Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill

Fourteenth Report of Session 2013-14
House of Lords
House of Commons
Joint Committee on
Human Rights

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Fourteenth Report of Session 2013-14

Report, together with formal minutes

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**Joint Committee on Human Rights**

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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**Current Staff**

The current staff of the Committee is: Mike Hennessy (Commons Clerk), Megan Conway (Lords Clerk), Murray Hunt (Legal Adviser), Natalie Wease (Assistant Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Holly Knowles (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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Summary

Criminal Justice and Courts Bill

The Criminal Justice and Courts Bill was introduced in the House of Commons on 5 February 2014. It received its Second Reading in the Commons on 24 February 2014, completed its Committee Stage on 1 April and began its Report Stage on Monday 12 May. The Bill has been carried over to the new Session of Parliament.

The rights of the child

While we welcome the Government’s acknowledgment of the importance to this Bill of the relevant international standards concerning the rights of children and, specifically, the rights of children within the youth justice system, there is no evidence to suggest that these standards were considered by the Ministry of Justice prior to the publication of the Bill, despite the commitment given by the Government in December 2010 always to have due regard to the UNCRC when developing law and policy. This is not the first time that such a lack of evident consideration has been commented on in our scrutiny Reports. We intend to return to the question of whether the Government has made any progress towards implementing this commitment.

Increased sentence for terrorism offences

The Bill increases the maximum sentence for certain terrorism-related offences from 10 or 14 years to life imprisonment. The Bill also adds these and other terrorism-related offences to the list of serious offences which are subject to the dangerous offenders sentencing scheme. The combined effect of this is that offenders may receive an automatic life sentence, they may be eligible to receive an “Extended Determinate Sentence”, and they will be subject to discretionary early release, after an assessment of risk by the Parole Board. They may even receive a “whole life order” in cases of sufficient seriousness. We believe that significant increases in maximum sentences require clear and transparent justifications which in this case have not been given.

The Government has clarified what was meant in its ECHR Memorandum when it stated that the effect of the provisions in these clauses of the Bill may be to “compel” courts to make whole life orders in certain cases concerning these terrorism-related offences. It is now clear that the compulsion only obtains where a court decides for itself that the case is sufficiently serious to warrant such an order, in which case the court has no choice but to make such an order.

Although the Court of Appeal in the McLoughlin case has brought welcome clarification of the legal position concerning “whole life orders”, we believe that, in view of the legal uncertainty that remains about the availability of a review mechanism for such orders, more specific details need to be provided about this mechanism, including the timetable on which such a review can be sought, the grounds on which it can be sought, who should conduct such a review, and the periodic availability of further such reviews after the first review. The current Bill provides an opportunity for Parliament to remove any legal uncertainty by specifying the details of the review mechanism. We have therefore suggested a probing amendment to the Bill in order to give Parliament the opportunity to debate the desirability
of amending the statutory framework to put beyond legal doubt the availability of this mechanism, in accordance with the principle of subsidiarity.

**Electronic monitoring following release on licence**

The Bill would give the Secretary of State a power to require compulsory electronic monitoring of offenders released on licence. It also provides for a Code of Practice to be issued by the Secretary of State relating to the processing of data gathered in the course of monitoring people under electronic monitoring conditions imposed on offenders following their release on licence. The detailed safeguards in the Code of Practice will be crucial to ensuring that the processing of data so gathered is carried out in such a way that any interference with the right to respect for private life is necessary and proportionate to the legitimate aims pursued. We recommend that the Bill be amended to make the Code subject to some form of parliamentary procedure in order to ensure that Parliament has an opportunity to scrutinise the adequacy of the relevant safeguards.

**Extreme pornography**

We welcome, as a human rights enhancing measure, the provision in the Bill to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. We consider that the cultural harm of extreme pornography, as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and for the proportionate restriction of individual rights to private life and freely to receive and impart information.

**Young offenders**

The Bill provides for a new form of youth detention accommodation, with a focus on education—namely, secure colleges. We emphasise the importance of existing international human rights standards to these provisions: for example, that the State should set up small open facilities where children can be tended to on an individual basis and so avoid the additional negative effects of deprivation of liberty; and that institutions should be decentralised to allow for children to continue having access to their families and their communities. We note that the Government does not appear to have carried out any equality impact assessments of the proposed secure colleges policy, and we recommend that such assessments should be carried out and made available to Parliament at the earliest opportunity. We call on the Government to provide further information in relation to SEN provision in secure colleges.

The Bill provides the authority for a secure college custody officer, “if authorised to do so by secure college rules”, to use reasonable force where necessary to ensure good order and discipline on the part of persons detained in a secure college. This provision of the Bill directly raises a human rights compatibility issue which has already been the subject of an inquiry and Report by our predecessor Committee in the last Parliament; of a judicial decision by the Court of Appeal; and of recommendations by the UN treaty monitoring bodies. In our view, it is clear from the reasoning of the Court of Appeal in the case of C v Secretary of State for Justice that it is incompatible with Articles 3 and 8 ECHR for any law, whether primary or secondary legislation, to authorise the use of force on children and young people for the purposes of good order and discipline. We therefore recommend that
the relevant provision in Schedule 4 of the Bill should be deleted, and the Bill should be amended to make explicit that secure college rules can only authorise the use of reasonable force on children as a last resort; only for the purposes of preventing harm to the child or others; and that only the minimum force necessary should be used.

**Criminal courts charge**

We have considered the extent to which the criminal courts charge proposed in the Bill is likely to influence impecunious defendants’ decisions about whether to plead guilty, whether to elect summary or jury trial, and whether to appeal against conviction or sentence. We have found it difficult to assess this risk in the absence of clear evidence about the impact of court charges in practice. We therefore recommend that the Government monitor carefully the impact of the criminal courts charge on the right of defendants to a fair trial of the criminal charge against them, and make available to Parliament the results of that monitoring. In the meantime we recommend that Parliament be provided with any other evidence that already exists about the impact of other, existing, charges and fees on criminal defendants’ decisions about plea, mode of trial and appeals.

**Contempt of court**

Part 3 of the Bill makes changes to the law of contempt of court and juror misconduct in response to concerns that the law striking the balance between the right to a fair trial and the right to freedom of expression needs updating for the internet age. It provides for a statutory procedure whereby the Attorney General may issue a formal notice to a publisher informing them that there are active proceedings and identifying prejudicial on-line material. We recommend that the Government publish a draft of the regulations setting out this procedure at the earliest opportunity to enable Parliament to scrutinise them for their possible implications for freedom of expression.

**Judicial Review**

We also set out again for the sake of comprehensiveness the amendments proposed to the Bill in our recent Report on the implications for access to justice of the Government’s proposed reforms to judicial review.

**Deregulation Bill**

The Deregulation Bill was introduced in the House of Commons on 23 January 2014. It received its Second Reading in the Commons on 4 February 2014, completed its Committee Stage on 25 March and began its Report Stage on 14 May. The Bill has been carried over to the next Session of Parliament. The Bill was preceded by a draft Deregulation Bill which was subject to pre-legislative scrutiny by the ad hoc Joint Committee on the Draft Deregulation Bill, a process to which we contributed.

The Bill provides that a person exercising a regulatory function specified by the Minister “must, in the exercise of the function, have regard to the desirability of promoting economic growth.” The Government intends this economic growth duty to apply to the EHRC. We believe that applying this growth duty to the EHRC poses a significant risk to the EHRC’s independence, and therefore to its compliance with the Paris Principles and the Equal Treatment Directives as implemented by the Equality Act 2010. The Government is therefore risking the possibility of the EHRC’s accredited “A” status being downgraded and
of putting the UK in breach of its obligations under EU equality law. Unless the continuing discussions between the Government and the Commission satisfy the Commission that the growth duty will not in any way impact upon its independence, we recommend that this duty not be applied to the EHRC.

The Bill would remove the power conferred on employment tribunals by the Equality Act to make wider recommendations in discrimination cases. The EHRC regards the power as useful, both for the employer to whom the recommendation is made and to the Commission itself for following up tribunal decisions, and it does not consider that sufficient evidence has been gathered to make out the case for abolition. We therefore recommend that the power of employment tribunals to make wider recommendations in discrimination cases should be retained.
1 Criminal Justice and Courts Bill

Background

1.1 The Criminal Justice and Courts Bill was introduced in the House of Commons on 5 February 2014. The Rt Hon Chris Grayling MP, the Lord Chancellor and Secretary of State for Justice, has certified that, in his view, the Bill is compatible with Convention rights. The Bill received its Second Reading in the Commons on 24 February 2014. It completed its Committee Stage on 1 April and began its Report Stage on Monday 12 May. The Bill will be carried over to the new Session.

1.2 We wrote to the Government on 12 March in connection with Part 2 of the Bill and on 19 March in relation to Parts 1, 3 and 4 of the Bill. The Government replied by letters dated 31 March and 16 April. Copies of the correspondence are available on the Committee’s website.

Information provided by the Department

1.3 The Government published a detailed ECHR Memorandum to accompany the Bill. With the exception of some of the issues which are the subject of this Report, the Government’s Memorandum is, for the most part, thorough and detailed and its analysis of the relevant human rights issues correct. This enabled us to focus our scrutiny on those ECHR issues on which further information was required in order for us to reach a fully informed view about the implications of the Bill for Convention rights. We welcome the usefulness of the Government’s ECHR Memorandum, which is in accordance with our recommendations for best practice by Government Departments.

1.4 The Government did not, however, publish a UNCRC memorandum to accompany the Bill. The Government undertook on 10 December 2010 always to have due regard to the UN Convention on the Rights of the Child when developing law and policy. We have received Government memoranda accompanying Bills which demonstrate that it has honoured that commitment by setting out a detailed analysis of the Bill’s compatibility with the UNCRC, for example in relation to the Children and Families Bill. Part 2 of the current Bill concerns young offenders and its provisions potentially have significant implications for children’s rights, including the impact of secure colleges on the rights of children detainees and the use of force to ensure “good order and discipline”.

1.5 In view of the fact that Part 2 of the Bill has some significant implications for the rights of children, we wrote to the Government asking to be provided with a Memorandum containing the Government’s analysis of the implications of any provisions in Part 2 of the Bill for the rights of children in the UN Convention on the Rights of the Child, and of relevant international standards, including in particular the UN Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”), the UN Guidelines for the Prevention of Juvenile Delinquency (“the Riyadh Guidelines”) and the UN Rules for the

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1 HC Bill 192 as amended in Public Bill Committee.
2 HC Bill 169 as introduced.
Protection of Juveniles Deprived of their Liberty. We asked the Government to explain the reasons for the view that the provisions in Part 2 are compatible with those standards.

1.6 In his letter dated 31 March the Secretary of State says that he is “content that the provisions in Part 2 of the Bill are compatible with the standards the committee has referred to.” The letter states that the UNCRC and the other standards identified above “are of fundamental importance in securing the rights of children within the youth justice system”, and it goes on to provide some analysis of the implications of Part 2 of the Bill for children’s rights, the substance of which we consider at the relevant points in our Report.

1.7 We welcome the Government’s acknowledgment of the importance of the relevant international standards concerning the rights of children and, specifically, the rights of children within the youth justice system. However, there is no evidence to suggest that the relevant international standards, including even the relevant rights in the UNCRC itself, were considered by the Ministry of Justice prior to the publication of the Bill and its accompanying explanatory material, notwithstanding the commitment given by the Government in December 2010. We have commented adversely on this lack of prior analysis in a number of recent scrutiny Reports in relation to Bills with clear implications for the rights of children, and we regret that it is necessary to do so again. We intend to return at a later date to the question of whether the Government has made any progress towards implementing the commitment it gave in 2010 to always have due regard to the UNCRC when developing law and policy.

Significant human rights issues

(1) Increased sentences for terrorism offences (clauses 1–3)

1.8 The Bill increases the maximum sentence for certain terrorism-related offences (making or possession of explosives; weapons training for terrorist purposes; and training for terrorism) from 10 or 14 years to life imprisonment.\(^4\) The Bill also adds these and other terrorism-related offences to the list of serious offences which are subject to the dangerous offenders sentencing scheme.\(^5\)

1.9 The combined effect of increasing to life imprisonment the maximum sentence for these offences and bringing them within the dangerous offenders sentencing scheme is that offenders may receive an automatic life sentence (unless it would be unjust to impose such a sentence), they may be eligible to receive an “Extended Determinate Sentence”, and they will be subject to discretionary early release, after an assessment of risk by the Parole Board. They may even, as explained further below, receive a “whole life order” in cases of sufficient seriousness.

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\(^4\) Clause 1.
\(^5\) Clauses 2 and 3, adding certain terrorism-related offences to Schedules 15 and 15B to the Criminal Justice Act 2003.
Evidence base justifying increased maximum sentence

1.10 The Lord Chancellor and Secretary of State for Justice said at the Bill’s Second Reading that these provisions in the Bill “close a loophole that desperately needs to be closed.” 6

1.11 The Ministry of Justice’s impact assessment in relation to this clause, however, says that in the years ending June 2012 and June 2013 no offenders were convicted for either of the offences of weapons training for terrorist purposes or training for terrorism. In Public Bill Committee, it was observed that there were only seven convictions for terrorism and weapons training in the past 10 years, and that, in those cases, the average custodial sentence was less than five years for providing weapons training, seven years for receiving such training, less than four years for attending such training, and about two years for making explosives. 7

1.12 In view of the fact that there appear to have been no recent convictions for these offences, and the lack of any evidence cited by the Government suggesting that sentencing judges consider the current maximum sentences to be too low, we asked the Government what evidence exists to demonstrate that the current sentencing powers are inadequate in relation to these terrorism-related offences and to justify increasing the maximum sentence to life imprisonment.

1.13 The Government replied that the rationale for the policy which is given effect by clauses 1 to 3 of the Bill is “to ensure that the most serious terrorist offences are subject to the enhanced sentencing regime for dangerous offenders, and that our courts are able to impose robust sentences where appropriate on the most serious and dangerous terrorist offenders in these cases.” It accepts that these offences are by their nature relatively rare, but it says that the offenders involved “are often very dangerous”, and it is therefore crucial to make sure that judges have the powers they need to deal with potentially very serious offences. The key point, the Government says, is how potentially serious these offences are, and the need to ensure that judges have the scope of sentencing powers they need to deal with the most serious examples of such offences. 8 It points out that increasing the maximum penalty does not affect the court’s discretion as to the nature and length of the sentence in any individual case.

1.14 It appears from the Government’s response to our question that the Government’s justification for increasing the maximum sentences for certain terrorism-related offences is not based on any proven inadequacy of the current sentencing powers in cases which have been prosecuted to date, but on the Government’s view that “it is important to maintain a consistent and up-to-date sentencing regime for all offences on the statute book.” 9 We agree with that proposition, and we accept the Government’s justification for increasing the maximum sentences for these serious terrorism-related offences, especially in view of the courts’ discretion to impose a lower sentence remaining unaffected by the provisions.

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6 HC Deb 24 Feb 2014 col 49.
7 PBC 18 March 2014 c 164.
8 PBC 18 March 2014 c 165 (Jeremy Wright MP, Parliamentary Under-Secretary of State for Justice).
9 Letter dated 16 April 2014 from the Lord Chancellor and Secretary of State for Justice, Chris Grayling MP, para. 1.
1.15 We note, however, that the Government has not been very clear about what has created the inconsistency or led to the sentencing powers for these offences being out of date. If the Government’s reforms to sentences for Indefinite Public Protection (“IPP”) have left sentencing powers for some offences less extensive than they were previously, the Government should be prepared to say so explicitly. Significant increases in maximum sentences require clear and transparent justifications.

Opportunity for review of a “whole life order”

1.16 The Government’s ECHR Memorandum says that “the raising of the maximum sentence to life imprisonment for these offences creates the potential that a court will be compelled to order a whole life order where the case is sufficiently serious.” Our understanding of the statutory regime providing for the imposition of a whole life order is that it provides, not for mandatory whole life orders, but for judicial discretion in the decision as to whether or not the case is sufficiently serious to warrant making such an order. We therefore asked the Government in what circumstances the court will be “compelled” to make a whole life order in relation to the terrorism-related offences the maximum sentences for which are being increased to life imprisonment by the Bill.

1.17 The Government reply explains that the compulsion it refers to in its ECHR Memorandum is the result of the operation of s. 82A of the Powers of Criminal Courts (Sentencing) Act 2000. Under the provisions of that section, where a court imposes a life sentence in relation to one of the terrorism-related offences, the court must specify the tariff which the offender must serve before being eligible for early release, unless the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, the early release provisions should not apply and only a whole life order is justified.

1.18 In such cases, the Government says, the court must order that the early release provisions do not apply to the offender, and therefore there is no tariff, or minimum period the offender must serve in custody, and a whole life order will have to be made. The Government acknowledges that “before making such a determination the court must, as part of the sentencing exercise, make an assessment of factors bearing on the seriousness of the crime, including specifically aggravating and mitigating factors”. However, where the court concludes that the case is so serious that a whole life order is merited, it has no choice but to impose such an order, a position the Government says has been confirmed by the Court of Appeal in the McLoughlin case in relation to the similar provisions concerning mandatory life sentences.

1.19 The Government’s reply has clarified what was meant in its ECHR Memorandum when it stated that the effect of the provisions in clauses 1–3 of the Bill may be to “compel” courts to make whole life orders in certain cases concerning these terrorism-related offences. The decision as to whether the seriousness of the offence is such as to warrant a whole life order is a decision for the court. The obligation to make such an order arises once such a determination has been made by the court. In other words,

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10 ECHR Memorandum, para. 10.
11 Letter dated 19 March, para. 4.
13 Section 82A(4).
when the Government referred to the court being “compelled” to make a whole life order in certain cases, it was referring, not to mandatory whole life orders imposed by statute, but to the fact that, where a court decides for itself that the case is sufficiently serious to warrant such an order, the court has no choice but to make such an order.

1.20 As the Government’s ECHR Memorandum rightly acknowledges, the fact that the provisions in the Bill bring some terrorism-related offences within the scope of possible whole life orders for the first time directly raises a human rights compatibility issue: whether the law currently provides sufficient opportunity for review of a whole life order, in light of the judgment of the Grand Chamber in the case of Vinter v UK and the decision of the Court of Appeal in the recent case of R v McLoughlin.

1.21 The Court of Appeal in McLoughlin has made clear that whole life orders still can and should be imposed by courts in the most heinous cases and that the current statutory regime, interpreted in accordance with s. 3 of the Human Rights Act so as to make it compatible with Convention rights, already allows for the possibility of exceptional release of whole life order prisoners, who can apply to the Secretary of State under s. 30 of the Crime (Sentences) Act 1997 asking to be released on compassionate grounds.

1.22 The Court of Appeal’s decision goes some considerable way towards removing the legal uncertainty about whole life orders that has arisen since the Vinter judgment. In particular, it makes clear that it continues to be entirely lawful for a court to impose a whole life order in an appropriate case, and that there already exists a mechanism for reviewing such whole life orders in exceptional cases.

1.23 There is some continuing legal uncertainty, however, as to whether the domestic law, as interpreted by the Court of Appeal, now provides an adequate mechanism for review of whole life prison orders. The Grand Chamber in Vinter was unequivocal that “a whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.” (paragraph 122 of the judgment). The judgment is clear that the procedure for such a review mechanism should be set out clearly in law so that prisoners subject to a whole life order clearly know, at the outset of their sentence, the process by which they may or may not be eligible to apply for a review of their whole life order should they wish to challenge it on the grounds that there are no longer justifiable penological grounds for their continued life detention, including the time when they can expect to be able to make such an application for a review. In our view, while the Court of Appeal’s judgment in McLoughlin significantly clarifies the law, it does not provide legal certainty about these three important aspects of the review mechanism.

1.24 We therefore wrote to the Government asking for its assessment as to whether any further measures are required in order to provide the requisite degree of legal certainty about the grounds on which a review of a whole life order may be sought, when such a review may be asked for and the criteria that will be applied to determine the outcome of such a review.

1.25 The Government responded to our letter on 2 April, indicating that one of the appellants in the McLoughlin case, Lee Newell, has applied to the Supreme Court for leave

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to appeal against the Court of Appeal’s judgment, and the Government will therefore be
awaiting the outcome of that application before updating the Committee of Ministers on
the actions the Government plans to take to implement the Vinter judgment.

1.26 In view of the legal uncertainty that remains about the availability of a review
mechanism for whole life orders, notwithstanding the clarification provided by the
Court of Appeal in McLoughlin, we have considered carefully what would be required
in order to remove that uncertainty. In our view, for the review mechanism to be
sufficiently certain, more specific details need to be provided about the mechanism,
including the timetable on which such a review can be sought, the grounds on which it
can be sought, who should conduct such a review, and the periodic availability of
further such reviews after the first review.

1.27 We note that until fairly recently these details were all spelt out in ministerial
statements of policy announced by the Home Secretary to Parliament: a prisoner subject
to a whole life order could apply to the Secretary of State after 25 years of their sentence (and
every five years thereafter) for a review, the purpose of which was to consider whether the
whole life tariff should be converted to a tariff of a determinate period, taking into
consideration exceptional circumstances, including exceptional progress by the prisoner
whilst in custody.

1.28 In our view, the requisite legal certainty would be provided by reverting to that
previous policy, but providing for the review to be judicial rather than ministerial, in
keeping with all other changes that have been made in recent years in relation to decisions
about tariffs for life sentence prisoners. In principle, we see no objection to such legal
certainty being provided by way of amendment to the relevant Prison Service Order. It
may be preferable, however, for the change to be made by primary legislation, in order to
give Parliament the opportunity to debate in full the details of the mechanism. It would
also be in accordance with the important principle of subsidiarity, according to which the
national authorities have the primary responsibility for deciding how to give specific effect
to Convention rights in their national law.

1.29 The current Bill provides an opportunity for Parliament to remove any legal
uncertainty by specifying the details of the review mechanism. In our view, providing
the requisite legal certainty could be achieved relatively simply by an amendment of the
existing statutory framework in s. 30 of the Crime (Sentences) Act 1997 to provide, for
example, that a prisoner who is subject to a whole life order can, after 25 years in
custody, apply to the Parole Board for a review of the continued justification for the
whole life order; and the Parole Board, if it is satisfied that the prisoner has made such
exceptional progress towards rehabilitation that the justification for a whole life order
no longer exists, can substitute a determinate tariff.

1.30 We therefore recommend the following probing amendment to the Bill in order to
give Parliament the opportunity to debate the desirability of amending the statutory
framework to put beyond legal doubt the availability of a mechanism for the review of a
whole life order:

Page 4, line 40, after clause 4 insert new clause:

15 See HC Deb 7 December 1994 cols 234–235 WA; HC Deb 10 November 1997 cols 419–420 WA.
Review of whole life orders

(1) The Crime (Sentences) Act 1997 is amended as follows.

(2) After section 30 insert—

“30A (1) A prisoner who is

(a) the subject of a whole life order made under

(i) s. 269 Criminal Justice Act 2003 or

(ii) s. 82(4) of the Powers of Criminal Courts Sentencing Act 2000 and

(b) has been in custody for 25 years

may apply to the Parole Board for a review of the whole life order.

(2) If on an application under subsection (1) the Parole Board is satisfied that the prisoner has made such exceptional progress towards rehabilitation that a whole life order is no longer justified, it shall substitute a determinate tariff for the whole life order.

(3) No fresh application may be made by a prisoner under sub-section (1) before the period of 5 years has elapsed since the Parole Board’s determination of the prisoner’s previous application.

(2) Electronic monitoring following release on licence (clause 6)

1.31 The Bill would give the Secretary of State a power, by order subject to negative resolution procedure, to require compulsory electronic monitoring of offenders released on licence.16 It also provides for a Code of Practice to be issued by the Secretary of State relating to the processing of data gathered in the course of monitoring people under electronic monitoring conditions imposed on offenders following their release on licence.17

1.32 In view of the seriousness of the interference with the right to respect for private life involved in compulsory electronic monitoring, we asked the Government for its justification for conferring such a broad power on the Secretary of State to make such provision by order, rather than making detailed provision in primary legislation. We also asked whether a draft of the proposed Code of Practice on the processing of data gathered from electronic monitoring will be made available to Parliament during the Bill’s passage.

1.33 The Government accepts that the imposition of an electronic monitoring condition and the collection and storage of location data obtained by it are likely to amount to an interference with the offender’s right to respect for private life under Article 8 ECHR. It also acknowledges that on its face the new power is broad, but it considers that it is nevertheless a proportionate means of achieving the legitimate aims of ensuring

16 Clause 6(3), inserting new s. 62A into the Criminal Justice and Court Services Act 2000, and Schedule 2.
17 New s. 62B Criminal Justice and Court Services Act 2000.
Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill

1.34 To ensure that the broad new power is exercised only where necessary and in a proportionate manner, the Government relies on the combination of the safeguards provided by s. 6 of the Human Rights Act, which requires the Secretary of State to act compatibly with Convention rights when exercising the power; the Data Protection Act, which will apply to the processing of any data gathered as a result of the electronic monitoring; and the Code of Practice which the Bill requires the Secretary of State to issue. It says that the new Code of Practice will set out the appropriate tests and safeguards for the processing of data by, for example, setting out the length of time for which data may be retained, and the circumstances in which it may be shared with others such as the police to assist in the prevention and detection of crime.

1.35 We note that under the Bill as drafted, the new Code of Practice will not be subject to any Parliamentary procedure. The Government says that this is because it is intended to be “operational guidance which will not define or create new legal responsibilities” and it is not usual for such guidance to be subject to Parliamentary procedure. The Government is unable to confirm when the Code will be finalised and published, other than to say that it will be available prior to the commencement of the provisions to which it applies. It has given a commitment to consult “key stakeholders”, including the Information Commissioner’s Office and the Lord Chief Justice in the development of the Code, and it says that this process will ensure that the Code contains the necessary safeguards.

1.36 In Public Bill Committee, concerns were expressed, in the light of previous experience of inadequate protection of personal data collected by the Government, about the safeguards that will be in place to ensure that any interference with the right to respect for private life is proportionate to the legitimate aims pursued. Questions were asked such as how the data will be stored, who will have access to it and for what purposes, whether it will be subject to constraints on its use such as those under RIPA, how long the information will be kept, and whether the database will be made commercially available. The House of Lords Delegated Powers Committee has not yet considered the Bill.

1.37 The detailed safeguards in the Code of Practice will be crucial to ensuring that the processing of data gathered from electronic monitoring following release on licence is carried out in such a way that any interference with the right to respect for private life is necessary and proportionate to the legitimate aims pursued. It is therefore important that there is some opportunity for parliamentary scrutiny of the adequacy of those safeguards. We recommend that the Bill be amended to make the Code subject to some form of parliamentary procedure in order to ensure that Parliament has such an opportunity.
(3) Extreme pornography (clause 18)

1.38 The Bill\textsuperscript{18} amends section 63 of the Criminal Justice and Immigration Act 2008 (“the 2008 Act”) to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. Possession of such pornography is an existing criminal offence in Scotland.\textsuperscript{19}

Right to private life; Right to freely receive and impart information

1.39 In its human rights memorandum, the Government accepts that the offence interferes with an individual’s private life (Article 8 ECHR) and with his or her right to freely receive and impart information (Article 10 ECHR).\textsuperscript{20} Consequently, the definition of the new offence must be sufficiently precise and foreseeable to satisfy the requirement that interferences with these rights be “in accordance with the law”, and the offence must be necessary in a democratic society and proportionate. We wrote to the Government to request further information in relation to the necessity of the proposed measure.\textsuperscript{21}

Necessity

1.40 The Government’s human rights memorandum states that the offence is designed to break the demand and supply cycle of rape pornography, and to protect others, particularly children and vulnerable adults, from inadvertently coming into possession of this material, which is available on the internet, and to prevent them from becoming desensitised to such acts of sexual violence. The Government considers that the provision can be justified on the grounds that, in relation to extreme images of this kind, the public interest outweighs any private right to possess such material.\textsuperscript{22} A Factsheet published by the Ministry of Justice on Clause 18 further explains:

“The Government believes there is some evidence that viewing these images may have an effect on young peoples’ attitudes to sexual and violent behaviour, and that some men can exhibit heightened aggression towards women after exposure to violent pornography. The Ministry of Justice’s rapid evidence assessment into the effects of exposure to extreme pornography (September 2007) highlighted these concerns. Similarly the report, “Basically […] porn is everywhere”, by the Children’s Commissioner echoed concerns about how exposure to sexualised or violent imagery could affect children and young people.”\textsuperscript{23}

1.41 We were not satisfied that the Government had provided sufficient information to explain fully its justifications for the extension of the current offence contained in section 63 of the 2008 Act, particularly as the previous Government had also relied on the results of the 2007 rapid evidence assessment to justify the need for the 2008 Act offence in relation to the possession of extreme pornography, which at that time did not cover

\textsuperscript{18} Clause 18.
\textsuperscript{19} Section 42 of the Criminal Justice and Licensing (Scotland) Act 2010
\textsuperscript{20} Government Human Rights Memorandum, para. 57
\textsuperscript{21} Letter from the Chair, to Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, 19 March 2014, Q. 5
\textsuperscript{22} Ibid, para. 58
\textsuperscript{23} Ministry of Justice, Factsheet on the Criminal Justice and Courts Bill—Extension of the offence of Extreme Pornography (clause 16), February 2014, p1
pornographic images depicting rape and other non-consensual sexual penetration. Therefore, we wrote to the Department to request further information about the evidence it relies on to support its justifications for the provision both in terms of the causal link between rape pornography and offences of violence; and the wider cultural harm of such pornography.

1.42 The Government’s response explains that its justifications for the provision are based on work carried out by a number of academics and NGOs, in particular by Professor Clare McGlynn and Professor Erika Rackley of University of Durham, the End Violence Against Women Coalition (EVAW) and Rape Crisis. We are grateful to the Department for providing us with copies of this work. While the Government does not agree with all the conclusions reached by these academics and organisations, its view is that extreme material depicting sexual abuse as a form of pornography is unacceptable. In addition to the material provided by the Department, the Committee received written evidence from Professor McGlynn and Professor Rackley.27

The cultural harm of extreme pornography depicting rape and assault by penetration

1.43 McGlynn and Rackley have stressed that the demand for evidence of direct, causal links between pornography and sexual violence is over-simplistic. They have argued that, while those who view extreme pornography will not necessarily go on to commit sexual offences, “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.” 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. This, according to McGlynn and Rackley, fails to protect women’s rights to dignity and equality. They also cite research carried out for the Children’s Commissioner, which suggests that young people are turning to pornography for guidance on sex, are engaging in riskier behaviour as a result of viewing pornography, are uncertain as to what consent means, and are developing harmful attitudes towards women and girls. McGlynn and

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24 The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment, Ministry of Justice and the Department of Health, 28 September 2007; Criminal Justice and Immigration Bill, Public Bill Committee, First Sitting, 16 October 2007, Col. 31
25 Letter from the Chair, to Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, 19 March 2014, Q 5
27 Written evidence from Professor Clare McGlynn and Professor Erika Rackley, Durham University, 27 March 2014
28 Ibid., para 4.4
29 McGlynn and Rackley ‘Why Criminalise the Possession of Extreme Pornography?’ Durham Law School Briefing Paper (Feb 2014)
30 Written evidence from Professor Clare McGlynn and Professor Erika Rackley, Durham University, 27 March 2014, paras 4.5–4.6
31 McGlynn and Rackley ‘Why Criminalise the Possession of Extreme Pornography?’ Durham Law School Briefing Paper (Feb 2014)
32 Office of the Children’s Commissioner, Basically […] Porn is everywhere—A Rapid Evidence Assessment of the effects that access and exposure to pornography have on children and young people, 24 May 2013
Rackley conclude that “rape pornography generates cultural harm and it is this cultural harm which justifies legislative action.”

**Human rights enhancing measure**

1.44 The Government’s Human Rights Memorandum does not expressly state that the measure contained in Clause 18 is potentially human rights enhancing. The provision relates to the positive obligations on the State to take measures that are designed to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment prohibited under Article 3, including where such treatment is administered by private individuals. The European Court of Human Rights has held that interferences with the right to private and family life may be necessary in order to protect the health and rights of a person, or to prevent criminal acts in certain circumstances. To that end, States are required to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals. In addition, Article 4 of the Convention on Preventing and Combating Violence Against Women and Domestic Violence (“the Istanbul Convention”), yet to be ratified by the UK, provides:

“Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.”

1.45 In addition to the cultural harm justification, McGlynn and Rackley believe that the proposed extension of the 2008 Act offence to cover the possession of extreme images that depict rape and assault by penetration can be justified on the basis that it is a human rights-enhancing measure. They consider that:

“The proliferation and easy availability of ‘rape pornography’ can impact broadly on many women’s ability to exercise both freedom of expression and their right to private life by restricting their autonomy and freedom of choice. The State has a positive obligation to ensure that it takes appropriate action to protect human rights including, in this context, Articles 2, 3 and 8 ECHR. Preventative and protective measures are required to ensure the free exercise of autonomy in sexual activity and expression, to challenge and change the societal context in which sexual violence is endemic and breaches the human rights of thousands of women and men.”

1.46 Rape Crisis welcomes the Government’s proposal to extend the existing extreme pornography provisions to include pornographic depictions of rape as an important step towards fulfilling human rights commitments, set out in international frameworks such as the Convention of the Elimination of Discrimination Against Women (CEDAW) and the UN Beijing Declaration and Platform for Action. The UN has reported:

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33 Written evidence from Professor Clare McGlynn and Professor Erika Rackley, Durham University, 27 March 2014, para 4.9
34 *Eremia v Moldova*, 28 August, 2013 § 49; *Opuz v. Turkey*, 9 June 2009, § 159
35 *Opuz v. Turkey*, § 144
36 *X and Y v. the Netherlands*, 26 March 1985, § 22 & 23; *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36
37 Written evidence from Professor Clare McGlynn and Professor Erika Rackley, Durham University, 27 March 2014, paras 3.1–3.2
38 The United Nations Fourth World Conference on Women 1995
“Images in the media of violence against women, in particular those that depict rape or sexual slavery as well as the use of women and girls as sex objects, including pornography, are factors contributing to the continued prevalence of such violence, adversely influencing the community at large, in particular children and young people.”

1.47 The CEDAW Committee has stated:

“Traditional attitudes by which women are regarded as subordinate to men […] contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.”

1.48 In its most recent Concluding Observations on the UK, the CEDAW Committee also expressed concern at the prevalence of stereotypical imaging and objectification of women by the media in the UK. In addition to UN standards, EVAW highlights work by the EU Commission, which 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 violence against women and girls. EVAW believes that it is important to link the Government’s proposal to restrict violent pornographic images to its broader, cross-government strategy on violence against women and girls.

1.49 In connection with our inquiry into violence against women and girls, we received written evidence from the Equality and Human Rights Commission outlining its view that the criminalisation of the possession of pornography depicting rape advances the UK’s fulfilment of its obligations under CEDAW and general obligations under the Council of Europe’s Istanbul Convention.

1.50 We welcome, as a human rights enhancing measure, the provision in the Bill to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. We consider that the cultural harm of extreme pornography, as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and for the proportionate restriction of individual rights to private life (Article 8 ECHR) and freely to receive and impart information (Article 10 ECHR).

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40 CEDAW General Recommendation 19, para 12
41 CEDAW Concluding Observations to the UK 2013, para 32
42 Written evidence submitted by End Violence Against Women Coalition (CJC 04), para 3.2
43 Ibid.; For information about the Government’s strategy, see: HM Government, A call to end violence against women, Action Plan 2014
44 JCHR inquiry into violence against women and girls, launched on 4 February 2014
45 EHRC Written Evidence to the JCHR inquiry into violence against women and girls (VAW0057) para 4(c); European Commission, Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on gender violence and violence against children, JLS/2009/D4/018
(4) Young offenders (clauses 19–21 and Schedules 3 and 4)

Secure colleges for young offenders

1.51 The Bill provides for a new form of youth detention accommodation, with a focus on education: secure colleges, which are added to the list of types of establishment that the Secretary of State is empowered to provide, alongside young offender institutions and secure training centres. Secure colleges are part of the Government’s plans to increase the focus on high quality education in youth custody: the intention is that secure colleges will provide a broad curriculum with the aim of supporting young people to refrain from reoffending once released.

1.52 The Secretary of State, in his reply to our letter, says that he believes that, by making this provision, Part 2 of the Bill promotes the best interests of the child because secure colleges are institutions which will place a significantly greater emphasis on education within the secure estate. The Government notes the emphasis placed on suitable and effective education and vocational training in both the UN Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”) and the UN Rules for the Prevention of Juvenile Delinquency (“the Riyadh Guidelines”). The Government says that the fundamental aim of secure colleges is to improve the educational engagement and attainment of young offenders, as well as providing them with the skills, motivation and self-confidence necessary to help them lead law-abiding lives in the community and to reduce the risk of re-offending.

1.53 In its reply to our letter, the Government implies that, apart from their emphasis on education, the international standards that we identified as being relevant to the part of the Bill are in fact of limited relevance to the Bill, because, it says, much of the content of the relevant international standards is directed at questions concerning the appropriateness of detention, and the Bill focuses on the nature of the secure estate, rather than custodial sentencing. In our view, however, the international standards also include a number of other provisions and principles which are highly relevant to Part 2 of the Bill: for example, that the State should set up small open facilities where children can be tended to on an individual basis and so avoid the additional negative effects of deprivation of liberty; and that institutions should be decentralised to allow for children to continue having access to their families and their communities. We emphasise the importance of these international standards to Parliament’s scrutiny of this part of the Bill.

1.54 We asked the Government what consideration it has given to the impact of secure colleges on the children’s right to respect for their private life, family life and home in view of the fact that there will be a small number of large secure colleges and children are therefore likely to be detained some distance from their homes. The Secretary of State accepts that the configuration of the under-18 secure estate engages the right of a child to maintain contact with their family through correspondence and visits, save in exceptional circumstances—rights which are recognised and protected under Article 37(c) UNCRC and Article 8 ECHR. The Government accepts that both commissioning decisions and individual child placement decisions must be compatible with the child’s right to respect for their private and family life. It says that it has decided to locate a pilot secure college in the East Midlands because there is currently a shortfall of youth custodial provision in the
Midlands and the east of England, and situating the first secure college there will enable young people to be placed in custodial establishments closer to their homes.

1.55 We also asked the Government for its assessment of the impact of secure colleges on girls and on children under the age of 16, and what evidence exists about the implications for child safety of large secure institutions and smaller secure institutions such as secure children’s homes. The Government replied that it intends secure colleges to accommodate both boys and girls between the age of 12 and 17, as both girls and younger children should be able to benefit from the improved educational provision that will be on offer.

1.56 We have found it difficult to scrutinise the Government’s secure college proposals for compatibility with the relevant human rights and equality standards because of the lack of specifics about the provision in the Bill. As the Government’s reply to our letter acknowledges, the Bill does no more than establish the legal framework for secure colleges: it does not specify the details of the regime to be delivered within secure colleges. There is very little detail available about the type of provision that will be made at secure colleges and the secure college rules, which will establish the operational framework for secure colleges, will not be published during the Bill’s passage but will only be developed following Royal Assent. Plans for the “pathfinder” secure college, to be opened in 2017, are at an early stage. In addition, we note that the Government has provided little information about how it will ensure that the providers of the proposed secure colleges will meet the Special Educational Needs (“SEN”) of children and young people.46 As we have highlighted in previous Reports, it is essential that children and young people in detention have equal access to SEN provision.47

1.57 We note that the Government does not appear to have carried out any equality impact assessments of the proposed secure colleges policy, and we recommend that such assessments should be carried out and made available to Parliament at the earliest opportunity, assessing in particular the impact on girls and younger children of detaining them in large mixed institutions holding up to 320 young people including older children up to the age of 18. We also call on the Government to provide further information in relation to SEN provision in secure colleges.

Use of force on children to ensure good order and discipline (Schedule 4)

1.58 The Bill provides the authority for a secure college custody officer, “if authorised to do so by secure college rules”, to use reasonable force where necessary to ensure good order and discipline on the part of persons detained in a secure college.48 This provision of the Bill directly raises a human rights compatibility issue which has already been the subject of an inquiry and Report by our predecessor Committee in the last Parliament; of a judicial decision by the Court of Appeal; and of recommendations by the UN treaty monitoring bodies.

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46 Criminal Justice and Courts Bill, Public Bill Committee, Eighth Sitting, HC 20 March 2014, col. 292
47 See e.g. Joint Committee on Human Rights, Legislative Scrutiny: Children and Families Bill; Energy Bill, Third Report of Session 2013–14, HL Paper 29 HC 452, paras. 76–79
48 Schedule 4, para. 10, which authorises secure college rules to empower a secure college custody officer to use reasonable force where necessary in carrying out their functions, which include, under para. 8(c), a duty to ensure good order and discipline.
1.59 Our predecessor Committee in the last Parliament held an inquiry into the human rights compatibility of amendments to the Secure Training Centre Rules (‘STC Rules’) which widened the scope for using restraint by permitting Secure Training Centres to use force against detained children and young people to “ensure good order and discipline”.\footnote{The Use of Restraint in Secure Training Centres, Eleventh Report of Session 2007–08, HL Paper 65/HC 378.} The Committee concluded that “the use of force in such widened circumstances is unacceptable and unlawful, and in breach of both ECHR standards given domestic effect by the HRA and international human rights standards contained in the UNCRC.”\footnote{Ibid., para. 55.} In light of the uncertainty about the meaning of the vague phrase “good order and discipline”, the Committee did not consider that the STC Rules were “sufficiently clear about when force can be used and, for that reason, they are both potentially in breach of the UK’s human rights obligations on their face, and likely to lead to such breaches in practice when force is used in circumstances in which it is not strictly necessary.”\footnote{Para. 73.} The Committee recommended that the STC Rules authorising the use of force to ensure good order and discipline be repealed and replaced by rules “which make it explicitly clear that the use of physical restraint is not permissible for the purposes of good order and discipline”.\footnote{Para. 74.}

1.60 The conclusions of our predecessor Committee were subsequently endorsed judicially when the Court of Appeal held that the STC Rules authorising the use of restraint in such centres where necessary for the purpose of ensuring good order and discipline were incompatible with the right not to be subjected to inhuman and degrading treatment in Article 3 ECHR and the right to respect for private life in Article 8 ECHR.\footnote{C v Secretary of State for Justice [2008] EWCA Civ 882; [2009] QB 657.}

1.61 In light of the Court of Appeal’s decision, we asked the Government why in its view it is compatible with Article 3 and 8 ECHR for Schedule 4 of the Bill to authorise the use of reasonable force by a secure college custody officer where necessary “to ensure good order and discipline”, and whether it would consider amending the Bill to give concrete effect to the Court of Appeal’s judgment by prohibiting the use of force to ensure good order and discipline in secure colleges.

1.62 The Government replied that it does not propose to amend this provision in the Bill. Its position is that “there are some situations in which the use of some reasonable force to ensure good order and discipline (in limited and clearly defined circumstances) will be necessary, and that the relevant primary legislation should allow for that possibility.” It says it is therefore “appropriate and necessary” for provision to be made in the Bill for secure college custody officers to be able to use reasonable force where necessary to ensure good order and discipline. It argues that this is not inconsistent with the Court of Appeal’s decision about the STC Rules for two reasons.

1.63 First, it says that the Court of Appeal quashed those Rules on the basis of inadequate consultation, and that the parts of the judgment concerning Article 3 and 8 ECHR were therefore merely “\textit{obiter comments}”: that is, they were merely said in passing and therefore do not constitute a determinative part of the reasoning. In our view, the relevance of the Court of Appeal’s judgment cannot be diminished by characterising the Court’s reasoning on the ECHR compatibility of the Secure Training Centre Rules as merely \textit{obiter}. It is
correct to say that the first ground of the appeal (that the High Court had been wrong not to quash the Rules even though various procedural requirements had not been satisfied) succeeded, and that that would have been sufficient to dispose of the appeal, but the Court of Appeal expressly explained why it was not appropriate to do so without also ruling on the second ground of appeal, concerning the human rights compatibility of the Rules:

“It is, however, important that we should go on and address additionally the position under the ECHR, since that affects the substance of the regime contained in the Amendment Rules, and not just the procedure by which the Amendment Rules were introduced.”

1.64 Second, the Government says that the Court of Appeal did not say that either the use of force or physical restraint for the purpose of ensuring good order and discipline was of itself incompatible with Convention rights. Rather, the focus of the Court’s comments, the Government argues, was the specific system in use and its operation, in particular in relation to techniques of restraint which were designed to cause pain. However, the Court of Appeal’s judgment was quite unequivocal that the Rules were on their face incompatible with Articles 3 and 8 ECHR “and must be quashed on that ground”:

“To say that the system “engages” article 3 is not the end of the matter. The conduct may be such as in principle to engage article 3, but not involve an actual breach of article 3 because [physical restraint] is necessary, for instance under the unamended rules to prevent injury to the trainee or others. The issue therefore is whether the Secretary of State can establish that [physical restraint] is necessary in the case of [good order and discipline]. For the reasons set out in §§ 20–34 above he cannot do so. The Amendment Rules are accordingly in breach of article 3, and must be quashed on that ground.”

1.65 The Government further argues that the Bill merely provides the framework for the authorisation of the use of force in contracted-out secure colleges: it is left to the secure college rules to set the legal parameters on the use of force, with the necessary and appropriate safeguards, and those rules will be carefully designed to ensure that any use of force authorised is compatible with Convention rights. Technically, the Government says, the provision in Schedule 4 of the Bill is compatible with Convention rights, because it only authorises the use of force to ensure good order and discipline where authorised by secure college rules. Those rules will be made by the Secretary of State who will be required by s. 6 of the Human Rights Act to act compatibly with Convention rights when making the rules.

1.66 In our view, the Government’s distinction between the provision in the Bill itself and the secure college rules which are yet to be made does not avoid the underlying human rights compatibility problem with the substance of the policy: it is clear from the reasoning of the Court of Appeal in the case of C v Secretary of State for Justice that it is incompatible with Articles 3 and 8 ECHR for any law, whether primary or secondary legislation, to authorise the use of force on children and young people for the purposes of good order and discipline.

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54 Ibid. at para. 56.
55 Ibid. at para. 79. The Court reached the same conclusion in relation to Article 8: see para. 82.
1.67 As well as being incompatible with Convention rights, the use of force on children to ensure good order and discipline also raises questions of compatibility with the UK's obligations under the UN Convention on the Rights of the Child and the UN Convention Against Torture, and has been the subject of recommendations by the UN treaty bodies with responsibility for monitoring the UK's compliance with those obligations. Most recently, the UN Committee Against Torture in its Concluding Observations on the UK adopted in May 2013:

reiterates the recommendation of the Committee on the Rights of the Child to ensure that restraint against children is used only as a last resort and exclusively to prevent harm to the child or others and that all methods of physical restraint for disciplinary purposes be abolished.56

1.68 **In light of the human rights compatibility issues explained above, we recommend that the relevant provision in Schedule 4 of the Bill should be deleted, and the Bill should be amended to make explicit that secure college rules can only authorise the use of reasonable force on children as a last resort; only for the purposes of preventing harm to the child or others; and that only the minimum force necessary should be used.**

**5) Criminal courts charge (clause 31)**

1.69 The Bill gives effect to the Lord Chancellor’s stated intention that convicted adult offenders should be made to pay towards the cost of running the criminal courts. It would require courts to impose a charge (“the criminal courts charge”) in respect of the costs of the criminal courts on all adult offenders who have been convicted of a criminal offence.57 Appellate courts would also be required to order an offender to pay the charge when dismissing an appeal against conviction or sentence. The level of the charge would be set by the Lord Chancellor in regulations and must be set at a level that does not exceed the relevant court costs reasonably attributable to a case of that particular class. The Explanatory Notes to the Bill explain that the Lord Chancellor expects to set the level of the charge with regard to factors likely to affect the cost of proceedings, such as whether the offender pleaded guilty, whether their case was dealt with by the magistrates or the Crown Court, and the type of offence.58 There is no means test when deciding whether the charge should be imposed.

1.70 The Government’s ECHR Memorandum considers whether the criminal courts charge operates as a barrier on defendants from accessing both trial and appeal courts.59 It acknowledges that it may be argued that the way defendants behave in criminal proceedings may be changed by the knowledge that a charge may be imposed, because there is a financial incentive on the defendant to plead guilty, or to consent to summary trial over Crown Court trial, or not to appeal against conviction or sentence. The Government’s Memorandum also acknowledges that the fact that the charge is imposed regardless of the offender’s means to pay could also be said to raise an access to court issue, in light of case-law in the civil context that court fees can be an obstacle to access to court if the applicant’s ability to pay is disregarded.

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56 UNCAT Concluding Observations on the UK, May 2013, para. 28.
58 EN para. 39.
59 ECHR Memorandum, paras 72–74.
1.71 However, the Government’s view, in both its ECHR Memorandum and its reply to our letter, is that “these are not properly access to court issues”, because payment is not a condition of being able to access the courts, the financial incentives do not hinder access to the courts and there is nothing in the Strasbourg case-law which prohibits such financial incentives. Even if the charge were considered to be an incentive which therefore constitutes a restriction on access to court, the Government considers that it is a justified restriction: the charge serves the legitimate aim of ensuring that offenders make a contribution towards the costs of criminal courts, it is set at a proportionate level, and there will be mechanisms to ensure that where an offender cannot pay the charge immediately it can be paid by instalments at an affordable level and can even be cancelled after a period of time if the offender has taken all reasonable steps to pay.

1.72 We have considered the extent to which, in the absence of a means test at the point of imposition of the charge (as opposed to later at the stage of enforcement), the proposed criminal courts charge is likely to influence impecunious defendants’ decisions about whether to plead guilty, whether to elect summary or jury trial, and whether to appeal against conviction or sentence. We have found it difficult to assess this risk in the absence of clear evidence about the impact of court charges in practice. We recommend that the Government monitor carefully the impact of the criminal courts charge on the right of defendants to a fair trial of the criminal charge against them, and make available to Parliament the results of that monitoring. In the meantime we ask that there be made available to Parliament any other evidence that already exists about the impact of other, existing, charges and fees on criminal defendants’ decisions about plea, mode of trial and appeals.

(6) Contempt of Court

1.73 Part 3 of the Bill makes changes to the law of contempt of court and juror misconduct in response to concerns that the law striking the balance between the right to a fair trial and the right to freedom of expression needs updating for the internet age. Under the current law on contempt of court, as judicially interpreted, a publisher is strictly liable for on-line prejudicial material even when the criminal proceedings only became active after the material was first posted on-line. The Bill introduces a defence in such circumstances, subject to a statutory procedure whereby the Attorney General issues a formal notice to the publisher informing them that there are active proceedings and identifying prejudicial on-line material. The effect of the notice is to remove the defence provided by the Bill. Other provisions in the Bill make it a criminal offence for jurors to carry out internet research. The changes to the law on contempt of court were recommended by the Law Commission in its Report published in December 2013.60 The aim of the provisions is to prevent fair trials being prejudiced by jurors coming across prejudicial material on the internet, whether deliberately by searching for it, or inadvertently.

1.74 The Government, in its ECHR Memorandum and its response to our letter, argues that the provisions in the Bill enhance freedom of expression because the availability of the new defence relieves media organisations of the burden of having to monitor their on-line archives to make sure that they do not expose them to the risk of liability for contempt because proceedings have subsequently become active. We note, however, that a number

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60 Contempt of Court (1): Juror Misconduct and Internet Publications, Law Com No. 340 (December 2013).
of media organisations are concerned about the impact of the new Attorney General’s notice procedure on the media’s freedom of expression. In their view, providing the Attorney General with a power to, in effect, require archive material to be taken down is unnecessary and disproportionate, given the new offences being introduced which will criminalise internet research by jurors and require judges to direct juries about their obligations in this respect.

1.75 We recognise that the Bill’s provision of a new defence to the strict liability rule for contempt of court, where proceedings become active after matter has been published on the internet, is in principle an improvement on the position under the current law. Currently, publishers who make material continuously available are exposed to the risk of becoming liable for contempt of court where proceedings subsequently become active, unless they monitor their archives to see if any such material has become contemptuous in the light of subsequent proceedings. However, we are concerned about the lack of safeguards on the face of the Bill against the arbitrary or disproportionate exercise of the Attorney General’s power to, in effect, require material to be taken down on pain of losing the new defence. For example, the Government says that the Attorney General will only issue such a notice where the high threshold statutory test of “substantial risk of serious prejudice” is satisfied, but this is not stated anywhere in the legislation itself. Nor is it clear from the Bill what role the “public interest” defence in s. 5 of the Contempt of Court Act 1981 should play in the Attorney General’s decision whether or not to issue a notice.

1.76 The Government may intend to provide for such safeguards in the regulations which the Bill envisages will be made about the giving of an Attorney General’s notice, and the information to be contained in the notice. We asked the Government whether it would make available a draft copy of those regulations during the passage of the Bill to enable Parliament to scrutinise fully the implications for freedom of expression. The Government replied that it does not expect to do so. To our surprise, it said “we do not view these arrangements as having any implications for freedom of expression.” We disagree. The compatibility of the new Attorney General’s notice procedure with the right to freedom of expression in Article 10 ECHR will depend to a large extent on the detailed provision to be contained in the proposed regulations and we cannot reach a view on that question without seeing them. We recommend that the Government publish a draft of the regulations at the earliest opportunity to enable such scrutiny to be carried out.

(6) Judicial Review (Part 4)

1.77 We recommended amendments to Part 4 of the Bill in our recent Report on Judicial Review. We do not make any further recommendations on this Part of the Bill in this Report.

1.78 For ease of reference, we set out the amendments we recommended below:

1. **Likelihood of substantially different outcome (paras 39–56)**

61 http://www.publications.parliament.uk/pa/cm201314/cmpublic/criminaljustice/memo/cjc42.htm
Page 52, line 31, leave out clause 52

Alternatively:

Page 52, line 35, leave out ‘must’ and insert ‘may’

Page 52, line 37, leave out ‘not’ and insert ‘decide not to’

Page 53, line 1, leave out ‘highly likely’ and insert ‘inevitable’

Page 53, line 12, leave out ‘highly likely’ and insert ‘inevitable’

Page 53, line 13, leave out ‘must’ and insert ‘may’

Page 53, line 16, leave out ‘conduct (or alleged conduct) of the defendant’ and insert ‘procedural defect’

Page 53, line 34, leave out ‘conduct (or alleged conduct) of the defendant’ and insert ‘procedural defect’

Page 53, line 38, leave out ‘highly likely’ and insert ‘inevitable’

Page 53, line 40, leave out ‘must’ and insert ‘may’

2. **Interveners (paras 87–93)**

Page 55, line 30, leave out sub-clause (4) and (5)

Page 55, line 37, leave out ‘or (5)’

3. **Costs capping (paras 95–105)**

   **Availability of costs capping order pre-permission (paras 100–101)**

Page 56, line 16, leave out “only if leave to apply for judicial review has been granted” and insert “at any stage of the proceedings.”

   **Meaning of “public interest proceedings” (paras 102–103)**

Page 57, line 3, leave out sub-clauses (9)–(11).

   **Cross-capping (paras 104–105)**

Page 58, line 1, leave out “must” and insert “should normally”.
2 Deregulation Bill

Background

2.1 The Deregulation Bill\(^{63}\) was introduced in the House of Commons on 23 January 2014.\(^{64}\) Oliver Letwin MP, the Minister for Government Policy, has certified that, in his view, the Bill is compatible with Convention rights. The Bill received its Second Reading in the Commons on 4 February 2014. It completed its Committee Stage on 25 March and began its Report Stage on 14 May. The Bill will be carried over to the next Session.

2.2 The Bill provides for the removal or reduction of burdens on businesses, civil society, individuals, public sector bodies and the taxpayer. The Explanatory Notes explain that the Bill forms part of the Government’s commitment to reduce the overall burden of regulation and to cut “red tape” during this Parliament. Many of the measures in the Bill arise as result of the Government’s “Red Tape Challenge” programme, which sought the views of businesses and the public on the removal and reform of areas of regulation. The Bill takes forward reforms where their implementation requires primary legislation. The Bill also provides for a duty on those exercising specified regulatory functions to have regard to the desirability of promoting economic growth.

The Draft Deregulation Bill

2.3 The Bill was preceded by a draft Deregulation Bill published on 1 July 2013. The draft Bill was subjected to pre-legislative scrutiny by the ad hoc Joint Committee on the Draft Deregulation Bill, chaired by Lord Rooker, which published its Report on 19 December 2013.\(^{65}\) The Government’s response to the Joint Committee’s Report was published shortly after the Bill was published, in January 2014.\(^{66}\)

2.4 We were invited by Lord Rooker to comment on the human rights implications of the draft Bill, and we wrote to the Joint Committee on the draft bill on 30 October 2013 raising three issues:\(^{67}\)

(1) the implications of the proposed “growth duty” for the UK’s compliance with the UN’s Paris Principles if the duty applies to national human rights institutions such as the Equality and Human Rights Commission (“EHRC”);

(2) the proposed removal of employment tribunals’ power under the Equality Act 2010 to make wider recommendations in discrimination cases; and

(3) the proposed Henry VIII clause which would empower ministers by order to provide for legislation to cease to apply “if the Minister considers that it is no longer of practical use.”

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\(^{63}\) HC Bill 191 (as amended in Public Bill Committee).
\(^{64}\) HC Bill 162


\(^{66}\) Government Response to the Report of the Joint Committee on the Draft Deregulation Bill, Cm 8808 (January 2014) (hereafter, “Government response to the Joint Committee on the draft Bill”)

\(^{67}\) Insert link to website
2.5 The Joint Committee on the draft Bill recommended that the relevant Henry VIII clause be removed from the draft Bill and the Government in its response accepted that recommendation (although it left open the possibility of returning to the issue in the future). 

“although we believe that an order-making power to disapply legislation that is no longer of practical use would be a useful additional tool for tidying up the statute book, we recognise that there is insufficient appetite for such a measure at this time.”

2.6 The other two issues we raised in relation to the draft Bill, however, remain live issues in the actual Bill. In addition, a third significant human rights issue arose concerning the implications of a provision in the Bill concerning access to journalists’ material. We wrote to the Government about these three issues on 12 March 2014 and received a response dated 27 March from Oliver Letwin MP, Minister for Government Policy. On the issue of access to journalists’ material, the Government proposes to table an amendment at Report Stage which has been agreed with representatives of the media and that issue is therefore not pursued in this Report.

2.7 The Explanatory Notes to the Bill set out the Government’s ECHR analysis of the Bill. In our view, none of the human rights matters covered in the Explanatory Notes to the Bill raised issues of sufficient significance to warrant further scrutiny by us.

**Significant human rights issues**

**(1) Implications of the “growth duty” for EHRC’s independence (clauses 70–72)**

2.8 The Bill provides that a person exercising a regulatory function specified by the Minister “must, in the exercise of the function, have regard to the desirability of promoting economic growth.” In performing that duty, the person must, in particular, consider the importance for the promotion of economic growth of exercising the regulatory function in a way which ensures that regulatory action is taken only when it is needed, and any action taken is proportionate. The Minister has an open-ended discretion to specify, by order, the regulatory functions to which the economic growth duty would apply. The Government indicated to the Joint Committee on the draft Bill that it intends to include the EHRC amongst the non-economic regulators which will be within the scope of the new duty.

2.9 Any regulator who is subject to the proposed new duty “must” have regard to any guidance issued by the Secretary of State, and that guidance may include guidance as to the ways in which regulatory functions may be exercised so as to promote economic growth. Such a duty to have regard to ministerial guidance about how to exercise its

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68 Government response to the Joint Committee on the draft Bill, para. 14.
69 ENs paras. 661–705.
70 Clause 70(1).
71 Clause 70(2).
72 Clause 71(1).
73 Clause 72(3).
74 Clause 72(2)(a).
functions raises serious questions about the EHRC’s independence from the executive. To the extent that it applies to the EHRC’s function of promoting human rights, it risks being incompatible with the requirement in the Paris Principles that national human rights institutions must be independent of the Government, and may therefore imperil the “A” status accreditation enjoyed by the EHRC. To the extent that it applies to the EHRC’s functions in relation to equality and discrimination it further risks being incompatible with the requirement in the EU Equal Treatment Directives that there must be a national equality body which is independent from the executive, and with the provisions in national legislation (the Equality Act) which are designed to give effect to that requirement in EU law.

2.10 We wrote to the Joint Committee on the draft Bill to draw attention to the implications for the UK’s compliance with the UN’s Paris Principles if the proposed duty on regulators to have regard to the desirability of promoting economic growth in the draft Bill is intended to apply to national human rights institutions such as the the EHRC.

2.11 The Joint Committee on the draft Bill recommended that the Government review with some care the list of organisations to which the growth duty is intended to apply and consult fully with the organisations proposed. It considered there to be a risk that there may be, for some regulators, disproportionate and unintended consequences of the duty which need to be identified before the duty is introduced, noting in particular the risks to the international standing of the EHRC if it is included within the scope of the duty.

2.12 The Government in its response to the Report of the Joint Committee on the draft Bill noted the Joint Committee’s observations on the EHRC and recognised the need to avoid inadvertently jeopardising its international standing. It said it will work closely with EHRC to consider this issue further before finalising the list of regulators.

2.13 In Public Bill Committee the Minister said:

“Our intention is to cover all non-economic regulatory functions that affect business, but we also intend to avoid the risk of disproportionate and unintended consequences. The business groups that gave evidence to the Committee supported the Government’s intention that the duty should apply as broadly as possible to all non-economic regulators. The Government noted the observations of the Joint Committee that was convened to scrutinise the draft Bill on the inclusion of the Equality and Human Rights Commission and the need to avoid inadvertently jeopardising its international standing. The Government recognise that and are working closely with the EHRC before finalising the list of regulatory functions.”

2.14 We wrote to the Government asking whether it still intended the economic growth duty in the Bill to apply to the EHRC. If so, and in view of the proposed duty in the Bill to have regard to guidance issued by the Secretary of State, including guidance as to the ways in which regulatory functions may be exercised so as to promote economic growth, we asked the Government to explain its reasons for considering this to be compatible with the
requirement in the UN’s Paris Principles that national human rights institutions should be independent of the Government.

2.15 We also wrote to the Secretary of the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (“the ICC”), Professor Alan Miller, asking to hear the views of the ICC as to the compatibility of the proposed duties in the Bill with the EHRC’s continued status as an accredited “A” rated national human rights institution. We asked to see any correspondence between the ICC and the Government on this issue.

2.16 The ICC has provided us with a copy of a letter dated 17 January that it sent to the then Minister for Equalities Helen Grant about the proposed duties contained in the draft Deregulation Bill. The ICC letter states:

Independence from Government is an essential element for a NHRI. In considering whether a NHRI is independent the ICC looks at all of the ways in which the NHRI is subject to control or direction. I am concerned that there are a number of clauses in the draft Deregulation Bill in relation to the duty to give regard to guidance in relation to the promotion of economic growth which would have an impact on the independence of the EHRC. The Bill might not intend to affect independence but attaching an additional duty which could be seen as competing with or limiting the existing duties and core function of EHRC would have a direct effect on its decision making processes. Being subject to Ministerial direction and the possibility of legal challenge to its work if it did not take into account the need to promote growth could have a detrimental effect on its ability to make decisions in relation to upholding human rights. These clauses combined with the existing connections and accountabilities to the UK Government would raise questions about the compliance of EHRC with the Paris Principles.

The Paris Principles provide a minimum standard for NHRI. ENNHRI78 is committed to ensuring that every country in Europe has a NHRI which is in compliance with the Paris Principles. The ICC considers that the best way to ensure independence is for an NHRI to be accountable to the legislature rather than the executive, and is increasingly concerned by reform of NHRI which reduces independence of NHRI, or the perception of independence. Additional directive powers provided to the executive and accountability requirements to the executive are retrogressive measures and are not only a concern in relation to the state involved, but also have wider implications across Europe and the rest of the world, particularly in those states which are in the process of creating NHRI.

2.17 In its reply to the ICC’s letter, dated 5 February 2014, the Government strongly reiterated its commitment to the continued independence of the EHRC and the importance of the Paris Principles, and said that “officials from the Government Equalities Office and from the Department for Business, Innovation and Skills are working closely with the EHRC to try and reach a satisfactory outcome on this matter.”

2.18 The Government’s reply to our letter about the Bill also states that the Government is committed to ensuring that the growth duty does not throw into question the EHRC’s
continued status as a national human rights institution. However, it does not explain how it proposes to achieve this, and simply goes on to state that the Order listing the functions to which the duty will apply will be laid before Parliament once the Deregulation Bill is enacted and will be subject to the affirmative procedure in both Houses. Nor has the Government responded to our invitation to explain its reasons for considering that applying the growth duty to the EHRC is compatible with the UN’s Paris Principles.

2.19 The position of the EHRC itself is unequivocal: while it supports the growth duty and indicates that it will voluntarily comply with the duty, it states that its “UN accredited A status is still at risk of being downgraded if, as the Government intends, the growth duty applies to the Commission.”79 The EHRC’s Chief Executive, Mark Hammond, told us in oral evidence that the Commission had been concerned about the potential impact of the growth duty from the start. He said that a large number of the EHRC’s functions would not be caught by the duty as framed anyway, because they are not regulatory functions, and in any event the Commission was committed to ensuring that its decisions and measures are scrutinised for their impact on business.80

    In substance, we have made a very clear public commitment to do what the duty is directed at. We therefore come to the conclusion that with regard to the threat that it could have to perceptions of our independence and A-status, the quite small coverage that it would have on our regulatory role against that risk and the commitment we have made to do things in substance are quite a strong argument for leaving it out.

2.20 Applying the economic growth duty to the EHRC poses a significant risk to the EHRC’s independence, for the reasons set out in the letter from the ICC to the Minister for Equalities, and therefore to its compliance with the Paris Principles and the Equal Treatment Directives as implemented by the Equality Act 2010. The Government is therefore risking the possibility of the EHRC’s accredited “A” status being downgraded and of putting the UK in breach of its obligations under EU equality law. This could be easily avoided if the proposed new duty did not apply to the EHRC. However, it would appear that the Government still intends to apply the economic growth duty to the EHRC and to attempt to deal with concerns about independence in another way.

2.21 We asked the Chair of the EHRC, Baroness O’Neill of Bengarve, whether in the Commission’s view there is any way of applying the growth duty to the EHRC in a way which is compatible with the Paris Principles requirement that NHRIs be independent of the executive. She said:81

    We have tended to agree with this Committee that, prima facie, it would indeed threaten the A-status. Therefore, it would be proposed that we come under the duty with respect to very specific functions. The debate between us and government at this stage is over how specific it would have to be and whether it is worth the candle when you get to that degree of specificity.

79  EHRC Second Reading briefing on the Deregulation Bill, 3 February 2014, p. 3.
80  Oral evidence, 14 May 2014, Q8
81  Ibid, Q9
2.22 We endorse Baroness O’Neill’s view. We are also conscious of the importance of the Commission’s category A status for the Foreign and Commonwealth Office in terms, as Baroness O’Neill said, of British soft power. Unless the continuing discussions between the Government and the Commission satisfy the Commission that the growth duty will not in any way impact upon its independence, we recommend that this duty not be applied to the EHRC.

(2) Tribunals’ power to make wider recommendations in discrimination cases (clause 2)

2.23 The Bill would remove the power conferred on employment tribunals by the Equality Act to make wider recommendations in discrimination cases.83

2.24 In our letter to the Joint Committee scrutinising the draft Bill, we pointed out that the Government does not appear to have carried out any assessment of the recommendations which have so far been made by tribunals under this power since it came into force, nor does it appear to have provided evidence that it imposes unjustified burdens on employers. We also pointed out that the power to make wider recommendations in cases which reveal systemic problems has recently been conferred on coroners, in order to prevent future deaths and to provide greater protection for the right to life.

2.25 The Joint Committee on the draft Bill summarised the evidence it received on this issue, including the evidence of the Equal Rights Trust that the removal of the power would leave the UK in clear violation of its obligations under the International Covenant on Civil and Political Rights,84 but did not make any recommendation, and the matter is therefore not dealt with in the Government’s response to the Joint Committee’s Report on the draft Bill.

2.26 We asked the Government (1) what evidence exists demonstrating that recommendations made by tribunals under this power have proved disproportionately burdensome on employers and (2) what justifies conferring a power to make wider recommendations on coroners but not on employment tribunals in the context of discrimination cases which raise systemic issues.

2.27 The Government said in response that the power to make wider recommendations has been exercised about 30 times since it came into force. It has written to employers in 26 of those cases and received 8 responses, on the basis of which it estimates that the average cost to employers of implementing such recommendations is about £2,000. In the Government’s view the wider recommendations power “causes burdens to business around uncertainty, risk and cost—all of which falls disproportionately on small business”, a conclusion which is supported by various trade organisations, including the Institute of Directors and the British Retail Consortium. The Government also considers that the powers and functions of coroners and employment tribunals are sufficiently distinct to make it justifiable for the former but not the latter to have a power to make wide recommendations.

82 Q5
84 Joint Committee Report on the draft Bill, paras 197–202.
2.28 The EHRC’s position remains the same as it was in its evidence to the Joint Committee on the draft Bill. It regards the power as useful, both for the employer to whom the recommendation is made and to the Commission itself for following up tribunal decisions, and it does not consider that sufficient evidence has been gathered to make out the case for abolition. It calls for the operation of the power in practice to be reviewed before any decision is made about whether to repeal it. The EHRC’s Chief Executive told us:

We do not see the case for removing this current power from the tribunals […] It is not used greatly; it is fairly sparing. We have not seen any evidence that in itself it imposes significant costs on businesses of any size. I do not think we have seen any numbers that suggest it has a detrimental impact. What we are aware of, at least anecdotally, is that where it is dealing with issues of general application, it has the potential to actually save costs to business by not re-running the same issues and the same problems. At the moment, […] we do not think a case has been made that it imposes costs on business that justify its removal—rather the reverse.

2.29 We recommend that the power of employment tribunals to make wider recommendations in discrimination cases should be retained.

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85 Oral evidence, 14 May 2014, Q7.
Conclusions and recommendations

Criminal Justice and Courts Bill

Information provided by the Department

1. We welcome the usefulness of the Government’s ECHR Memorandum, which is in accordance with our recommendations for best practice by Government Departments. (Paragraph 1.3)

2. We welcome the Government’s acknowledgment of the importance of the relevant international standards concerning the rights of children and, specifically, the rights of children within the youth justice system. However, there is no evidence to suggest that the relevant international standards, including even the relevant rights in the UNCRC itself, were considered by the Ministry of Justice prior to the publication of the Bill and its accompanying explanatory material, notwithstanding the commitment given by the Government in December 2010. We have commented adversely on this lack of prior analysis in a number of recent scrutiny Reports in relation to Bills with clear implications for the rights of children, and we regret that it is necessary to do so again. We intend to return at a later date to the question of whether the Government has made any progress towards implementing the commitment it gave in 2010 to always have due regard to the UNCRC when developing law and policy. (Paragraph 1.7)

Significant human rights issues

3. It appears from the Government’s response to our question that the Government’s justification for increasing the maximum sentences for certain terrorism-related offences is not based on any proven inadequacy of the current sentencing powers in cases which have been prosecuted to date, but on the Government’s view that “it is important to maintain a consistent and up-to-date sentencing regime for all offences on the statute book.” We agree with that proposition, and we accept the Government’s justification for increasing the maximum sentences for these serious terrorism-related offences, especially in view of the courts’ discretion to impose a lower sentence remaining unaffected by the provisions. (Paragraph 1.14)

4. We note, however, that the Government has not been very clear about what has created the inconsistency or led to the sentencing powers for these offences being out of date. If the Government’s reforms to sentences for Indefinite Public Protection (“IPPs”) have left sentencing powers for some offences less extensive than they were previously, the Government should be prepared to say so explicitly. Significant increases in maximum sentences require clear and transparent justifications. (Paragraph 1.15)

5. The Government’s reply has clarified what was meant in its ECHR Memorandum when it stated that the effect of the provisions in clauses 1–3 of the Bill may be to “compel” courts to make whole life orders in certain cases concerning these terrorism-related offences. The decision as to whether the seriousness of the offence
is such as to warrant a whole life order is a decision for the court. The obligation to make such an order arises once such a determination has been made by the court. In other words, when the Government referred to the court being “compelled” to make a whole life order in certain cases, it was referring, not to mandatory whole life orders imposed by statute, but to the fact that, where a court decides for itself that the case is sufficiently serious to warrant such an order, the court has no choice but to make such an order. (Paragraph 1.19)

6. In view of the legal uncertainty that remains about the availability of a review mechanism for whole life orders, notwithstanding the clarification provided by the Court of Appeal in McLoughlin, we have considered carefully what would be required in order to remove that uncertainty. In our view, for the review mechanism to be sufficiently certain, more specific details need to be provided about the mechanism, including the timetable on which such a review can be sought, the grounds on which it can be sought, who should conduct such a review, and the periodic availability of further such reviews after the first review. (Paragraph 1.26)

7. The current Bill provides an opportunity for Parliament to remove any legal uncertainty by specifying the details of the review mechanism. In our view, providing the requisite legal certainty could be achieved relatively simply by an amendment of the existing statutory framework in s. 30 of the Crime (Sentences) Act 1997 to provide, for example, that a prisoner who is subject to a whole life order can, after 25 years in custody, apply to the Parole Board for a review of the continued justification for the whole life order; and the Parole Board, if it is satisfied that the prisoner has made such exceptional progress towards rehabilitation that the justification for a whole life order no longer exists, can substitute a determinate tariff. (Paragraph 1.29)

8. The detailed safeguards in the Code of Practice will be crucial to ensuring that the processing of data gathered from electronic monitoring following release on licence is carried out in such a way that any interference with the right to respect for private life is necessary and proportionate to the legitimate aims pursued. It is therefore important that there is some opportunity for parliamentary scrutiny of the adequacy of those safeguards. We recommend that the Bill be amended to make the Code subject to some form of parliamentary procedure in order to ensure that Parliament has such an opportunity. (Paragraph 1.37)

9. We welcome, as a human rights enhancing measure, the provision in the Bill to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. We consider that the cultural harm of extreme pornography, as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and for the proportionate restriction of individual rights to private life (Article 8 ECHR) and freely to receive and impart information (Article 10 ECHR). (Paragraph 1.50)

10. The international standards also include a number of other provisions and principles which are highly relevant to Part 2 of the Bill: for example, that the State should set up small open facilities where children can be tended to on an individual basis and so
avoid the additional negative effects of deprivation of liberty; and that institutions
should be decentralised to allow for children to continue having access to their
families and their communities. We emphasise the importance of these international
standards to Parliament’s scrutiny of this part of the Bill. (Paragraph 1.53)

11. We note that the Government does not appear to have carried out any equality
impact assessments of the proposed secure colleges policy, and we recommend that
such assessments should be carried out and made available to Parliament at the
earliest opportunity, assessing in particular the impact on girls and younger children
of detaining them in large mixed institutions holding up to 320 young people
including older children up to the age of 18. (Paragraph 1.57)

12. In our view, the Government’s distinction between the provision in the Bill itself and
the secure college rules which are yet to be made does not avoid the underlying
human rights compatibility problem with the substance of the policy: it is clear from
the reasoning of the Court of Appeal in the case of C v Secretary of State for Justice
that it is incompatible with Articles 3 and 8 ECHR for any law, whether primary or
secondary legislation, to authorise the use of force on children and young people for
the purposes of good order and discipline. (Paragraph 1.66)

13. In light of the human rights compatibility issues explained above, we recommend
that the relevant provision in Schedule 4 of the Bill should be deleted, and the Bill
should be amended to make explicit that secure college rules can only authorise the
use of reasonable force on children as a last resort; only for the purposes of
preventing harm to the child or others; and that only the minimum force necessary
should be used. (Paragraph 1.68)

14. We have considered the extent to which, in the absence of a means test at the point
of imposition of the charge (as opposed to later at the stage of enforcement), the
proposed criminal courts charge is likely to influence impecunious defendants’
decisions about whether to plead guilty, whether to elect summary or jury trial, and
whether to appeal against conviction or sentence. We have found it difficult to assess
this risk in the absence of clear evidence about the impact of court charges in
practice. We recommend that the Government monitor carefully the impact of the
criminal courts charge on the right of defendants to a fair trial of the criminal charge
against them, and make available to Parliament the results of that monitoring. In the
meantime we ask that there be made available to Parliament any other evidence that
already exists about the impact of other, existing, charges and fees on criminal
defendants’ decisions about plea, mode of trial and appeals. (Paragraph 1.72)

15. We recognise that the Bill’s provision of a new defence to the strict liability rule for
contempt of court, where proceedings become active after matter has been published
on the internet, is in principle an improvement on the position under the current
law. Currently, publishers who make material continuously available are exposed to
the risk of becoming liable for contempt of court where proceedings subsequently
become active, unless they monitor their archives to see if any such material has
become contemptuous in the light of subsequent proceedings. However, we are
concerned about the lack of safeguards on the face of the Bill against the arbitrary or
disproportionate exercise of the Attorney General’s power to, in effect, require
material to be taken down on pain of losing the new defence. For example, the Government says that the Attorney General will only issue such a notice where the high threshold statutory test of “substantial risk of serious prejudice” is satisfied, but this is not stated anywhere in the legislation itself. Nor is it clear from the Bill what role the “public interest” defence in s. 5 of the Contempt of Court Act 1981 should play in the Attorney General’s decision whether or not to issue a notice. (Paragraph 1.75)

16. The Government may intend to provide for such safeguards in the regulations which the Bill envisages will be made about the giving of an Attorney General’s notice, and the information to be contained in the notice. We asked the Government whether it would make available a draft copy of those regulations during the passage of the Bill to enable Parliament to scrutinise fully the implications for freedom of expression. The Government replied that it does not expect to do so. To our surprise, it said “we do not view these arrangements as having any implications for freedom of expression.” We disagree. The compatibility of the new Attorney General’s notice procedure with the right to freedom of expression in Article 10 ECHR will depend to a large extent on the detailed provision to be contained in the proposed regulations and we cannot reach a view on that question without seeing them. We recommend that the Government publish a draft of the regulations at the earliest opportunity to enable such scrutiny to be carried out. (Paragraph 1.76)

Deregulation Bill

Significant human rights issues

17. Applying the economic growth duty to the EHRC poses a significant risk to the EHRC’s independence, for the reasons set out in the letter from the ICC to the Minister for Equalities, and therefore to its compliance with the Paris Principles and the Equal Treatment Directives as implemented by the Equality Act 2010. The Government is therefore risking the possibility of the EHRC’s accredited “A” status being downgraded and of putting the UK in breach of its obligations under EU equality law. This could be easily avoided if the proposed new duty did not apply to the EHRC. However, it would appear that the Government still intends to apply the economic growth duty to the EHRC and to attempt to deal with concerns about independence in another way. (Paragraph 2.20)

18. We endorse Baroness O’Neill’s view. We are also conscious of the importance of the Commission’s category A status for the Foreign and Commonwealth Office in terms, as Baroness O’Neill said, of British soft power. Unless the continuing discussions between the Government and the Commission satisfy the Commission that the growth duty will not in any way impact upon its independence, we recommend that this duty not be applied to the EHRC. (Paragraph 2.22)

19. We recommend that the power of employment tribunals to make wider recommendations in discrimination cases should be retained. (Paragraph 2.29)
Declaration of Lords’ Interests

Criminal Justice and Courts Bill

Baroness Berridge

Membership, London Policing Ethics Panel

Baroness Kennedy of the Shaws

Barrister (QC), practicing at English Bar

Deregulation Bill

Baroness Kennedy of the Shaws

Barrister (QC), practicing at English Bar

A full list of members’ interests can be found in the Register of Lords’ Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/
Formal Minutes

Wednesday 14 May 2014

Members present:

Dr Hywel Francis, in the Chair

Mr Robert Buckland
Mr Virendra Sharma
Sarah Teather

Baroness Berridge
Baroness Buscombe
Baroness Kennedy of the Shaws
Lord Lester of Herne Hill
Baroness Lister of Burtersett

Draft Report (Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill), proposed by the Chairman, brought up and read.

Ordered, That the Chair’s draft Report be now considered.

Paragraphs 1.1 to 2.29 read and agreed to.

Resolved, That the Report be the Fourteenth Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 11 June at 9.30 am]
## List of Reports from the Committee during the current Parliament

### Session 2013–14

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