

# Joint Committee on Human Rights

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From Andrew Dismore MP, Chair

29 October 2007

Rt Hon. David Hanson MP  
Minister of State  
Ministry of Justice  
Selbourne House  
54 Victoria Street  
London SW1E 6QW

## **Criminal Justice and Immigration Bill**

The Joint Committee on Human Rights is considering the human rights compatibility of the Criminal Justice and Immigration Bill. Having carried out an initial examination of the Bill, the Committee would be grateful if you could provide answers to the following questions concerning the human rights compatibility of some of the Bill's provisions, and some missed opportunities to implement human rights obligations. The Committee may have further questions when the Government brings forward its amendments to Part 3 of the Bill concerning criminal appeals and to extend the offence of incitement to racial hatred to cover hatred against persons on the basis of their sexuality.

### **Youth Rehabilitation Orders**

In principle the introduction of a generic community sentence for children and young offenders has the potential to enhance the legal protection for the human rights of children and young people in the criminal justice system. Indeed, we note that Article 40(4) CRC requires that a variety of dispositions shall be available "to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." In particular, seeking to ensure that the requirements imposed in a community sentence are more closely tailored to the individual circumstances of the juvenile offender, which is said to be one of the main aims of this Part of the Bill, should help to make the requirements imposed on juvenile offenders more proportionate. However, the legal framework set out in the Bill does raise a number of human rights concerns.

### ***Adequacy of safeguards to ensure that custody of children is a last resort***

The UN Convention on the Rights of the Child ("CRC") requires that the use of custody for children should be a last resort. Article 37(b) CRC provides "The ... detention or imprisonment of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time." The Explanatory Notes to the Bill contain a detailed

analysis of the compatibility of YROs with the ECHR but do not consider compatibility with the CRC.<sup>1</sup>

In its most recent observations on the UK in 2002, the UN Committee on the Rights of the Child was “deeply concerned at the high and increasing numbers of children in custody, at earlier ages for lesser offences, and for longer custodial sentence imposed by the recent increased court powers to give detention and training orders. Therefore, it is the concern of the Committee that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time, in violation of Article 37(b).”

In our predecessor Committee’s Report on the UK’s compliance with the CRC, it urged the Government to re-examine, with renewed urgency, sentencing policy and practice (and in particular the use of detention and training orders) and alternatives to custodial sentences, with the specific aim of reducing the number of young people entering custody and with a commitment to implementing Articles 37(b) and 40(4) of the Convention to the fullest extent possible.<sup>2</sup>

The Bill’s introduction of a YRO with “intensive supervision and surveillance” (“YRO with ISS”)<sup>3</sup> as an alternative to custody represents an important step towards the fulfilment of this recommendation. However, the Bill does not require that a YRO with ISS should always be tried before custody is ordered, unless the offence is exceptionally serious. We note that in the Government’s response to our predecessor Committee’s recommendation, it said that “intensive supervision and surveillance would be the first option for courts, and custody would be available as a second option only where the offences were so serious that only a physical restriction of liberty could be justified.” As presently drafted, however, there appears to be nothing in the Bill to require that a YRO with ISS be the first resort, before custody, other than in exceptionally serious cases. Such a requirement would be an important additional safeguard to ensure that custody of children is only used as a last resort. Moreover, such a safeguard is arguably necessary to counter the risk that a single community sentence may lead to a quicker escalation to custody if the order is breached.

**Q1. Why does the Bill not contain a requirement that a YRO with ISS should always be tried before custody is ordered, unless the offence is exceptionally serious, to make it more likely in practice that custody of children will only be used as a last resort?**

### *Adequacy of safeguards to ensure proportionality of YRO*

The CRC requires that custody of children should be only for “the shortest appropriate period of time”<sup>4</sup> and that “children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”.<sup>5</sup>

The Committee is concerned that certain aspects of the YRO framework in the Bill may give rise to disproportionate use of custody for children and young offenders. For example, the Bill contains a requirement that YROs should be proportionate in relation to the seriousness of the offence, but not in relation to the child’s age and emotional and intellectual maturity. The provisions in the Bill concerning the consequences of breach

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<sup>1</sup> EN paras 729-747.

<sup>2</sup> JCHR Tenth Report of 2002-03, *The UN Convention on the Rights of the Child*, at para. 41.

<sup>3</sup> Clause 1(3)(a).

<sup>4</sup> CRC Article 37(b).

<sup>5</sup> CRC Article 40(4).

also contain very little discretion which gives rise to the risk that breach of a YRO may quickly lead to custody even where custody could not have been an option in relation to the original offending behaviour.

**Q2. Will the sentencing guidelines for judges be made available in draft during the passage of the Bill?**

**Q3. If not, will a draft will be made available to the Committee for its comment?**

**Q4. Are there any reasons why more judicial discretion could not be provided for in the provisions concerning the consequences of breach of a YRO?**

### *Children's right to legal representation*

The Bill expressly provides that a fostering requirement in a YRO (that is, a requirement that the child live for a specified time with one or more named local authority foster parents) cannot be imposed unless the child has had the opportunity to be legally represented.<sup>6</sup> There is, however, no general requirement that children be legally represented in criminal proceedings. This seems surprising given the obligation in the CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning them.<sup>7</sup>

**Q5. Why is the right of children to legal representation confined in the Bill to the fostering requirement?**

**Q6. Are there any reasons why children should not enjoy a general right to legal representation in criminal proceedings?**

### **Sentencing**

The Bill provides that where a court is dealing with an offender aged under 18 in respect of an offence, it must have regard primarily to the principal aim of the youth justice system, which is to prevent offending, and must also have regard to the purposes of sentencing, which are the punishment of offenders, the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offences.<sup>8</sup> The court must also have regard to the welfare of the offender, as required by s. 44 of the Children and Young Persons Act 1933, but that duty is expressly made *subject to* the new duty to have regard to the principal aim of the youth justice system.<sup>9</sup>

The Explanatory Notes to the Bill state that the Government “does note that Article 3 CRC provides that in all actions concerning children their best interests are to be a primary consideration.”<sup>10</sup> They state that the duty in the Children and Young Persons Act 1933 to have regard to the welfare of the particular child or young person will continue to apply, but clause 9 clarifies that where the court is sentencing a juvenile offender it must primarily have regard to the principal aim of the youth justice system.

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<sup>6</sup> Schedule 1, para. 19(1).

<sup>7</sup> CRC Article 3.

<sup>8</sup> Clause 9(1), inserting new s. 142A of the Criminal Justice Act 2003.

<sup>9</sup> Clause 9(3), inserting new subsection (1A) into s. 44 of the Children and Young Persons Act 1933.

<sup>10</sup> EN para. 750.

The Committee is concerned that the effect of clause 9 of the Bill is to subordinate the best interests of the child to the status of a secondary consideration below the primary consideration of crime prevention.

**Q7. Please explain why the Government considers that clause 9 of the Bill is compatible with the obligation in Article 3 CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning children.**

**Compensation for miscarriages of justice**

**Q8. Please explain the reasons for the Government's view that the cap on compensation for miscarriages of justice in clause 62 of the Bill is compatible with the right in Article 5(5) ECHR to have an enforceable right to compensation in respect of arrest or detention in breach of Article 5.**

*Extreme Pornography*

The Committee is considering three compatibility issues which in its view arise from the Bill's creation of a new offence of possession of extreme pornographic images.<sup>11</sup> firstly, whether the definition of the new offence is sufficiently precise and foreseeable to satisfy the requirement that interferences with the right to respect for private life in Article 8 and the right to freedom of expression in Article 10 ECHR be "in accordance with the law"; second, whether the offence is necessary in a democratic society and proportionate so as to be compatible with those rights; and third, whether the offender should be subject to registration requirements.

*Whether definition of new offence is sufficiently precise*

The Committee is considering whether the definition of the new offence is sufficiently precise and foreseeable to meet the test of "prescribed by law". The offence requires the pornographic image in the individual's possession to be "extreme". An assessment of whether an image is or is not "extreme" is inherently subjective. This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession.

**Q9. Please provide a more detailed explanation of how an individual user of pornography is able to know whether or not his or her possession of a particular image would constitute a criminal offence.**

*Whether the new offence is necessary in a democratic society and proportionate*

The Committee is considering whether the new offence has been shown to be necessary in a democratic society and strikes a fair balance between the rights of the individual and the needs of the community. According to its consultation, the Government suggests that the new offence is necessary to (1) break the supply/demand cycle as the growth in the internet means that supply can no longer be regulated; (2) protect participants involved in the making of the images, who may be victims of criminal offences; and (3) protect children from exposure to such materials. The Committee is considering whether the two proposed offences in clauses 64(6)(a) and (b) can be justified, so long as the participants

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<sup>11</sup> Clause 64

consent and there is no risk of physical harm.<sup>12</sup> The Government accepts that there is no proof that the use of such images causes or induces violence.

**Q10. Please provide, in light of the above, the weighty reasons required to justify prosecuting people for viewing these images privately.**

### *Sex Offender registration*

An individual convicted under Clause 64 who is 18 years or over at the time of the offence and receives a sentence of at least two years imprisonment, will be subject to the registration requirements under the Sexual Offences Act 2003.<sup>13</sup> Registration requirements interfere with an individual's right to respect for private life (Article 8 ECHR) and must therefore be shown to be necessary and proportionate.

**Q11. Why are registration requirements considered to be justified for the offences in Clause 64(6)(a) and (b) or for any consensual activity not leading to physical harm?**

### **Orders to promote rehabilitation**

**Q12. Please explain why, in the Government's view, compulsory rehabilitation orders for those convicted of "street offences" (clause 72 of the Bill) will not result in a significant increase in the number of vulnerable women being imprisoned.**

### **Violent Offender Orders ("VOOs")**

#### *The applicable standards of due process*

The Committee is considering whether proceedings for obtaining a VOO meet the fairness requirements of Article 6, and whether the more stringent criminal standards of due process should apply. The Government's position is that the criminal fair trial standards do not apply because a Violent Offender Order will be civil in nature, imposing conditions which are necessary to protect the public from the risk of serious violent harm identified and it will not have any punitive purpose.

**Q13. What distinguishes VOOs from indeterminate sentences for public protection, which clearly amount to punishment and to which the criminal fair trial standards therefore apply?**

**Q14. Why does the Government consider it to be appropriate for civil proceedings to be used, in circumstances where an individual has been convicted of an offence?**

**Q15. Why does the Government not consider that criminal fairness guarantees are appropriate in light of the judgment of the House of Lords in the case of *McCann*?**

### *Retrospective punishment*

The Committee is concerned by the fact that any individual convicted of a specified offence, whenever the offence was committed, may be subject to a VOO. It appears to the Committee that this gives rise to a risk of retrospective punishment of individuals

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<sup>12</sup> *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39

<sup>13</sup> Clause 67(5)

convicted of specified offences before the coming into force of the Act contrary to Article 7 ECHR, especially where the terms of the VOO are particularly onerous.

**Q16. What safeguards will be put in place to ensure that an individual is not retrospectively punished for an offence committed before the coming into force of the Act?**

#### **Anti-Social Behaviour**

##### ***Compatibility of Premises Closure Orders with the right to respect for family life and home***

It is proposed that a new provision be inserted into the Anti-social Behaviour Act 2003 to permit closure of premises (including homes, whether tenanted or owner-occupied) associated with persistent disorder or nuisance (similar to the existing provisions for closure of premises where drugs are unlawfully used). There is no explicit requirement in the Bill for the authorising officer or the court to consider whether an order would make someone homeless (and if they could find alternative accommodation) or the vulnerabilities of children or some adults, although it is anticipated that the Government will issue guidelines. The Committee is concerned that the proposed measure may carry a real risk of violations of the right to family life and respect for the home, and the protection of property (where the premises are privately owned).

**Q17. What is the Government's justification for the introduction of such measures, particularly when children and vulnerable adults will be affected?**

**Q18. What safeguards does the Government intend to put in place to ensure that the safety of children and vulnerable adults is not compromised?**

**Q19. Why are these measures considered necessary, given the range of other measures available to deal with anti-social behaviour?**

#### **Impact of new offence of causing nuisance or disturbance on NHS premises**

The creation of the new offence of causing nuisance or disturbance on NHS premises has the potential to affect the ability of some vulnerable people (such as those with mental health problems) to access medical treatment, which raises issues under Articles 2 (the right to life) and 8 ECHR (which includes respect for physical and psychological integrity), as well as the right not to be discriminated against in the enjoyment of Convention rights (Article 14 in conjunction with Articles 2 and 8).

**Q20. Please explain the necessity for the new offence, identifying the gap in the current scope of the criminal law.**

**Q21. Please explain why the Government has chosen to adopt a criminal sanction to deal with the suggested problem.**

**Q22. How is such a measure proportionate to the need to ensure that all members of the public have equal access to basic medical treatment?**

The Committee is also concerned that the proposed measures create the possibility that an individual would avoid seeking help for medical problems, including those that are life threatening, for fear that s/he would face a criminal sanction.

**Q23. What steps does the Government propose to take to ensure that it complies with its positive obligations to protect life and prevent ill-treatment?**

### **Special Immigration Status**

The Bill provides that the Secretary of State may not designate a person a “foreign criminal” if the Secretary of State “thinks that” an effect of designation would breach the UK’s obligations under the Refugee Convention.<sup>14</sup> The Explanatory Notes to the Bill describe the effect of this provision as being that a person may not be designated where the effect of designation would breach the UK’s obligations under the Refugee Convention,<sup>15</sup> but the Committee is concerned that this overlooks the significance of the subjective words “if the Secretary of State thinks that”.

The Committee is also concerned by the Bill’s reliance on the so-called statutory construction of Art. 33(2) of the Refugee Convention by s. 72 of the Nationality, Immigration and Asylum Act 2002 and the Particularly Serious Crimes Order,<sup>16</sup> and of Article 1F of the Refugee Convention by s. 54 of the Immigration, Asylum and Nationality Act 2006.<sup>17</sup> In previous reports the Committee has reported that both statutory constructions undermine the protection afforded by the Refugee Convention because they expand the scope of the exclusions from refugee protection well beyond the narrow scope given to those exclusions in the Convention itself. These concerns are shared by the UNHCR.

**Q24. Please clarify whether the Secretary of State’s designation of a person under clause 115 of the Bill would be unlawful if in the opinion of a court the effect of designation would breach the UK’s obligations under the Refugee Convention?**

**Q25. In the Government’s view would the courts be bound by the statutory construction of Articles 1F and 33(2) of the Refugee Convention when deciding whether the effect of designation would breach the UK’s obligations under the Refugee Convention?**

I am copying this letter to the Secretary of State for Children, Schools and Families because of his department’s obvious interest in questions 1-7 above concerning juvenile offenders and the UN Convention on the Rights of the Child.

I would be grateful for a response by Friday 9 November.

Andrew Dismore MP  
*Chair, Joint Committee on Human Rights*

cc: Rt Hon Ed Balls MP, Secretary of State for Children, Schools and Families

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<sup>14</sup> Clause 115(5)(a).

<sup>15</sup> EN paras 649 and 873.

<sup>16</sup> See JCHR, 22<sup>nd</sup> Report of 2004-05.

<sup>17</sup> See JCHR, 3<sup>rd</sup> Report of 2005-06.