.

3. The Bill seeks to include further "serious terrorism and terrorist-related offences". We have particular concern for the inclusion of s.2-4 of the Explosive Substances Act 1883 within schedule 15B. These offences do not require the activity to relate to terrorism or terrorist acts. There are many different ways in which these offences may be committed without having any connection to terrorist activity. The impact of the inclusion of these offences will be much wider reaching than the Bill seeks to achieve.

4. We also do not agree to the inclusion of offences which at present hold a maximum sentence of 10 years. For s.224A to operate, the index offence must be serious enough to justify a sentence of 10 years or more i.e. a term which was previously the maximum sentence. If the other criteria are met, the judge will then be required to impose a mandatory life term for an offence which previously carried a maximum sentence of 10 years. We therefore take the view that it is not appropriate for those offences to be included within schedule 15B.

Clause 4: release for Extended Determinate Sentence (EDS)

5. The CBA is opposed to sentences where there is uncertainty as to the sentence length. Before an EDS may be imposed, a court must make a finding of dangerousness. The automatic release date under an EDS will be two thirds of the way through the custodial term rather than after one half, as with other determinate sentences. In addition, the offender is subject to an extended licence period which provides further protection to the public upon release. Further, the release date for the most serious offenders subject to an EDS is at the discretion of the Parole Board.

6. The EDS will be the sentence most commonly imposed for those offenders who are determined as dangerous due to the abolition of IPPs. One of the critical problems with IPP sentences, resulting in an adverse ruling from the ECHR (*James & Others v UK* [2013] 56 EHRR 12), was the inability for offenders to demonstrate to the Parole Board that they were no longer a risk to the public, e.g. by not being able to access courses.

7. We have significant concerns that the removal of the automatic release provisions will lead to the same serious problems that occurred with the IPP regime. In many cases this problem will be felt more acutely by those serving an EDS as the length of the custodial term will be shorter than with IPPs. The issue will be exacerbated further if release dates for some determinate sentences fall to be determined by the Parole Board as well, as proposed in clause 5.

8. In addition taking account of the additional protection that an EDS provides we do not consider the amendments contained within clause 4 to be necessary.

Clause 5 and schedule 1: Release for certain determinate sentences

9. All of these offences (except s.4 of the Explosive Substances Act 1883) are listed in Schedule 15 of the CJA 2003. Therefore when someone falls to be sentenced for any of those offences, it is open to the court to conclude they are dangerous and sentence accordingly.

10. We do not consider that the proposals of clause 5 are necessary as if the court considers that the offender is dangerous, the EDS is available to the sentencer.

11. If the offender is not dangerous (as with those targeted in clause 5), then an offender should be released automatically and not when the Parole Board *"is satisfied that it is not necessary for the protection of the public that P should be confined" (schedule 1, para.6(4)(b) of the Bill)*.

12. We hold the same concerns set out above in relation to clause 4, in relation to this clause.

Clause 6 and schedule 2: Electronic monitoring

13. We agree that in some cases this technology may be useful in the prevention of re-offending and ensuring compliance with licence conditions, if the technology is deemed safe and reliable.

14. In the vast majority of cases the imposition of electronic monitoring conditions and the collection and storage of location data obtained by it would interfere with an offender's Article 8 rights.

15. We take the view that amending the use of such technology to make it a compulsory licence condition is extremely likely to result in cases where it is not necessary or proportionate, and thereby lead to cases in which there is a breach of the offender's Article 8 rights.

16. We acknowledge that the order allows for exceptions to be made where necessary. However we do not deem this caveat sufficient to avoid violations of Article 8 rights. Given the serious impact that such technology will have on individual's lives (in particular tracking), we consider that it should remain a discretionary tool, to be imposed only where necessary considering the individual case and all the relevant circumstances.

Clause 7-9: Re-release of recalled offenders

17. We are concerned about the effect of the clause on those who do not comply with their licence conditions because of circumstances beyond their control. It is likely to have a disproportionate effect upon those from chaotic backgrounds, those with addictions and/or mental health issues, who are not deemed a risk to the public but breach their licence conditions because of issues such as loss of accommodation.

18. A standard recall for what might be viewed as minor breaches of licence can in some cases lead to a wholly disproportionate overall sentence being served. We suggest consideration is given to increasing the fixed term recall period to 56 days to mark repeated minor infringements of licence.

Clause 10

19. We agree.

Clause 11

20. We agree.

Clause 14-15: Cautions

21. We agree with the provisions for indictable only offences. We consider that making the specified either way drug offences subject to the exceptional circumstances test is too prescriptive, taking account the wide variety of seriousness encompassed within these type of offences. Equally we are concerned that the imposition of the exceptionality test upon the commission of an either-way and summary only offence, within a two-year period of having been convicted or cautioned for a similar offence, is too prescriptive and does not provide sufficient flexibility.

Clause 16

22. We agree.

PART 2: YOUNG OFFENDERS

Clauses 17-19, schedule 3 and 4: Detention of young offenders and secure colleges

23. We recognise the success in reducing the number of children in prison. It is crucial that the good work continues to further reduce this number. We agree that there should be a greater focus upon the provision of effective education in STCs, SCH and YOIs and the current average hours of education are completely inadequate.

24. However it is also important to ensure that focus is also placed on the need for specialist intervention for individual needs (e.g. mental health, self harm, learning disabilities, behavioural disorders, previous neglect and abuse, unstable and inadequate housing). Such needs are best met by institutions such as SCHs where there are specialist staff and a very high staff to young person ratio.

25. We consider that the money could be better spent on intensive rehabilitation and responding to specific needs of individual rather than effectively replacing the YOI.

26. We also agree that there should be improvement to the policies and processes in place to manage each young offender's transition from custody into stable accommodation and education, training or employment, in the community

Clause 20: Appropriate adults

27. We agree with this clause and agree with the importance of 17 year olds having the benefit of an appropriate adult as per the High Court decision of *HC vs. (1) Secretary of State for the Home Department and (2) Commissioner of Police for the Metropolis* [2013] EWHC 982 (Admin) (date April 2013).

28. This would create an anomaly in that a 17 year old is not entitled to an appropriate adult during a police interview under code C. If this measure is to be introduced the decision as to who the appropriate adult is, ought to be entirely the choice of the 17 year old.

Clause 21-23: Referral orders

29. We agree.

Part 3: Courts and Tribunals

Clauses 24-28: Trial by single judge on the papers

30. In principle, we have no real concerns about these clauses, because these regulatory offences are non-imprisonable [per Clause 16A(1)(a) to (7)]. However, we do wish to raise two discrete points:

i. Clause 16A(1)(d) should affirm—and specifically iterate—the principle of the overarching objective of the CPR—that the courts must deal justly between the parties, so as to emphasise that CPR-prescribed time limits and forms of service are guidance, rather than definitive—or otherwise having the effect barring challenges to prosecutions. Related to this is that this should prompt revision of 16A(6), which—we think inexplicably and without merit—provides, *"The court may try the charge in the absence of the parties and, if a party appears, must proceed as if the party were absent"*;

ii. Clause 16A(3)(b) should include provision for an accused to make available written submissions relevant to commission of the offence—whether denied or, if accepted, material to seriousness;

iii. Clause 16A(5) provides that the court is not required to conduct any part of the proceedings in open court—we consider that openness of court proceedings is an essential safeguard, in the absence of a defendant and/or where a defendant is a litigant in person. We think this clause should be revised such that proceedings are required to be conducted in open court, to ensure that the judge and clerk are together acting fairly.

Clauses 29 to 36: Costs of criminal cases (order and collection of costs)

31. We recognise that exemption from payment of costs of persons under eighteen years [per Clause 21A(2)] is intended as a safeguard. Consistently with this, however, we are strongly of the view that the courts must—whenever exercising a discretionary power, which award of costs involves—conduct a summary means assessment. There will remain a significant number of cases in which any order as to costs is inappropriate (for example, where to do so would risk setting up a defendant to fail, because there already exist a number of court-ordered fines or costs outstanding which should first be discharged—or where compensation to a victim, which should take priority, must be assessed and ordered according to means).

Clauses 32 to 35: Appeals in civil proceedings

32. We are neutral on proposal of a new test applicable to leave from various courts and tribunals to the UKSC—that there is "a sufficient case for an appeal".

Clauses 37 to 48: Contempt of court, juries, and the Court Martial

33. We affirm the view espoused in the response of the Criminal Bar Association to the Law Commission's consultation paper 209, published in March 2013 [https://www.criminalbar.com/resources/cba-responses/]

Part 4: Judicial Review

Clauses 50 to 56: Judicial review in the High Court & Upper Tribunal

34. We have grave misgivings about the newly conceived test—in Clause 50(1)—for striking out claims for relief, whereby the courts are obliged to refuse such claims where it *"appears [...] to be highly likely that the outcome [...] would not have been substantially different"*. This imports a materially new—and high—hurdle for claimants to clear in their claim for relief, notwithstanding that a claimant has (by definition, at this stage of proceedings) satisfied the Court of the merits of a claim:

> *(2A) The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review,*
>
> *and*
>
> *(b) may not make an award under subsection (4) on such an application,*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.*

35. We see no justifiable or defensible reason for inclusion of this new check on—and bar to—relief. Relief has always been, and will remain, within the discretion of the Court. This provision is plainly designed to do nothing more than insulate unsuccessful government respondents from accountability and expenditure. This represents a sea-change in the relationship between parties to judicial review. Necessity, the availability and recovery of relief is bound up with award and recovery of the costs of litigation by those representing a successful claimant.

36. We are unequivocal and firm in our view that this new test re: relief should not be legislated.

37. Moreover, we are firmly against the radical changes proposed in clauses 53 (re: interveners and costs) and 54 and 55 (re: capping of costs). We see no sound reason—other than to limit accountability of government respondents, which is no justification—for the limitation which clause 55(2) imposes on recovery of claimant costs:

> *A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is.*

38. A driving purpose and aim of the Bill is—unabashedly—to drastically restrict the ambit of cases which are amenable to judicial review. This much is readily apparent in clause 54(7) (re: capping of costs), which adds to the relevant test two further, hitherto unseen, limbs (b) and (c), below, designed to bar the number of cases which are deemed to be brought as "public interest proceedings":

> *The proceedings are "public interest proceedings" only if—*
>
> *(a) an issue that is the subject of the proceedings is of general public importance,*
>
> *(b) the public interest requires the issue to be resolved, and*
>
> *(c) the proceedings are likely to provide an appropriate means of resolving it.*

39. We think it is quite wrong that further, similar, devices are proposed by this Bill, restricting claims which will be considered as "public interest proceedings". Clause 55(8) (a) to (c) demonstrates these further conceived restrictions:

> *The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—*
>
> *(a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,*
>
> *(b) how significant the effect on those people is likely to be, and*
>
> *(c) whether the proceedings involve consideration of a point of law of general public importance.*

40. We are troubled by the Clause 53(2) (re: the proposed absolute bar on payment of costs of an intervener to judicial review proceedings):

> *A relevant party to the proceedings may not be ordered by the High Court or the Court of Appeal to pay the intervener's costs in connection with the proceedings.*

41. This clause proposes to do exactly what Lord Pannick warned should not be done [see his opening address, given in October 2013, at the Annual General Bar Council conference]. Lord Pannick argued, *"this Government does not understand or appreciate the importance of advocacy to the rule of law"*. Specifically:

> *My third example is [the proposal that] the rules of standing for judicial review should be restricted so that claims could be brought be persons with a direct interest and not by public interest groups such*

as NGOs, charities and pressure groups. [...] [This Government] does not understand, or appreciate, the importance of judicial review advocacy as a check on abuse of the power of public bodies, and an important inducement to them to adopt higher standards of legality, fairness and proportionality.

42. Lord Pannick finds company with other distinguished commentators. Professor Dawn Oliver, Emeritus Professor of Public Law at the Faculty of Laws, University College, London, in an article published on 19th March 2014, by the Constitutional Law Blog, has voiced indistinguishable concerns [http://ukconstitutionallaw.org/2014/03/19/dawn-oliver-does-treating-the-system-of-justice-as-a-public-service-have-implications-for-the-rule-of-law-and-judicial-independence/]. Her central thesis is that the courts are—and the justice system generally is—fundamentally different to other public services. Differently, judicial constitutional independence is, as Professor Oliver reminds readers, *"an important constitutional role on with much of the system of government depends"*. Professor Oliver continues:

This 'public service' perspective puts some proposals for changes to the system of justice in a new light. The availability to critics of government of recourse to the courts and the independence of the judiciary can be a nuisance. What might a government do if it wanted to avoid litigation and embarrassment and enable it to get away with illegality? Just as, when developing policy in relation to the NHS, it can seek to limit access to the service (e.g. to drugs) and costs (e.g. by cutting staff, closing hospitals), so to it can do this in relation to the system of justice—but with startling consequences for the rule of law. It could limit access to justice and deprive the courts of jurisdiction over unwelcome cases by reducing the limitation period for claiming judicial review and limiting the standing of charitable or voluntary sector bodies; it could find ways of weakening the ability of unpopular individuals (e.g. illegal immigrants, asylum seekers, convicted criminals) to pursue their claims in court by limiting their access to legal advice and representation; it could secure that unpopular parties (especially defendants in criminal cases) are less likely to win their cases [...]

I do not allege that any of these are the conscious intentions of the government. But the overall effect of such changes, based in part on assumptions that the system of justice is just another public service, may be to undermine the independence of the judiciary, broadly understood, and the rule of law. Thinking of the system as a service obscures its special constitutional importance.

April 2014

Written evidence submitted by BritCits (CJC 41)

About us

1. BritCits is a human rights charity and campaign group, focused on the rights of British citizens, residents and non-EEA family members. We are especially concerned about UK's family immigration rules and hurdles being put in the way to prevent family unity or those which force citizens into exile. Often judicial review is the only means to keeping the family together so any curbs on this route presents a further barrier for our members and others in similar positions.

Summary

2. There are various elements in the CJC Bill which are of concern, because they:

a) are unnecessary as the current process is working efficiently;
b) will lead to a system where justice is a privilege only for the rich, leading to a systematic devaluing of parliamentary and judicial processes;
c) prevent NGOs from collating resources to seek justice where an individual may otherwise not be able to or where such an approach would be in the public interest;
d) will lead to government departments not being held accountable for not upholding the law;
e) persecute the most vulnerable;
f) when combined with the legal aid provision for Judicial Review through the legal residence test, which did not require primary legislation, completely avoids full parliamentary scrutiny—not in my view therefore representative of a democracy.

Comments on the Criminal Justice and Courts Bill by [Clause]:

3. **[50 (2A)] The HC/UT would be required to refuse an application for permission to undertake a JR if it is 'highly likely' the outcome for the applicant would not have been substantially different if the reason for wanting the JR had not occurred anyway.**

Concerns:

a) At first reading this seemed sensible to me—what is the point in going through the motions if the end result for the applicant would not have been different anyway? And perhaps this is sensible—but the issues here are around the potential for abuse by the side with deeper pockets (particularly where taxpayer funded e.g.

government departments) and the timing of the test, which could lead to someone having to fight just for the right to fight for justice, and worse, being forced to give up this right because of the numerous hurdles put in their way—even where both sides agree the law has been broken. This cannot be in the public interest.

b) This means a government department could break the law, even knowingly, but not be held accountable for it unless i) the applicant can prove had the government not broken the law, the result would have been different, and/or ii) the government department cannot prove the result would not have been different if they had not broken the law.

It's not clear who the onus is on to make this argument, but that this is a discussion that is likely to reach a level of complexity is of concern, but more so is that this discussion is being had before the applicant is even granted permission to have the court hear the impact the breaking of law has had on them. I fear it's likely to let government departments be more lax in not upholding the law simply because the burden of proof is on the other party.

c) Having to prove your case at an earlier stage—at the application for permission for the undertaking of JR—is especially onerous. This means more work for your lawyers and therefore more legal fees, before you even know whether or not you are allowed to take your case to court. Made worse by the granting of a PCO after the permission stage (see below).

d) "highly likely": how is this defined? Greater than 50%? Greater than 90%? Subjective and very much left to the judge in a 'let's imagine' scenario before they truly have all the facts to hand. Given judges already have the discretion to refuse a JR or stop it at any time they believe it's going nowhere what this is trying to achieve is not clear, but that bullying tactics are being put in place by the government, is.

e) What recourse does the applicant have where an application for judicial review is refused?

4. **[51 (1)] Applicants are required to provide the HC and UT with info about how they are paying for the court proceedings, as specified in the 'rules of court'.**

Concerns:

a) Do the courts currently have a problem getting people to pay up? Else why this measure?

5. **[51 (2) (3A)] In HC and UT, individuals and organisations are required to specify the source, nature and extent available or likely to be available to meet the legal costs. Organisations must demonstrate they are 'likely' to have such financial resources, or provide information about its members and the members' ability to pay up.**

Concerns:

a) This is hugely intrusive. If I have a friend who needs help in paying legal fees and I agree to give them, say, £3000 towards a cause I think is very worthy, it seems my personal details (not clear what this entails) must be declared by my friend. As a private person, this may mean I choose not to help out where I would otherwise—even where the cause is in the public interest.

b) As an organisation, BritCits—if we were to take a case to court, this also suggests we have to demonstrate that we are 'likely' to have the financial resources, or, we must provide to the court information about our members and their ability to provide financial support. What does 'likely' mean, and how does one go about demonstrating it? I would also be concerned about sharing membership data—not clear what level of detail, nor who will see this data, nor the limitations, if any, of its usage, nor whether or not it must be with member consent. This requirement alone would prevent us from taking any action against the government, however strong our case. That we could further be asked to declare member financials is yet another barrier. Most organisations such as BritCits will not hold financial information about members. Even where members may donate money, it does not mean they then go on to provide the recipient with their income and assets info. This severely limits ability of organisations such as BritCits to take the government to court—however unlawfully it may be behaving! What this may mean in terms of violation of DPA is also of concern.

6. **[52 (1), (2)] The HC, UT and CoA then decide on who pays the costs of the JR, and how much they pay. [52 (3)] The friend/family of a person, or a member of an organisation, whose info is provided to court as someone who has financially helped or could help, may become liable for further costs.**

Concerns:

a) So where in the above example I helped my friend out with £3,000, the Bill allows the court to demand that I then pay even more. The government is not even trying to hide the fact that if someone has the audacity to help someone take (or try to take) them to court for breaking the law, they will be punished! No matter how good a friend you may have—even where they do not mind the sharing of their personal info with the court and government, it's unlikely they will leave themselves open to being called upon to pay a further unspecified amount of money.

This is bullying from a government which seems to forget that it is in place to serve the public, not the other way around.

7. **[53 (4)] This relates to where an intervener is involved in a case.**

a) An intervener is a third party speaking in support of one side in a hearing; they have evidence they can present to strengthen the case—indeed, the more evidence a court has, surely the fairer the ruling? The intervener pays their own legal in presenting their evidence, so it's not a drain on any of the main two parties.

Concerns:

b) Imagine a scenario where BritCits is an intervener in a case involving the income threshold imposed on British citizens with non-EEA spouses. BritCits instructs a lawyer, and pays their fees itself—neither of the main two sides pays us or our lawyer. We present solid evidence to show the devastating impact on the lives of our members because of the income threshold. The government has to spend time in finding excuses to refute it. So according to this clause, the government can demand that BritCits pay them for the work they have to carry out because of evidence that BritCits presented. BritCits has no way of controlling or knowing in advance what the government's costs will be; we are just a charity trying to do good. This clause creates a fear factor so that even organisations which use their own money to provide the court with more evidence, to enable a better decision to be made, may not do so lest they be liable for a further unknown amount of money to then cover the government's costs!

c) This leads to the prevention of justice by stifling those brave enough to otherwise speak out.

8. **[54 (3)] This clause relates to capping of costs i.e. courts can say to you, ok if you lose this case against the government, the maximum you will need to pay in terms of their legal fees is £X. This is also known as a Protective Costs Order (PCO). According to the Bill, an application for this PCO would only be possible AFTER permission for JR has been granted. Bear in mind, the application for a PCO alone could cost £5k-£10k.**

Concerns:

a) Already established the significant costs likely to be incurred in application for permission for JR, where things which under the existing regime would be discussed in the actual JR are brought forward. Estimates suggest this application stage alone could cost around £30k. So it's imperative that a PCO be awarded BEFORE this stage, else it could prevent someone from assessing whether or not they can afford to take a case against the government e.g. BritCits wants to take the government to court on its family immigration rules. We have limited funds, and so only want to do so if there is a clear cap on the fees we would need to pay in the event we lose the case.

b) Under the current regime: We apply for a PCO. If granted at a level we are happy with, we take the case further and apply for permission for JR. If we don't get the PCO, we could stop there, and only lose the money spent on applying for a PCO, which was a reasonably known amount at the outset.

c) Under the proposed regime: We first apply for permission for JR, which in itself could cost heaps of money—even £30k. If successful, we then apply for PCO. It could be at a level we're happy with, but if it isn't and we discontinue, it means we have paid possibly £30k for nothing. Not the best use of charity funds, and hence means we are less likely to ever, under the proposals, be able to take the government to court.

9. **[54 (7)] The court to only grant a PCO if the proceedings are of 'general public importance'.**

Concern:

a) How is this defined? Perhaps not really an issue as likely something the courts must currently consider anyway. In which case why is it here as an amendment?

10. **[55 (1) (a)] This suggests that before granting a PCO the court must consider the finances of the parties and the finances of those who provide or may provide financial support to the parties**

Concerns:

a) So are courts required to look at all parties involved, even the government, with access to taxpayers funds, in deciding whether the other side should be granted a PCO?

b) If you have been able to show that you have the financial means to undertake a JR, either because you have money yourself, or have financial support from friends/family/members, then this is held against you when applying for a PCO, even though being unable to show the evidence of financial means may mean being denied permission for the JR in the first place.

11. **[55 (1) (d)] The court must also consider whether the legal representatives are working for free before granting a PCO.**

Concern:

a) So if legal representatives are working for free, is PCO grant more likely, because more are doing it for free, or less likely, as you're not having to pay your lawyer's fees?

12. **[55 (2)] This clause says that if a PCO is granted i.e. the courts agree that if BritCits lose their JR then they have to pay a capped amount for the government's legal fees, then if BritCits wins, the government's costs in terms of what they pay for legal fees to BritCits is also capped.**

Concerns:

a) This does not seem fair. In the example above, BritCits will have gone to considerable expense to be granted a PCO. Yet the government gets the benefit for free, despite not being lumbered with the same requirements to show a need for a PCO.

b) Not clear whether the reciprocal PCO is on identical terms to that originally awarded.

April 2014

Written evidence submitted by the BBC, Guardian News & Media Limited, Independent Print Limited, Express Newspapers, ITN, Channel 4 Television Corporation, Telegraph Media Group Limited, Associated Newspapers Limited and Times Newspapers Limited on Clauses 37 and 38 on the Criminal Justice and Courts Bill (CJC 42)

1. Summary

1.1 Clauses 37 and 38 of the Bill deal with the introduction of new powers which will allow the Attorney General and the courts to require owners of online news archives to remove material which it is argued might prejudice upcoming criminal proceedings, from their archives. If the website operators fail to comply, then the current proposals stipulate that criminal sanctions could follow in the form of either an unlimited fine or imprisonment.

1.2 We are concerned that the introduction of these new powers could introduce a chilling effect on the operation and accessibility of public news archives, and ask Parliament to reconsider the appropriateness of clauses 37 and 38 in light of the arguments raised below.

1.3 In the event that Parliament deems it appropriate to introduce the two clauses notwithstanding our submissions, we would ask that the precise manner in which these sections will operate in practice should be considered as a matter of urgency and that the Regulations referred to in the Bill should be drafted and consulted upon in parallel with the provisions of the Bill itself so that affected parties can understand the full implications of the proposed changes to the current statutory regime. We have highlighted a number of specific issues that we believe should be addressed in the Regulations in section 4 below.

2. Objections in principle to the introduction of new restrictions on freedom of speech

2.1 We recognise that the right to freedom of expression contained in Art 10.2 of the European Convention on Human Rights is not absolute and we take seriously the rights of individuals to a fair trial. However the press has a duty to report court proceedings in its capacity as public watchdog. Any restrictions on this freedom have to be proportionate and no more than are necessary.

2.2 Furthermore, the online news archives of the BBC, Guardian News & Media Limited, Independent Print Limited, Express Newspapers, ITN, Telegraph Media Group Limited, Associated Newspapers Limited, Times Newspapers Limited and many other media organisations, are a valuable source of information, not least for researchers and academics. The courts have therefore considered that, while the primary function of the press in a democracy is to act as a "public watchdog", it has a valuable secondary role in maintaining and making available to the public, archives containing news which has previously been reported.

2.3 As such the courts have long held that any restrictions on the press' duty to report court proceedings have to be proportionate and no more than is necessary. By way of example we cite the following cases:

2.4 In *Sunday Times v United Kingdom [1979] ECHR 6538/74* the European Court of Human Rights said: "Whilst the mass media must not overstep the bounds imposed in the interest of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courst just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them."

2.5 Similarly, in *McCartan, Turkington Breen (a firm) v Times Newspapers Ltd [2001] 2 AC 277*, Lording Bingham said (at p290): "The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on the freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

3. Specific concerns regarding the detailed provisions of clauses 37 and 38

3.1 Under the current legislation once proceedings become active mainstream media organisations take great care not to put material on the current (front) pages of their websites where such material could create a substantial risk of serious impediment or prejudice to active proceedings [Contempt of Court Act 1981].

Generally, these website operators also have a policy of not linking to material in their archives that may be prejudicial, but which was unproblematic when it was first published. We consider that these two precautions are sufficient to protect the interests of justice.

3.2 We are therefore particularly concerned about the proposals in sections 37 and 38 which introduce a new statutory power for the Attorney General to formally require the removal of material from online archives (clause 37) and the statutory recognition of an injunctive power under the Senior Courts Act 1981 (clause 38) which will allow the courts to prevent the publication of material. As stated above, we believe that both of these powers are unnecessary and are likely to have an unnecessarily restrictive impact on the media's coverage of court proceedings and the accessibility of news archives by the public.

3.3 The necessity of such measures is also reduced by the Bill's new statutory provisions which seek to control the actions of jurors in relation to research and the use of communications devices (contained in clauses [40]-48 of the Bill). In particular clause 40 creates a specific offence for jurors who research a case during a trial period. The new section 20A(3)(b) specifies that it will be an offence for a juror to "search an electronic database, including by means of the internet." If jurors are sufficiently directed in relation to the material which is accessible on the internet while they are deliberating on a case and if the new statutory provisions as proposed by clauses 40-48 are properly enforced, then material which has to be deliberately searched for within online news archives should present a very low risk of prejudice.

3.4 We believe that news archives are best viewed by analogy with a newspaper library. Contemporary publications on the internet can be distinguished from archives due to the necessity with the latter to apply search criteria which is a quite deliberate and directed act. We therefore believe that the existence of material in an archive should not be held to constitute publication to the public or to a section of the public, contrary to the decisions in the recent cases of *HM Advocate v Beggs (No 2) 2001 Scot (D) 31/10; 2002 S.L.T 139* and in *R v Harwood* and contrary to the proposals contained within s.38 of the Bill.

3.5 We have had the benefit of seeing, and agree with the submissions made to Parliament on behalf of the Newspaper Society, in particular their suggestion that the Bill could seek to clarify the position by providing a statutory definition of "first publication" or an unqualified statutory defence to resolve the uncertainty which has arisen as a result of the cases mentioned above.

3.6 We fear that the introduction of statutory powers could lead to the use of notices becoming standard practice leading to the courts and media becoming inundated with requests to take down material. This has serious practical implications for the resourcing and maintenance of and public access to the archives of both national and regional media. This precedent which has the effect of giving power to influence the editorial content of national news organisations to a member of the government is also a significant step in principle and one that should be treated with great caution.

3.7 We are concerned that the explanatory notes accompanying the Bill and the briefing notes for the second reading both state that the new power given to the Attorney General is intended to be used in circumstances where "the Attorney General gives the person a notice informing the person that there are active proceedings in respect of which the publication *may be* contemptuous" (our emphasis)." This is clearly a much lower test than that contained in the 1981 Contempt of Court Act [footnote], in the absence of legislative safeguards, we fear that it may result in future Attorneys General using the system of notices in respect of any material where there might be a potential risk, rather than in respect of material which creates "as substantial risk of serious prejudice" as per the current test in the 1981 Act.

3.8 If it is indeed Parliament's intention to reduce the benchmark under which media organizations might be compelled to remove material from public view then then we would submit that this is an unjustified interference with the Article 10 rights of the publishers and broadcasters who may be affected. To rectify this there would need to be confirmation that notices could only be issued in circumstances where the Attorney General is satisfied that the material in question meets the statutory threshold i.e. that it in fact creates a substantial risk of serious prejudice, and a means by which the media might challenge such decisions prior to the automatic loss of the statutory defences otherwise available under the 1981 Act.

4. Issues which require clarification via the Regulations

4.1 However, if notwithstanding these views, these new powers are to be introduced, we believe that it is imperative to simultaneously address the details of the regulations that will govern their operation in practice (as per clause 37(5)(4) of the draft Bill). In our view it is critical that the content of the regulations is discussed in tandem with the core provisions of the Bill, so that those affected can understand what the full implications of the new processes will be.

4.2 In those cases where the Attorney General believes a takedown notice under clause 37 may be necessary (i.e. where there is material which poses a substantial risk of serious prejudice, which cannot be cured by jury direction and which is not replicated in material posted outside this jurisdiction) a proper procedure needs to be in place, including by way of example the following:

- Provision of clear advanced notice to specific contacts at the relevant media organisations.
- Proper identification of the material (e.g. by reference to the media organisation and where possible specifying date of publication, URL and headline).

— Provision of a reasonable timeframe in which the media organisation is required to remove the material.
— An explanation of the reasons for the Attorney General's conclusion that the material in question poses a substantial risk of serious prejudice.
— Notification given in sufficient time before any trial commences / jury is empanelled so as to allow an adequate period of time for there to be proper consideration of the issues by the courts and to allow time for an appeal.
— Notification to be given of the conclusion of the proceedings so that the material can be restored to the archive.

4.3 In any event, whatever form the Regulations might take, we believe that it is essential that they are considered in tandem with the draft clauses and would ask that this issue should be highlighted to the Ministry of Justice and the Attorney General's Office before the Bill progresses to the 3rd Reading stage in the House of Commons.

April 2014

Written evidence submitted by Terence Ewing (CJC 43)

Reform of Judicial Review—Criminal Justice and Courts Bill

I am writing to the Criminal Justice and Courts Bill concerning the Ministry of Justice's current Criminal Justice and Courts Bill concerning the reforms relating to Judicial Review.

Clause 50—"Likelihood of substantially different outcome for applicant"

I am opposed to this clause, as one of the main planks of Judicial Review is top highlight procedural impropriety and irregularities.

On a hearing for Judicial Review, the court considers the nature of any procedural irregularities that the public body has made in arriving at its final decision currently.

It then decides whether such irregularities are such that they merit the quashing of the decision or whether or not the decision can stand, notwithstanding the irregularities highlighted.

One of the tests is of course whether those irregularities are mandatory and substantive and create any condition precedent, or is merely directory.

I would contend that it is only possible to undertake this balancing exercise on the substantive hearing when all of the evidence and Skeleton Arguments have been filed, and after hearing the oral submissions of both parties. Only then would any reasonable court be in a position to form a final view.

It is wholly wrong that a court considering the grant of permission at the outset should have to consider the question of whether any irregularities should be waived through on the basis that even if they have been found to have taken place, they wouldn't affect the outcome of the final decision.

That is a decision relating to the seriousness of the procedural defect and its affect on the procedural propriety of the public body's decision-making process or the proceedings under review.

In effect, this proposed clause will invite and encourage the court to conduct the substantive Judicial Review on the permission hearing, something that was supposed to be a cheap filter mechanism to filter out completely hopeless and inarguable cases at an early stage.

This will inevitably lead to more court time being taken up not less, and more expense for the respective parties, as the matters raised will have to be considered in far more detail than at present as the current test is whether or not simply put, there is an arguable case.

In addition, the imposition of the test that the court must refuse to grant permission for Judicial Review at the permission stage in clause 50(1) amending section 31 of the Senior Courts Act 1981 with a proposed section (2)(a) if it forms the view that the substantive decision would be unaffected at that early stage, removes completely the current judicial discretion to grant or refuse either permission or even substantive relief that has been a long standing feature of Judicial Review.

As such, this provision clearly interferes with the constitutional independence of the judiciary from the state, when the intention of Judicial Review was to operate as a safety valve and a scrutiny and accountability role over public bodies and their decisions and decision-making processes.

I would therefore urge the committee to move that clause 50 be removed from the Bill.

Clause 53—Interveners and costs

I object to the proposal that Interveners should be considered for costs orders if any application has been made as a result of their intervention.

Interveners provide a welcome assistance in relation to Judicial Review claims, especially if they are charitable bodies such as Liberty or Justice or Howard League for Penal Reform etc.

They are able to provide independent assessment of claims and they make invaluable contributions to the outcome of these type of public interest proceedings, and this has also been the case in the former House of Lords and currently in the Supreme Court.

It should also be remembered that in the United States, there are provisions for filing of Amicus Briefs by any interested parties without leave, and I would contend that a similar right should be introduced in the UK courts.

Clauses 54-55—"Capping of costs"

The current procedures for the discretionary grant of protective costs capping orders both in respect of substantive hearings and permission hearings has worked well, and operates to protect claimants with small or moderate means from high costs orders should their applications and claims fail.

I can see no reason for changing these procedures at all as proposed, and would argue that such orders should be applicable to all applications, whether or not they involve issues concerning the wider public interest.

Indeed, regarding environmental cases, these are as the Committee will be aware, subject to the "unreasonably high" costs provisions of article 9(4) of the Aarhus Convention, which is applicable if the claim is an Aarhus case and whether or not the particular application raises general issues of environmental or planning law or not.

Therefore, it is clear that Aarhus cases are going to have to be the subject of separate provisions concerning the making of protective costs capping orders as is highlighted by clause 56.

It would therefore seem illogical therefore if a two-tier system were to operate between Aarhus Judicial Reviews and non Aarhus Judicial Reviews as is proposed.

It is important that prospective claimants for Judicial Review, who act without the protection of legal aid, are given equal protection under Protective Costs Capping Orders at the permission stage just as much as at the substantive hearing stage.

I would also draw to the Committee's attention the fact that for defamation and privacy claims, completely costs capping rules are set to be introduced to allow ordinary citizens greater redress in law against media organizations and publishers as a result of the Leveson Inquiry.

It therefore seems illogical therefore that the reverse should now be proposed relating to challenges brought by claimants for public law Judicial Review challenges.

Finally, I would contend that the current full judicial discretion to grant Protective Costs Capping Orders should be retained for all Judicial Review proceedings, irrespective of whether they may involve wider issues of general public importance.

If such a stringent test were to be now employed, much unnecessary court time would be taken up deciding whether or not the Judicial Review claim did raise issues of general public importance, as no doubt all claimants would then seek to argue that their respective claims satisfied that criteria.

I would also contend that even if a particular claimant was unable to satisfy the general public interest test, nevertheless, many other claims might equally engage the convention rights of the claimant under schedule 1 of the Human Rights Act 1998, and may also involve the determination of individual "civil rights and obligations" under article 6(1) of that Act, without nevertheless raising issues of general public importance to the wider community at large.

In such cases, it seems only fair and reasonable that such claimants should be able to seek the protection of Protective Costs Capping Orders as at present.

Accordingly, I would also urge the committee to reject these clauses from the current bill and leave the current provisions relating to Protective Costs Capping Orders as they currently are as they are working well.

I have no objections however to the means of the respective parties being taken into account regarding the making of Protective Costs Capping Orders.

April 2014

Written evidence submitted by Mrs Sue Braithwaite and Mrs Mandy Stock (CJC 44)

SUBMISSION TO SCRUTINY COMMITTEE RE THE CRIMINAL JUSTICE AND COURTS BILL CONCERNING CAUSING DEATH OR SERIOUS INJURY WHILST DRIVING WHILST DISQUALIFIED

1. MANDY STOCK'S HUSBAND PAUL WAS KILLED WHILST CROSSING A RESIDENTIAL ROAD IN GLOUCETSER IN MARCH 2012 BY A MOTORCYCLIST WHO WAS DRIVING WHILST REPEATEDLY DISQUALIFIED, SPEEDING, ILLEGALLY INSURED AND WHILST CARRYING A PILLION ON A SINGLE SEATER MOTORCYCLE.

2. It is my understanding from recent correspondence with David Cameron and Chris Grayling that measures concerning causing death while driving whilst disqualified will be introduced into the Criminal Justice and Courts Bill you are currently discussing in Committee Stage.

3. I set out below the events that have lead to me wanting changes to be introduced, finishing with a summary of what I feel needs to be changed.

4. At Prime Minister's Questions on Wednesday 30 January 2013 Mr Richard Graham, MP for Gloucester, raised the matter of the death of Mr Paul Stock in March 2012. Paul was my brother-in-law and was married to my sister Mandy for over 30 years; they ran a car repair business together for 25 years. His death has left a massive void in our lives, especially Mandy's as they lived and worked together throughout this time and were seldom apart. Now Paul is dead, their business has closed and Mandy is totally let down by the system that is supposed to protect us.

5. Mr Graham mentioned dangerous driving several times in his address to the House of Commons, but Mandy's main concern is with the ridiculously low maximum sentences associated with causing death whilst disqualified and/or uninsured—the charges that Paul's killer was convicted of. He was given the **maximum** sentence of 2 years, reduced by 6 months as the defendant pleaded guilty at an early stage and, if released early under licence, that could be reduced to 9 months. Paul underwent several hours of life saving surgery immediately after the collision, and continued to receive amazing medical care and further surgery until his death a week later. We were also appalled to find that if Paul had survived the horrific injuries he sustained whilst crossing a residential road, the defendant would probably not have been given a custodial sentence at all, and merely received a fine. For any kind of justice to be served, death and serious injury caused in this manner by a person serially disqualified from driving and uninsured must carry a heavier sentence than 2 years or a fine.

6. The main point to be raised is that there are complex criteria for what is or is not classed as dangerous, careless or reckless driving. The dangerous/careless guidelines range widely, with the highest sentence being 14 years imprisonment. If the CPS decides that the manner of driving does not fit these criteria, even though it is obviously dangerous or careless to any sane law abiding person, the charge is simply causing death while disqualified and the Act covering this is relatively new and separate. As a result, this new Act seems to have been left out of any reviews, with the maximum penalty being only 2 years, regardless of the offender's previous driving history and any other aggravating factors. The severity of the crime is grossly understated in the sentencing guidelines, ultimately a person has died. The offender who killed Paul has 24 previous motoring convictions. He falsely insured the vehicle, not to comply with the law but to abuse it by avoiding being pulled up by ANPR technology. He had a pillion on a single seat bike. He was speeding in a residential area.

7. The Judge in this case, Judge Jamie Tabor QC, has written a private letter to Mandy and in the court repeatedly asked why a charge of careless driving had not been brought, which is a separate issue; he described this case as the "worst of its type imaginable". Judge Tabor continued in the court by saying "This was bound to happen at some time or another and I say that because he is a man with an appalling driving record.", "You are a menace, an absolute menace on the roads.", "His pre-sentence report describes Mr Godwin's attitude to life as someone that 'considers himself exempt from some of the roles that govern society' and I agree", "Nothing I can do can possibly reflect the value of the life of Mr Stock".

8. Mandy wrote to the Judge following the sentencing to thank him for doing what he could and for mentioning his obvious frustration with the sentencing guidelines. He admitted there is no deterrent to stop repeat offenders. Our Judges see it all too often, and it is time to take notice of their views.

9. In his response to Richard Graham's comments, David Cameron mentioned that he would ask the Justice Secretary to look at these issues. There seemed to be considerable support from the members of the House of Commons for change during this exchange during Prime Minister's questions.

10. In February 2013, my sister and I met with both David Cameron (my MP) and Chris Grayling concerning these issues and were pleased to find support and understanding for the need for changes both in the law and sentencing guidelines in these areas. We have been in ongoing correspondence with both David Cameron and Chris Grayling concerning the changes that need to be implemented, the latest letters being received in February 2014.

11. Mandy launched e-petitions and written petitions regarding changes in the law and we gathered well over 1,000 signatures. During 2014 there have been two private members bills and one ten minute rule bill, with some discussion in the Chamber, regarding similar changes being necessary after at least ten deaths related to driving offences in MPs constituencies. It is time to make changes before more innocent people lose their lives unnecessarily. There is no provision for injury however severe or any realistic deterrent to kerb these repeat offenders; this also needs to be dealt with.

12. These are not just my views, after correspondence and discussions with both the Judge and Senior CPS Prosecutor in this case, it is clear there is a major on-going problem with both the attitudes and actions of these serial offenders. They are a cause for genuine concern and effective measures need to be taken not only to deal with the consequences of their actions but also to deal with the real issue of prevention by means of an effective deterrent. Left unchecked they will continue to kill and maim innocent victims in ever increasing numbers.

13. The charge of causing death while disqualified is relatively new; being introduced in 2008. It was specifically brought in to cover disqualified drivers who were not driving dangerously; ie within the general rules of the law, even though they should not have been on the road in the first place, basically the victim may have been the cause. This charge is now being used as a default, firstly as there is no requirement of proof that dangerous/careless driving was to blame, and secondly there are too many clauses and loopholes to evade the higher charges, hence the continual plea bargaining to lower sentences. Basically it is used to avoid the time and cost involved in proving guilt of the higher offences in court; "He's got death while disqualified anyway" was one of the phrases used by the police during the investigation into my husband's death.

14. This charge does not revolve around proof of danger or carelessness and so has fallen behind the other categories; however it has totally lost track of the fact someone has died as a result of deliberate, repeated disregard for the law and previous court order imposed. Nobody expects someone who made a genuine mistake to get the maximum sentence: however there should be an adequate provision to cover the most extreme cases of blatant disregard for the law and life itself. This is obviously not the case at the moment. The Judge should have the power to "reflect the value of life" in these extreme cases.

15. The whole issue of disqualified drivers needs review, but my main points in need of consideration are:

16. **Increase the maximum sentence for Causing Death While Disqualified.**

17. It is obvious there needs to be a dramatic increase in the sentencing guidelines; they are grossly inadequate and need to reflect the **fact** that someone has actually **died as a direct result of a repeated, deliberate illegal** action. These serial offenders have a total disregard for the law and previous court orders imposed; they have **not** made an unfortunate mistake. Any other illegal acts such as speeding and falsely insuring the vehicle are aggravating factors because of the **fact** they are illegal.

18. **Introduce a new charge for Causing Serious Injury.**

19. At present the maximum sentence for causing even the most severe of injuries is only 6 months (effectively 2 months after reductions) for Driving While Disqualified. This is not acceptable. Ken Clarke has set precedence by introducing an injury charge into the dangerous driving equation; this needs to be extended to cover disqualified offenders. 2 months in custody is not a just punishment for inflicting severe injuries that can, and do, destroy the lives of not only the victims, but also their families. The argument then of course would be define 'serious', so maybe 'injury' with a sliding scale of severity inflicted, and/or consideration of previous driving history would be a more realistic approach. There must be a substantial custodial sentence for the most severe cases.

20. **Introduce a minimum custodial penalty for repeat offenders**

21. I'm not asking or implying that a minimum sentence is to be given to everyone for a first offence. From the guidelines it is obvious it takes several offences, or something really major to get disqualified in the first place, assuming the offender had a licence to start with. If the offender is caught driving while disqualified after the ban is imposed, there may be a genuine reason for breaking it, an emergency etc. Getting caught a 2nd time is dubious; the possibility of getting apprehended the only 3 times you commit an offence is extremely unlikely, so it is safe to assume they have committed more offences.

22. At present if the offender gets caught the 2nd, 3rd, 4th, time all they receive is a fine or another disqualification, they soon realise there is nothing to stop them and start to push the limits further; there is no threat to deter them. The 6 month maximum sentence (2 months in reality) is obviously not a deterrent, which is why it is seldom implemented, especially in view of the overcrowding issue. If on the second offence they are warned, if you do it again, there is a minimum 3 year sentence", then it might make them think a little, before they get into the cycle of abuse. Those who have already breached the court orders imposed, more than 3 times need a stiff penalty to deliver a message to others.

23. The sentencing guidelines council is trying to reflect consistency across the board; Burglary is obviously a serious crime, but not normally life threatening. 3 years is the minimum sentence which has to be imposed for 3 standard domestic burglaries. These disqualified, serial offenders have the potential to kill every time they go on the road; a similar minimum sentence should be available to kerb these people. I know prison is a costly option and budgets are tight, but these offenders need to be dealt with and stopped. With the current guidelines, they will eventually kill when there is nothing to deter them until they do. Even then, when they do kill 2 years (18 months) is not a deterrent to prevent them going back on the streets and doing it again.

24. "Brake" the road charity, advocate any form of illegal driving is dangerous when it has resulted in death or injury, and also ask why any form of excessive speed is tolerated. Graham Godwin is not an exception, there are an increasing number of deaths being caused by disqualified 'drivers, some are obviously driving dangerously, with excessive speed, but many know to stay off the radar to avoid detection. Dangerous or careless is difficult to prove if there is no video or CCTV evidence, unless there is major excessive speed. Why is 40% over the speed limit not dangerous or careless?

25. **In Summary:**

26. The reaction of the house to the initial question raised sums up the feeling of the vast majority of decent law abiding people. They rightly expect the law and judicial system to protect them, and are at present being

failed. It is ultimately your duty and responsibility to ensure these offenders are deterred or prevented from causing death or serious harm. The issue of prevention is as important, if not more important than dealing with the consequences after the event.

27. The 3 points raised are all interconnected:

28. Dramatically raise the current maximum sentence for Causing Death While Disqualified, to reflect the **fact** someone has died as a result of repeated, deliberate disregard for the law.

29. Introduce a new charge to cover serious injury, (or any injury if it would prevent loopholes) with a sliding scale to reflect the severity of injury or history of the offender. This must ultimately carry a substantial custodial sentence. Some injuries result in little or no quality of life for the victim, or their families.

30. Introduce **an EFFECTIVE DETERRENT** to give a serious message to stop the **deliberate, repeated** disrespect shown for the law. The maximum threshold would therefore need to rise to accommodate this. Some offenders in this category may genuinely kill as a result of a one off mistake, but mitigating circumstances are always taken into account by judges passing sentence. However, many offences in this category are blatantly disrespecting the law, and the guidelines need to empower the judges to pass the heavier sentences should the circumstances demand it. Just because there is no requirement for proof of danger, does not mean it is an easy option. The fact that laws have been broken is the key - Being disqualified, speeding, carrying an illegal pillion, are breaches of the law. Falsely insuring the vehicle shows intent. This loophole needs to be closed with the utmost urgency. Prevention to deal with the cause would, I hope, lessen the need to deal with the consequences.

31. Thank you for your time and I hope you will consider all I have raised with the respect it deserves. These are not unreasonable requests, but measures many would expect to already be in place.

April 2014